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**1923**

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Indian Digest.]

BY  
R. NARAYANASWAMI IYER, B.A. B.L.,  
*Vakil, High Court, Madras.*



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# 1923

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## ABBREVIATIONS EXPLAINED.

### Reports.

|                    |     |     |     |   |
|--------------------|-----|-----|-----|---|
| All. or A          | ..  | ... | ... | Indian Law Reports, Allahabad Series.     |
| A. L. J.           | ... | ... | ... | Allahabad Law Journal.                    |
| 1923 All or 1923 A | ..  | ... | ... | All India Reporter 1923, Allahabad        |
| Bom or B.          | ... | ... | ... | Indian Law Reports, Bombay Series         |
| Bom L R            | ..  | ... | ... | Bombay Law Reporter.                      |
| 1923 Bom.          | ... | ... | ... | All India Reporter 1923, Bombay           |
| Bur L. T           | .   | ... | ... | Burma Law Times.                          |
| Bur L J            | ..  | ... | ... | Burma Law Journal.                        |
| Cal or C.          | ... | ... | ... | Indian Law Reports, Calcutta Series.      |
| C L. J.            | ... | ... | ... | Calcutta Law Journal.                     |
| C W N              | ... | ... | ... | Calcutta Weekly Notes                     |
| 1923 Cal.          | ... | ... | ... | All India Reporter 1923, Calcutta.        |
| Cr L J             | ... | ... | ... | Criminal Law Journal                      |
| I. A.              | ... | ... | ... | Law Reports, Indian Appeals.              |
| I C                | ... | ... | ... | Indian Cases.                             |
| Lah or L.          | ... | ... | ... | Indian Law Reports (Lahore Series).       |
| 1923 Lah           | ..  | ... | ... | All India Reporter, Lahore.               |
| Lah. L J or L L J  | ..  | ... | ... | Lahore Law Journal                        |
| L B R              | ... | ... | ... | Lower Burma Rulings                       |
| L W.               | .   | ... | ... | Law Weekly.                               |
| Mad or M           | .   | ... | ... | Indian Law Reports, (Madras Series)       |
| M. L J             | ..  | ... | ... | Madras Law Journal.                       |
| M. L. T.           | ..  | ... | ... | Madras Law Times.                         |
| M. W. N.           | ... | ... | ... | Madras Weekly Notes.                      |
| 1923 Mad           | ..  | ... | ... | All India Reporter 1923, Madras.          |
| N L J.             | ..  | ... | ... | Nagpur Law Journal.                       |
| N. L. R.           | ... | ... | ... | Nagpur Law Reports                        |
| 1923 Nag           | ..  | ... | ... | All India Reporter, Nagpur.               |
| O. & A L. R.       | ... | ... | ... | Oudh & Agra Law Reporter                  |
| O. C.              | ... | ... | ... | Oudh Cases.                               |
| 1923 Oudh          | ... | ... | ... | All India Reporter, Oudh                  |
| O L J              | ... | ... | ... | Oudh Law Journal.                         |
| P R                | ..  | ... | ... | Punjab Record                             |
| P L. R             | ..  | ... | ... | Punjab Law Reports                        |
| P. W R             | ... | ... | ... | Punjab Weekly Notes.                      |
| Pat                | ... | ... | ... | Indian Law Reports (Patna, Series)        |
| 1923 Pat           | ... | ... | ... | Patna Supplement to C. W. Notes.          |
| 1923 P.            | ... | ... | ... | All India Reporter, Patna                 |
| 1923 P. C.         | ... | ... | ... | All India Reporter, Privy Council Section |
| Pat. L. R          | ... | ... | ... | Patna Law Reporter                        |
| Pat L J            | ..  | ... | ... | Patna Law Journal.                        |
| R or Rang          | ... | ... | ... | I L. R. Rangoon Series                    |
| S L. R.            | ... | ... | ... | Sind Law Reporter                         |
| 1923 S.            | ... | ... | ... | All India Reports, Sind.                  |
| U. B R.            | ... | ... | ... | Upper Burma Rulings.                      |
| 1923 R.            | ... | ... | ... | All India Reporter, Rangoon               |

### Other Abbreviations.

|           |     |     |                 |           |     |     |                |
|-----------|-----|-----|-----------------|-----------|-----|-----|----------------|
| Appl. ... | ... | ... | Applied.        | Expl. ... | ... | ... | Explained.     |
| Appr ...  | ... | ... | Approved        | Foll. ... | ... | ... | Followed.      |
| Dist. ... | ... | ... | Distinguished.  | F B ...   | ... | ... | Full Bench.    |
| Disc. ... | ... | ... | Discussed.      | P. C. ... | ... | ... | Privy Council. |
| Diss. ... | ... | ... | Dissented from. | Ref. ...  | ... | ... | Referred to    |

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| 69                                | 427, 607, 884, 1016    | 763                             | 1171                  | 179                             | 427, 907              | 374                             | 1228                   |
| 77                                | 365, 678, 1188, 1197   | <b>45 A.—</b>                   |                       | 185                             | 1108                  | 376                             | 263                    |
| 84                                | 919, 978               | 1                               | 7, 913                | 186                             | 1110                  | 378                             | 264, 908               |
| 92                                | 973                    | 5                               | 25                    | 189                             | 996                   | 380                             | 1176                   |
| 108                               | 730, 962               | 7                               | 30, 1151              | 191                             | 831                   | 383                             | 236, 241               |
| 115                               | 263                    | 11                              | 560                   | 193                             | 172                   | 384                             | 964                    |
| 121                               | 36, 654, 669, 1311     | 13                              | 1295                  | 196                             | 722                   | 386                             | 831                    |
| 134                               | 1194                   | 17                              | 560                   | 198                             | 701                   | 388                             | 1267                   |
| 142                               | 430                    | 18                              | 879                   | 203                             | 323                   | 395                             | 345                    |
| 155                               | 73                     | <b>21</b>                       | 679                   | 208                             | 890                   | 396                             | 415                    |
| 162                               | 279, 429, 1196, 1267,  | 25                              | 571                   | 215                             | 197                   | 390                             | 753                    |
|                                   | 1287                   | 27                              | 904                   | 218                             | 280, 401              | 401                             | 300                    |
| 173                               | 767                    | 43                              | 897                   | 220                             | 274, 1187             | 404                             | 817, 829               |
| 179                               | 726                    | 46                              | 126                   | 223                             | 523                   | 407                             | 734                    |
| 183                               | 388, 644, 1130         | 49                              | 752                   | 226                             | 536, 537, 658         | 410                             | 841                    |
| 192                               | 773, 774               | 52                              | 1057                  | 235                             | 441                   | 413                             | 607, 1303              |
| 196                               | 607, 1303              | 53                              | 1119, 1120            | 237                             | 1107                  | 419                             | 8, 891                 |
| 202                               | 8, 891                 | 56                              | 1177                  | 245                             | 793                   | 425                             | 233                    |
| 210                               | 846                    | 58                              | 524                   | 255                             | 778                   | 429                             | 749                    |
| 212                               | 797, 799               | 59                              | 726                   | 258                             | 711                   | 432                             | 870                    |
| 227                               | 712, 799, 1225         | 66                              | 859                   | 260                             | 786                   | 437                             | 148                    |
| 239                               | 1131, 1244             | 72                              | 1113, 1258            | 263                             | 47                    | 438                             | 309                    |
| 247                               | 64                     | 77                              | 770                   | 267                             | 1301                  | 441                             | 395                    |
| 255                               | 11                     | 79                              | 417                   | 268                             | 995                   | 443                             | 821                    |
| 265                               | 622, 1016              | 81                              | 282, 1055             | 272                             | 1056                  | 445                             | 776                    |
| 276                               | 1287                   | 84                              | 450                   | 273                             | 1271                  | 449                             | 972                    |
| 283                               | 1242, 1259, 1270       | 90                              | 739                   | 276                             | 1110                  | 450                             | 122                    |
| 295                               | 920                    | 91                              | 31                    | 277                             | 647                   | 453                             | 1180                   |
| 301                               | 813                    | 96                              | 181                   | 281                             | 1291                  | 455                             | 190                    |
| 308                               | 114, 715               | 99                              | 446                   | 286                             | 328, 331, 367         | 456                             | 294                    |
| 324                               | 43                     | 107                             | 975                   | 290                             | 972                   | 458                             | 390                    |
| <b>I. L. R. Allahabad Series.</b> |                        | 109                             | 475, 507              | 297                             | 780                   | 459                             | 1108                   |
| <b>44 A.—</b>                     |                        | 115                             | 1285                  | 300                             | 584, 663              | 461                             | 913                    |
| 706                               | 1290                   | 124                             | 541, 575              | 304                             | 296                   | 466                             | 155, 685               |
| 708                               | 1264                   | 128                             | 553                   | 306                             | 898                   | 472                             | 41                     |
| 712                               | 151                    | 130                             | 1064                  | 309                             | 1298                  | 474                             | 526                    |
| 714                               | 312                    | 133                             | 227                   | 311                             | 758, 1223             | 478                             | 1253                   |
| 718                               | 425                    | 135                             | 508                   | 316                             | 884                   | 482                             | 293, 1288              |
| 721                               | 202, 1203              | 137                             | 1078                  | 319                             | 1204                  | 484                             | 764                    |
| 724                               | 149                    | 142                             | 1056                  | 321                             | 1310                  | 485                             | 521                    |
| 726                               | 643                    | 143                             | 553                   | 323                             | 664                   | 487                             | 972                    |
| 730                               | 159                    | 145                             | 544                   | 329                             | 684                   | 490                             | 1107                   |
|                                   |                        | 148                             | 385                   | 332                             | 1149                  | 492                             | 1118                   |
|                                   |                        | 149                             | 1276                  | 335                             | 198                   | 501                             | 1111                   |



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| 503                      | 419            | 724                      | 1011                 | 194                  | 554       | 389                  | 521            |
| 506                      | 152, 250,      | 807                      | 727                  | 1064                 | 201       | 178, 433, 771, 1281  | 391            |
| 515                      | 155            | 729                      | 766, 787             | 204                  | 5         | 393                  | 155, 685       |
| 518                      | 249, 276       | 735                      | 157                  | 205                  | 1149      | 399                  | 240            |
| 520                      | 1247           | 741                      | 220                  | 207                  | 526       | 402                  | 1308           |
| 524                      | 997            | 749                      | 476                  | 209                  | 406       | 409                  | 913            |
| 528                      | 482, 558,      | 1053                     | 211                  | 211                  | 1054      | 413                  | 1118           |
| 529                      | 1058           | 21 All. Law Journal      | 213                  | 213                  | 1153      | 416                  | 388            |
| 530                      | 1174, 1177     | 1                        | 964, 976, 1003, 1171 | 215                  | 5.5       | 417                  | 293, 1288      |
| 534                      | 1171           | 9                        | 407                  | 216                  | 1146      | 420                  | 527            |
| 535                      | 859            | 13                       | 1018                 | 220                  | 1176      | 421                  | 155            |
| 537                      | 461            | 18                       | 784, 786             | 223                  | 1179      | 424                  | 1247           |
| 541                      | 1128           | 23                       | 54, 314, 884         | 228                  | 184       | 428                  | 430            |
| 545                      | 738, 762       | 27                       | 132                  | 232                  | 780, 781  | 430                  | 1253           |
| 548                      | 238, 348       | 32                       | 1144                 | 235                  | 785       | 434                  | 34             |
| 553                      | 571            | 33                       | 31, 831              | 248                  | 717       | 436                  | 638            |
| 554                      | 191            | 36                       | 711                  | 2.0                  | 847, 1207 | 438                  | 1174, 1177     |
| 557                      | 1059           | 37                       | 935                  | 263                  | 1228      | 441                  | 238, 348       |
| 559                      | 619, 1107      | 39                       | 1274, 1279           | 265                  | 264, 908  | 446                  | 415, 418       |
| 561                      | 1112           | 42                       | 536, 537, 653        | 267                  | 263       | 447                  | 253            |
| 563                      | 1290           | 50                       | 778                  | 269                  | 964       | 448                  | 1171           |
| 565                      | 377, 1197      | 53                       | 323                  | 271                  | 753       | 450                  | 997            |
| 567                      | 30             | 57                       | 770, 747             | 276                  | 529       | 452                  | 1233, 1234     |
| 569                      | 1149           | 60                       | 1108                 | 277                  | 831       | 454                  | 191            |
| 571                      | 1094           | 61                       | 1109                 | 279                  | 1263      | 455                  | 1057, 1058     |
| 575                      | 1178           | 63                       | 1110                 | 280                  | 826       | 487                  | 831            |
| 576                      | 748, 750       | 65                       | 846, 1107            | 288                  | 744       | 459                  | 571            |
| 581                      | 125, 622       | 72                       | 1056                 | 289                  | 986       | 460                  | 768, 1194      |
| 588                      | 1086           | 73                       | 793                  | 292                  | 845       | 465                  | 152, 250, 807  |
| 590                      | 418            | 77                       | 786                  | 294                  | 1267      | 474                  | 441            |
| 592                      | 1272           | 81                       | 47                   | 296                  | 826, 1012 | 476                  | 151            |
| 594                      | 466            | 84                       | 1118                 | 297                  | 910       | 478                  | 728            |
| 596                      | 622, 1016      | 86                       | 176                  | 300                  | 817, 829  | 480                  | 418            |
| 606                      | 988            | 88                       | 1054                 | 303                  | 415       | 481                  | 1128           |
| 608                      | 1118           | 89                       | 503                  | 308                  | 300       | 485                  | 783, 762       |
| 610                      | 788            | 90                       | 577                  | 310                  | 199       | 488                  | 709            |
| 613                      | 786            | 91                       | 328, 331, 367        | 313                  | 233       | 490                  | 244            |
| 616                      | 1312           | 95                       | 1109                 | 316                  | 532       | 495                  | 283, 290       |
| 618                      | 283, 290       | 97                       | 296                  | 318                  | 1155      | 498                  | 647, 1247      |
| 621                      | 418            | 99                       | 7108                 | 319                  | 870       | 500                  | 285, 1101      |
| 623                      | 346            | 100                      | 1097                 | 321                  | 1084      | 503                  | 125, 622       |
| 624                      | 270, 413       | 101                      | 1301                 | 323                  | 764       | 510                  | 1086           |
| 628                      | 41             | 102                      | 898                  | 326                  | 395       | 513                  | 474, 554       |
| 630                      | 352            | 109                      | 972                  | 328                  | 255       | 515                  | 1178           |
| 633                      | 661            | 114                      | 753                  | 329                  | 1111      | 516                  | 971            |
| 640                      | 1011           | 118                      | 878                  | 330                  | 150       | 518                  | 1112           |
| 641                      | 411            | 120                      | 1013                 | 331                  | 17        | 521                  | 1290           |
| 642                      | 1291           | 122                      | 1233                 | 333                  | 747       | 522                  | 1149           |
| 649                      | 188            | 125                      | 1307, 1131           | 335                  | 122       | 524                  | 30             |
| 653                      | 999            | 135                      | 385                  | 338                  | 821       | 526                  | 934            |
| 654                      | 755            | 137                      | 575                  | 340                  | 317       | 527                  | 1112           |
| 656                      | 480            | 140                      | 647                  | 341                  | 859       | 529                  | 480            |
| 667                      | 226            | 143                      | 584, 663             | 342                  | 309       | 538                  | 377, 1197      |
| 671                      | 1155           | 148                      | 1204                 | 345                  | 841       | 541                  | 41             |
| 676                      | 713, 857       | 149                      | 1291                 | 348                  | 734       | 542                  | 1109           |
| 679                      | 885            | 153                      | 420                  | 351                  | 1175      | 545                  | 1272           |
| 680                      | 1076           | 159                      | 1298                 | 353                  | 190       | 548                  | 788            |
| 682                      | 975            | 161                      | 1291                 | 354                  | 759       | 551                  | 1118           |
| 685                      | 1300           | 162                      | 317                  | 357                  | 1184      | 554                  | 388, 644, 1130 |
| 687                      | 645, 646, 1299 | 168                      | 758, 1223            | 358                  | 776       | 563                  | 786            |
| 691                      | 1312           | 173                      | 1150                 | 361                  | 1200      | 567                  | 383            |
| 692                      | 755, 757       | 175                      | 765                  | 365                  | 650       | 569                  | 642, 1102      |
| 701                      | 205            | 176                      | 884                  | 369                  | 526       | 571                  | 270, 413       |
| 709                      | 1117           | 179                      | 664                  | 377                  | 390       | 576                  | 1011           |
| 711                      | 1024           | 182 (P. C)               | 784                  | 378                  | 1108      | 578                  | 1303           |
| 715                      | 779            | 184                      | 1115                 | 380                  | 41        | 582                  | 773, 774       |
| 718                      | 759            | 189                      | 30, 31               | 382                  | 996       | 585                  | 661            |
| 720                      | 1298           | 191                      | 198                  | 385                  | 1111      | 591                  | 346            |
|                          |                | 193                      | 1301                 | 387                  | 249, 276  | 593                  | 571            |

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| 595                  | 966              | 834                  | 526                     | 155                    | 1171           | 783                    | 943                    |
| 596                  | 411              | 836                  | 688, 1082               | 174                    | 114            | 785                    | 274                    |
| 602                  | 1156             | 838                  | 544                     | 182                    | 278            | 790                    | 1287                   |
| 604                  | 188              | 839                  | 468, 1047               | 191                    | 109, 1223      | 798                    | 11                     |
| 607                  | 999              | 841                  | 470                     | 218                    | 823            | 809                    | 104, 259               |
| 608                  | 755              | 844                  | 1070                    | 227                    | 268            | 843                    | 630, 631, 632, 633,    |
| 610                  | 755, 757         | 847                  | 473                     | 231                    | 730, 979, 1132 |                        | 634, 811, 818, 1101,   |
| 617                  | 352              | 850                  | 1078                    | 244                    | 881, 1122      |                        | 1103, 1290             |
| 619                  | 573              | 855                  | 565                     | 250                    | 49             | 907                    | 1034, 1052             |
| 621                  | 499              | 858                  | 590                     | 263                    | 420            | 915                    | 397                    |
| 622                  | 1312             | 859                  | 520                     | 270                    | 510, 860       | 924                    | 405                    |
| 623                  | 1064             | 861                  | 188, 217, 232, 936      | 275                    | 1122, 1131     | 940                    | 744                    |
| 626                  | 205              | 865                  | 1085                    | 283                    | 1190           | 942                    | 108                    |
| 634                  | 1024             | 869                  | 552                     | 290                    | 1199           | 956                    | 357, 369               |
| 637                  | 1011             | 871                  | 571                     | 298                    | 630            | 960                    | 110                    |
| 639                  | 1300             | 875                  | 1057                    | 306                    | 106            |                        |                        |
| 641                  | 157              | 877                  | 570, 1092               | 315                    | 106, 789       |                        | 25 Bombay Law Reporter |
| 646                  | 23               | 873                  | 1085                    | 321                    | 1230           | 1                      | 747, 770               |
| 648                  | 1117             | 879                  | 52                      | 327                    | 716, 814       | 7                      | 326, 859               |
| 650                  | 975              | 881                  | 470                     | 335                    | 407, 680       | 13                     | 113                    |
| 654                  | 1076             | 882                  | 1003                    | 344                    | 406, 609       | 15                     | 404                    |
| 656                  | 779              | 886                  | 997                     | 349                    | 627            | 26                     | 1171                   |
| 659                  | 759              | 890                  | 170                     | 369                    | 730            | 43                     | 537                    |
| 661                  | 1298             | 893                  | 852                     | 389                    | 771            | 45                     | 1199                   |
| 665                  | 226              | 896                  | 1173                    | 401                    | 769            | 52                     | 630                    |
| 667                  | 39               | 899                  | 817                     | 438                    | 472            | 58                     | 106                    |
| 669                  | 682, 885         | 901                  | 284                     | 451                    | 685            | 63                     | 106, 789               |
| 671                  | 713, 857         | 907                  | 16                      | 465                    | 1171           | 74                     | 930                    |
| 673                  | 508              | 908                  | 972                     | 485                    | 930            | 76                     | 630, 1287              |
| 675                  | 797              | 911                  | 517                     | 487                    | 709            | 77                     | 220                    |
| 683                  | 762              | 912                  | 500                     | 493                    | 1006           | 79                     | 1190                   |
| 686                  | 220              | 914                  | 592                     | 509                    | 805            | 84                     | 112                    |
| 689                  | 712, 799, 1225   | 915                  | 507                     | 523                    | 347            | 97                     | 472                    |
| 697                  | 16               | 916                  | 1304                    | 527                    | 630            | 95                     | 111                    |
| 701                  | 351              | 917                  | 648, 704                | 529                    | 1208           | 107                    | 403                    |
| 703                  | 796, 800         | 922                  | 1291                    | 534                    | 162            | 112                    | 1290                   |
| 713                  | 418              | 925                  | 574, 859, 1031          | 542                    | 727            | 116                    | 1212                   |
| 718                  | 1131             | 1244                 | 1107                    | 548                    | 1147           | 121                    | 876                    |
| 723 (P C)            | 209              | 930                  | 562                     | 552                    | 1309           | 127                    | 730, 962               |
| 726                  | 813              | 932                  | 681                     | 556                    | 746            | 131                    | 856                    |
| 730                  | 920              | 934                  | 734, 740, 753           | 563                    | 430            | 134                    | 686                    |
| 734                  | 623              |                      |                         | 578                    | 43             | 144                    | 885                    |
| 737                  | 1140, 1141, 1147 |                      | I.L.R. 47 Bombay Series | 589                    | 1221           | 147                    | 185, 228               |
| 750                  | 979              | 1                    | 785                     | 593                    | 389            | 151                    | 765                    |
| 754                  | 855              | 4                    | 109                     | 597                    | 191            | 153                    | 939                    |
| 757                  | 8, 891           | 11                   | 237                     | 607                    | 403            | 155                    | 1147                   |
| 765                  | 558, 582         | 15                   | 1092                    | 621                    | 1254           | 157                    | 1309                   |
| 763                  | 1112             | 18                   | 1178                    | 637                    | 763            | 161                    | 1125                   |
| 770                  | 310              | 28                   | 896                     | 643                    | 296            | 164                    | 305, 1098              |
| 772                  | 1057             | 31                   | 534                     | 652                    | 1001           | 173                    | 709                    |
| 774                  | 1300             | 35                   | 728                     | 654                    | 107            | 177                    | 1006                   |
| 776                  | 1040             | 37                   | 729                     | 657                    | 634            | 189                    | 790                    |
| 777                  | 622, 1016        | 44                   | 629                     | 664                    | 632, 635       | 192                    | 1198                   |
| 784                  | 1242, 1259, 1270 | 48                   | 744                     | 674                    | 380            | 195                    | 369                    |
| 791                  | 466              | 56                   | 942                     | 678                    | 789            | 197                    | 746                    |
| 793                  | 125, 997         | 65                   | 791                     | 692                    | 613            | 199                    | 347                    |
| 796                  | 787              | 71                   | 108                     | 696                    | 782            | 203                    | 264, 903               |
| 801                  | 1108, 1304       | 74                   | 670                     | 699                    | 241            | 207                    | 1208                   |
| 805                  | 505              | 76                   | 404                     | 707                    | 745            | 211                    | 161                    |
| 808                  | 1300             | 92                   | 335                     | 712                    | 974            | 214                    | 659                    |
| 809                  | 751              | 95                   | 108, 327                | 716                    | 1133           | 220                    | 263                    |
| 811                  | 212, 962         | 102                  | 508                     | 719                    | 1245           | 224                    | 399                    |
| 817                  | 871              | 104                  | 349                     | 721                    | 229            | 228                    | 467                    |
| 818                  | 993              | 106                  | 219                     | 724                    | 797            | 231                    | 512                    |
| 820                  | 518              | 110                  | 729                     | 742                    | 712, 799, 1225 | 234                    | 1221                   |
| 822                  | 1106, 1308       | 117                  | 859                     | 756                    | 112            | 237                    | 1100                   |
| 825                  | 465, 501         | 128                  | 905                     | 764                    | 113            | 239                    | 802                    |
| 828                  | 1300             | 137                  | 674                     | 773                    | 773            | 242                    | 335, 462               |
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| 247                  |           | 297                  | 513                              | 274                  | 1014                       | 265                 | 394                  |
| 248                  | 657, 666  | 316                  |                                  | 1151                 | 1027                       | 267                 | 916, 986             |
| 251                  | 551       | 518                  |                                  | 943                  | 1032                       | 272                 | 332                  |
| 252                  | 415, 627  | 520                  |                                  | 420                  | 1037                       | 276                 | 1088                 |
| 264                  | 853       | 521                  |                                  | 846                  | 1063                       |                     |                      |
| 268                  | 162       | 527                  | 716, 814, 1131                   | 1074                 | 622                        | 2 Bur L J —         |                      |
| 274                  | 727       | 531                  | 407, 680                         | 1078                 | 784                        | 1                   | 979                  |
| 278                  | 1001      | 537                  | 406, 609                         | 1081                 | 340                        | 4                   | 1255                 |
| 280                  | 389       | 541                  | 992, 1275                        | 1083                 | 397                        | 5                   | 128                  |
| 282                  | 557       | 548                  | 1170                             | 1089                 | 110                        | 8(1)                | 1057                 |
| 286                  | 561       | 560                  | 730                              | 1093                 | 445                        | 8(2)                | 129                  |
| 289                  | 634       | 568                  | 764                              | 1099                 | 1231                       | 10                  | 1092                 |
| 293                  | 191       | 577                  | 746                              | 1137                 | 612, 1101                  | 11                  | 1035                 |
| 301                  | 979       | 582                  | 305 678, 1188, 1197              | 1144                 | 1216                       | 12                  | 128                  |
| 305                  | 107       | 588                  | 43                               | 1160                 | 102                        | 15                  | 826                  |
| 308                  | 333       | 595                  | 608                              | 1144                 | 1257                       | 16                  | 1015                 |
| 313                  | 1194      | 599                  | 1285                             | 1160                 | 113, 895                   | 17                  | 1089                 |
| 315                  | 645       | 604                  | 1008                             | 1170                 | 693                        | 19                  | 1056                 |
| 323                  | 765       | 610                  | 818, 1302                        | 1172                 | 860                        | 21                  | 130                  |
| 328                  | 403       | 621                  | 1305                             | 1178                 | 112, 833                   | 22                  | 1051                 |
| 339                  | 632, 635  | 625 (P C)            | 1306                             | 1180                 | 1184                       | 25                  | 365, 678, 1188, 1197 |
| 345                  | 112       | 634                  | 784, 786                         | 1182                 | 824                        | 29                  | 197                  |
| 350                  | 1174      | 640                  | 910                              | 1192                 | 847                        | 30                  | 394                  |
| 354                  | 888       | 643                  | 244                              | 1207                 | 1192                       | 32                  | 489                  |
| 358                  | 613       | 6-8 (P C)            | 783                              | 1209                 | 629                        | 34                  | 166, 168             |
| 361                  | 789       | 655                  | 1200                             | 1211                 | 191                        | 37                  | 462, 1088            |
| 362                  | 957       | 660                  | 973                              | 1214                 | 629                        | 39                  | 457                  |
| 371                  | 188       | 670                  | 919, 978                         | 1218                 | 105, 107                   | 40                  | 500                  |
| 375                  | 1218      | 674                  | 380                              | 1222                 | 289                        | 42                  | 1234                 |
| 378                  | 196       | 676                  | 743                              | 1225                 | 444, 796                   | 45                  | 1234                 |
| 381                  | 1254      | 680                  | 54, 314, 884                     | 1232                 | 721, 722                   | 46                  | 445                  |
| 390                  | 109       | 683                  | 767                              | 1237                 | 937                        | 47                  | 1266                 |
| 392                  | 394       | 689                  | 104, 259, 813                    | 1240                 | 460                        | 48                  | 507                  |
| 395                  | 782       | 713                  | 254                              | 1248                 | 279, 429, 1196, 1267, 1287 | 50                  | 844                  |
| 398                  | 241       | 726                  | 723                              | 1256                 | 773, 774                   | 52                  | 1145                 |
| 404                  | 745       | 747                  | 198                              | 1259                 | 1131, 1244                 | 54                  | 314                  |
| 408                  | 974       | 767                  | 106                              | 1269                 | 920                        | 55                  | 1089                 |
| 411                  | 729       | 772                  | 1034, 1052                       | 1275                 | 1242, 1259, 1270, 209      | 58                  | 119                  |
| 414                  | 435       | 778                  | 436                              | 1287                 | 813                        | 60                  | 311                  |
| 429                  | 746       | 785                  | 108                              | 1290                 | 869                        | 61                  | 565                  |
| 431                  | 110       | 794                  | 821                              | 1296                 | 112                        | 63                  | 126                  |
| 435                  | 1133      | 797                  | 163                              | 1297                 | 536                        | 65                  | 117                  |
| 437                  | 45        | 806                  | 773                              | 1307                 | 104                        | 67                  | 118, 121             |
| 440                  | 188       | 810                  | 937                              | 1313                 | 890, 896, 898              | 69                  | 1197                 |
| 443                  | 229       | 813                  | 727, 780                         | 1318                 | 776                        | 75                  | 1077                 |
| 445                  | 1245      | 818                  | 680                              | 1321                 |                            | 76                  | 1069                 |
| 446                  | 316       | 826                  | 146, 356                         | 1333                 |                            | 78                  | 339                  |
| 447                  | 832, 1102 | 837                  | 806                              | 1340                 |                            | 79                  | 120                  |
| 449                  | 185       | 839                  | 434, 111, 803, 1237, 1262, 1265, |                      |                            | 85                  | 568                  |
| 450                  | 1221      |                      | 436                              |                      |                            | 89                  | 1187                 |
| 452                  | 337       | 854                  | 880                              |                      |                            | 94                  | 1065                 |
| 453                  | 179, 702  | 863                  | 682                              | Burma Law Journal.   |                            | 96                  | 1185                 |
| 456                  | 921       | 867                  | 1239                             | 1 Bur. L J.—         |                            | 98                  | 1057                 |
| 459                  | 935       | 873                  | 140                              |                      |                            | 99                  | 1067                 |
| 462                  | 1105      | 881                  | 109, 256                         | 138                  | 1183                       | 101                 | 552                  |
| 463                  | 340       | 888                  | 614                              | 143                  | 1181                       | 102                 | 120                  |
| 468                  | 368       | 893                  | 108                              | 145                  | 130                        | 103                 | 1065                 |
| 470                  | 1212      | 896                  | 797                              | 146                  | 1238                       | 106                 | 633                  |
| 474                  | 296       | 908                  | 712, 799, 1225                   | 150                  | 131                        | 108                 | 292                  |
| 480                  | 823, 825  | 920                  | 744                              | 154                  | 871                        | 109                 | 152                  |
| 484                  | 113       | 929                  | 1256                             | 155                  | 504                        | 113                 | 309                  |
| 488                  | 553       | 931                  | 404                              | 157                  | 679                        | 114                 | 116, 1126            |
| 490                  | 943       | 938                  | 357, 369                         | 158                  | 433                        | 119                 | 1261                 |
| 491                  | 264       | 990                  | 630, 631, 632, 633,              | 257                  | 129                        | 125                 | 128                  |
| 494                  | 186, 707  | 945                  | 634, 811, 818, 1101,             | 259                  | 505                        | 127                 | 576                  |
| 499                  | 1139      |                      | 1103, 1290                       | 261                  | 608                        | 130                 | 608                  |
| 503                  | 900       |                      | 104, 236                         | 262                  | 1008                       | 134                 | 312                  |
| 508                  | 758       | 992                  | 11                               | 263                  | 1265                       | 136                 | 1240                 |
| 510                  | 728       | 1005                 |                                  |                      | 119                        | 138                 | 119, 1183            |

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| 2 Bur. L. J.—(Contd.)     |             | 49 C. Series.—(Contd)     |                      | 50. Cal Series.—(Contd) |                | 37 C. L. J.—(Contd.) |                      |
| 139                       | 1086        | 948                       | 8, 705, 858          | 461                     | 501            | 42                   | 1105                 |
| 142                       | 1036        | 967                       | 1131                 | 475                     | 159, 914       | 48                   | 885                  |
| 144                       | 118         | 989                       | 833                  | 482                     | 549            | 52                   | 80, 622, 838         |
| 146                       | 588, 1051   | 994                       | 359                  | 487                     | 9. 447         | 56 (P C)             | 964, 976, 1003       |
| 149                       | 1057        | 997                       | 462                  | 491                     | 133            | 67 (P C)             | 132                  |
| 150                       | 529         | 999                       | 878                  | 508                     | 1013           | 73                   | 747, 770             |
| 151                       | 306         | 1005                      | 1306                 | 518                     | 538            | 79                   | 753                  |
| 152                       | 569         | 1014                      | 65                   | 526                     | 676            | 86                   | 878                  |
| 153                       | 129         | 1019                      | 852                  | 531                     | 132            | 90                   | 147                  |
| 154                       | 586, 1151   | 1026                      | 67, 88               | 549                     | 444, 889, 932  | 94                   | 643                  |
| 161                       | 1182        | 1035                      | 984                  | 564                     | 521, 522, 1083 | 99                   | 390                  |
| 163                       | 395         | 1040                      | 434                  | 572                     | 695            | 101                  | 135                  |
| 164                       | 866         | 1043                      | 773, 1027, 1029      | 577                     | 928            | 105                  | 529                  |
| 165                       | 866         | 1048                      | 351                  | 585                     | 567            | 108                  | 909                  |
| 166                       | 314         | 1059                      | 803                  | 594                     | 548            | 118                  | 92                   |
| 169                       | 265         | 1069                      | 730, 1233            | 597                     | 463            | 122                  | 380                  |
| 173                       | 311         | 1075                      | 542                  | 604                     | 745            | 127                  | 493                  |
| 177                       | 415         |                           |                      | 610                     | 900            | 128                  | 485                  |
| 186                       | 594         | I L R 50 Calcutta Series. |                      | 615                     | 413, 1256      | 131                  | 730, 962             |
| 188                       | 409, 1187   | 1                         | 49, 51               | 626                     | 91, 335        | 136                  | 856                  |
| 192                       | 1039        | 12                        | 115                  | 632                     | 548            | 139                  | 91                   |
| 193                       | 48, 50, 867 | 23                        | 1215                 | 639                     | 1220           | 141                  | 1033                 |
| 196                       | 128         | 29                        | 1212                 | 650                     | 335            | 145                  | 183                  |
| 199                       | 1079        | 41                        | 534, 1038, 1044      | 658                     | 532, 533       | 171                  | 466                  |
| 201                       | 130         | 49                        | 877, 919, 924,       | 664                     | 545            | 173                  | 576, 700             |
| 203                       | 53          |                           | 1132, 1232           | 667                     | 1280           | 180                  | 151, 564             |
| 205                       | 667         | 79                        | 90                   | 689                     | 561            | 191                  | 1025                 |
| 208                       | 201         | 84                        | 747, 770             | 694                     | 842            | 199 (P C)            | 124, 217, 834        |
| 210                       | 266         | 94                        | 518                  | 700                     | 1214, 1216     | 219                  | 846                  |
| 214                       | 128         | 100                       | 1309                 | 718                     | 355, 421       | 222                  | 66, 73, 84, 85, 1237 |
| 216                       | 379         | 115                       | 324, 810, 913        | 727                     | 732, 793       | 233                  | 658, 731, 772        |
| 217                       | 279, 349    | 127                       | 662                  | 737                     | 422            | 253                  | 524                  |
| 218                       | 265, 266    | 141                       | 742                  | 743                     | 993            | 254                  | 543                  |
| 221                       | 128         | 146                       | 1033                 | 749                     | 75             | 256                  | 491                  |
| 224                       | 520         | 153                       | 635                  | 756                     | 67             | 257                  | 797                  |
| 227                       | 410         | 159                       | 521, 557             | 762                     | 1241           | 263                  | 72                   |
| 229                       | 40, 930     | 166                       | 1196                 | 807                     | 94             | 265                  | 1183                 |
| 231                       | 130         | 171                       | 1134                 | 813                     | 132, 1247      | 281                  | 200                  |
| 233                       | 1302        | 180                       | 64 628, 1196         | 822                     | 57. 58, 1311   | 287                  | 743                  |
| 235                       | 1182        | 197                       | 1206                 | 849                     | 1085           | 292                  | 944                  |
| 236                       | 559         | 202                       | 646                  | 853                     | 250            | 298                  | 135                  |
| 238                       | 541         | 208                       | 67                   | 867                     | 565            | 302                  | 979                  |
| 239                       | 1062        | 215                       | 359                  | 872                     | 530            | 305                  | 1018                 |
| 241                       | 442, 570    | 223                       | 538, 583             | 878                     | 115, 271       | 314                  | 89, 386              |
| 246                       | 1056        | 229                       | 477                  | 892                     | 1155           | 319                  | 784                  |
| 248                       | 1124        | 233                       | 1132, 1203           | 898                     | 779            | 326                  | 548                  |
| 252                       | 1182        | 239                       | 460                  | 903                     | 90             | 327                  | 549                  |
| 253                       | 909         | 243                       | 64                   | 907                     | 800            | 329                  | 969, 1073            |
| 254                       | 1242, 1259, | 253                       | 909                  | 912                     | 132            | 331                  | 689                  |
| 258                       | 444         | 258                       | 444                  | 919                     | 1120           | 333                  | 86                   |
| 260                       | 116         | 653                       | 741                  | 929                     | 1131, 1244     | 336                  | 49, 51               |
| 264                       | 1196        | 276                       | 58, 381, 690         | 939                     | 538, 540       | 343                  | 1196                 |
| 266                       | 118, 1289   | 292                       | 1103, 1202           | 948                     | 38, 53         | 346                  | 884, 1016            |
| 270                       | 540, 675    | 308                       | 539                  | 957                     | 84             | 351                  | 744                  |
| 275                       | 232         | 311                       | 894                  | 969                     | 567            | 356                  | 784, 786             |
| 277                       | 547, 1061   | 318                       | 478, 532, 583, 684   | 972                     | 551            | 363                  | 746                  |
| 280                       | 1183        | 329                       | 919, 978             | 974                     | 406, 418, 887  | 369                  | 730                  |
| 285                       | 554         | 338                       | 365, 678, 1188, 1197 | 978                     | 961            | 377                  | 1200                 |
| 287                       | 566         | 347                       | 191                  | 985                     | 464, 537       | 383                  | 783                  |
| 289                       | 506         | 356                       | 636, 637             | 992                     | 196            | 391                  | 852                  |
| 291                       | 405         | 367                       | 536                  | 1004                    | 519            | 394                  | 347                  |
| 295                       | 484         | 370                       | 658, 731, 712        |                         |                | 395                  | 228, 247             |
| 296                       | 398         | 394                       | 848                  |                         |                | 399                  | 1153                 |
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| 911                       | 722         | 409                       | 843                  | 15 (P C)                | 762, 777       | 406                  | 416                  |
| 919                       | 92          | 423                       | 556                  | 20                      | 1206, 1247     | 409                  | 582                  |
| 924                       | 549         | 426                       | 792                  | 30                      | 535            | 410                  | 582                  |
| 928                       | 134, 233    | 439                       | 767                  | 34                      | 517, 534       | 413                  | 542                  |
| 631                       | 134         | 446                       | 36, 654, 659, 1311   | 39                      | 483, 487, 713  | 415                  | 576                  |

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| 417                     | 364                  | 155                      | 535             | 204                  | 224               | 555                  | 552            |
| 420                     | 1806                 | 158                      | 1054            | 208                  | 194, 302          | 567                  | 611, 635       |
| 426                     | 910                  | 161                      | 1089            | 210                  | 909, 912          | 561                  | 768, 1194      |
| 430                     | 314, 54 884          | 163                      | 580, 658, 655   | 218                  | 1202              | 566                  | 276, 455       |
| 435                     | 768, 1194            | 175                      | 540             | 221 (P C)            | 1131, 1307        | 569                  | 133            |
| 440                     | 407, 680             | 177                      | 851, 1213, 1283 | 229                  | 433               | 575                  | 615            |
| 447                     | 707                  | 183                      | 167             | 231                  | 438, 711          | 578                  | 548            |
| 452                     | 936                  | 186                      | 665             | 240                  | 65                | 582                  | 244            |
| 457                     | 178, 433, 774.       | 190                      | 368             | 245                  | 124, 217, 834     | 587                  | 183            |
|                         | 1281                 | 192                      | 67              | 259                  | 99, 921, 925      | 607                  | 650, 993       |
| 461                     | 652                  | 196                      | 525             | 263                  | 673, 1260         | 611                  | 1123           |
| 464                     | 814, 1131            | 198                      | 554             | 267                  | 488               | 621                  | 353            |
| 469                     | 149, 792             | 201                      | 487             | 269                  | 784, 786          | 624                  | 5              |
| 473                     | 78                   | 202                      | 545             | 275                  | 1276              | 626                  | 519, 533, 589  |
| 475                     | 1193                 | 203                      | 591             | 280                  | 156, 182, 701     | 646                  | 460            |
| 478                     | 834, 1280            | 206                      | 555             | 285                  | 1132, 1133        | 653                  | 783            |
| 482                     | 915, 1224            | 207                      | 918             | 287                  | 135               | 660                  | 49, 51         |
| 489                     | 76 81                | 213                      | 667, 722, 898   | 290                  | 1039              | 666                  | 50, 300        |
| 491                     | 377                  | 220                      | 4               | 294                  | 54, 314, 884      | 669                  | 732, 793       |
| 494                     | 330                  | 229                      | 98              | 299                  | 178, 771, 1281    | 673                  | 11, 262        |
| 496                     | 345                  | 231                      | 973             | 305                  | 54, 184, 656, 686 | 675                  | 576            |
| 499                     | 1221, 1223           | 242                      | 919, 978        | 312                  | 646               | 677                  | 761            |
| 501                     | 1170                 | 248                      | 248, 406, 609   | 315                  | 95                | 685                  | 1204, 1206     |
| 515                     | 767                  | 255                      | 146, 293, 1289  | 317                  | 847, 1207         | 693                  | 1216           |
| 521                     | 95                   | 265                      | 822             | 328                  | 88, 126, 714      | 700                  | 582            |
| 524                     | 99                   | 266                      | 8, 192          | 336                  | 679               | 701                  | 973            |
| 626                     | 1092                 | 272                      | 338             | 340                  | 924               | 710                  | 334            |
| 535                     | 563                  | 275                      | 1120            | 343                  | 856               | 716                  | 94             |
| 538                     | 828, 1246            | 281                      | 540, 546        | 359                  | 174, 616          | 720                  | 228, 247       |
| 542                     | 45                   | 284                      | 486             | 370                  | 1123              | 723                  | 63             |
| 545                     | 11, 262              | 285                      | 476             | 372                  | 99, 768           | 725                  | 901            |
| 548                     | 80, 830, 843         | 286                      | 548             | 381                  | 838               | 733                  | 1286           |
| 552                     | 681, 1094            | 291                      | 842             | 386                  | 68                | 739                  | 1122           |
| 556                     | 62, 621              | 298 (P C)                | 1098            | 387                  | 984               | 740                  | 82             |
| 561                     | 64                   | 299                      | 726             | 389                  | 538               | 743                  | 538, 540       |
| 569                     | 761                  | 302                      | 607, 1303       | 411                  | 1132, 1203        | 749                  | 64             |
| 580                     | 215                  | 307                      | 716             | 414                  | 40 793, 1308      | 755                  | 334            |
| 585                     | 59, 820              | 309 (F B)                | 522, 861        | 416                  | 821               | 759                  | 75             |
| 589                     | 64                   | 350                      | 849             | 420                  | 393               | 760                  | 1013           |
| 592                     | 567                  | 353                      | 854             | 430                  | 416               | 763                  | 999            |
| 595                     | 530                  | 355                      | 1259            | 433                  | 783, 1248         | 765                  | 96, 706        |
| 598                     | 83                   | 358                      | 243             | 347                  | 1200              | 769                  | 857            |
| 38 Calcutta Law Journal |                      | 360                      | 132, 1227       | 442                  | 414               | 772                  | 148            |
| 1                       | 534, 587             | 365                      | 977             | 449                  | 1225              | 774                  | 730, 962       |
| 7                       | 581                  | 369                      | 73              | 457                  | 455               | 783                  | 287            |
| 9                       | 517                  | 372                      | 89              | 459                  | 481               | 787                  | 132, 1227      |
| 13                      | 65                   | 379                      | 533, 1046       | 461                  | 650               | 792                  | 346            |
| 17                      | 156, 182, 701        | 384                      | 535             | 466                  | 315               | 797                  | 698, 1308      |
| 21                      | 627                  | 388                      | 466, 501, 567   | 469                  | 1153              | 802                  | 263            |
| 25                      | 764                  | 406                      | 861, 933        | 472                  | 191               | 806                  | 897            |
| 34                      | 992, 1275            | 411 (F B)                | 583, 591 860,   | 479                  | 1092              | 809                  | 822            |
| 41                      | 365, 678, 1188, 1197 |                          | 1037            | 485                  | 1308              | 812                  | 463            |
| 47                      | 57, 58               | Calcutta Weekly Notes.   |                 | 494                  | 49                | 816                  | 1139           |
| 67                      | 42                   |                          |                 | 496                  | 681, 1094         | 817                  | 97             |
| 72                      | 338                  | 27 C W N :—              |                 | 501                  | 369               | 820                  | 591            |
| 74                      | 276, 455             | 1040                     | 87              | 502                  | 86                | 821                  | 1045           |
| 77                      | 467                  | 150 (P C)                | 753             | 505                  | 944               | 824                  | 652            |
| 104                     | 196                  | 156                      | 878             | 509                  | 1131              | 857                  | 467            |
| 111                     | 204, 1027            | 159 858, 977, 1255, 1279 | 513             | 513                  | 1228              | 879                  | 406, 609       |
| 114                     | 123, 671, 673, 1280  | 166                      | 839             | 521                  | 266, 422, 784     | 883                  | 1120           |
| 121                     | 73, 714, 834         | 168                      | 548             | 528                  | 852               | 888                  | 63, 85         |
| 126                     | 263                  | 171                      | 483, 487, 713   | 531                  | 966, 1073         | 893                  | 919            |
| 180                     | 43                   | 174                      | 149, 792        | 533                  | 1196              | 897                  | 1195           |
| 137                     | 1033                 | 179 (P C)                | 747, 770        | 537                  | 131               | 901                  | 730            |
| 139                     | 115                  | 183                      | 324, 810, 913   | 542                  | 171, 707          | 908                  | 1123           |
| 142                     | 986                  | 189                      | 1033            | 548                  | 88                | 916                  | 1121           |
| 147                     | 97                   | 193                      | 801             | 549                  | 1153              | 919                  | 1085           |
| 149                     | 288                  | 196                      | 514             | 552                  | 514               | 923                  | 529            |
| 150                     | 894                  | 199                      | 1030            | 554                  | 548               | 925                  | 8, 69, 88, 668 |

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| 933                  | 44                   | 289                   | 226           | 195             | 275                | 40                  | 580, 1059       |
| 936                  | 92                   | 449                   | 814           | 200             | 738                | 44                  | 182             |
| 941                  | 900                  | I. L. R. Lah. Series, |               | 202             | 592, 606           | 47                  | 886             |
| 943                  | 692                  | 2 Lahore—             |               | 211             | 306, 1251          | 49                  | 379             |
| 947 (2)              | 551, 1235            | 208                   | 753           | 215             | 408, 619           | 53                  | 1166            |
| 949                  | 884, 1016            | 3 Lahore—             |               | 224             | 479                | 55                  | 1170            |
| 955                  | 723, 805             | 414                   | 192, 1286     | 233             | 675                | 63                  | 594, 596, 912   |
| 962                  | 77                   | 417                   | 988           | 236             | 604, 731           | 67                  | 303, 314, 354   |
| 964                  | 677, 714             | 420                   | 452, 825, 862 | 239             | 400, 401           | 70                  | 304             |
| 969                  | 649, 839             | 426                   | 749, 915      | 243             | 318, 321, 323      | 73                  | 626             |
| 972                  | 463                  | 431                   | 536           | 246             | 1090               | 75                  | 1186            |
| 974                  | 430                  | 433                   | 1164          | 249             | 10                 | 78                  | 588             |
| 982                  | 87                   | 437                   | 52            | 256             | 596                | 81                  | 479             |
| 987                  | 91, 335              | 440                   | 1044          | 258             | 1163               | 82                  | 1078            |
| 989                  | 146, 293, 1289       | 443                   | 573           | 263             | 289, 433, 680      | 87                  | 1083            |
| 996                  | 503                  | 4 Lahore—             |               | 271             | 1191               | 89                  | 371             |
| 997                  | 767                  | 1                     | 945           | 282             | 861                | 90                  | 598             |
| 1004                 | 1103                 | 7                     | 1091          | 284             | 599                | 91                  | 1154            |
| 1007                 | 115, 271             | 10                    | 1159          | 295             | 1267               | 92                  | 1154            |
| 1013                 | 964                  | 12                    | 1015          | 297             | 1287               | 95                  | 1209            |
| 1017                 | 212, 1172            | 15                    | 973           | 323             | 198                | 97                  | 38              |
| 1021                 | 746                  | 32                    | 263           | 327             | 600, 606, 666      | 99                  | 1282            |
| 1025                 | 374, 911, 1256       | 38                    | 572           | 334             | 809, 1213          | 106                 | 211             |
| 1029                 | 718                  | 44                    | 1193          | 336             | 1214, 1216         | 108                 | 373             |
| 1033                 | 1202                 | 46                    | 1179          | 344             | 421                | 109                 | 862             |
| 1037                 | 850                  | 49                    | 569           | 346             | 786                | 111                 | 886, 915        |
| 1042                 | 689                  | 52                    | 265           | 350             | 607                | 114                 | 885             |
| 28 C. W. N.—         |                      | 55                    | 542, 1093     | 354             | 806, 1156          | 117                 | 210, 367        |
| 1                    | 365, 678, 1188, 1197 | 58                    | 561           | 356             | 773, 774           | 119                 | 331             |
| 6                    | 1119                 | 61                    | 539           | 359             | 323                | 121                 | 1066            |
| 10                   | 196                  | 66                    | 490           | 364             | 621                | 124                 | 584             |
| 16                   | 309, 1148            | 69                    | 517           | 367             | 465, 514           | 128                 | 583, 662        |
| 20                   | 323                  | 72                    | 326           | 373             | 291, 1100          | 135                 | 207             |
| 23                   | 554                  | 76                    | 262, 411      | 376             | 809, 932           | 137                 | 1118            |
| 25                   | 992, 1275            | 85                    | 967           | 382             | 521                | 140                 | 289             |
| 31                   | 979                  | 90                    | 875           | 390             | 546, 575, 582, 583 | 142                 | 385             |
| 34                   | 444                  | 93                    | 735           | 392             | 531, 587           | 143                 | 1157            |
| 46                   | 38, 60, 61           | 99                    | 606, 1211     | 399             | 342                | 146                 | 40, 51          |
| 49                   | 716, 1131            | 102                   | 595           | 402             | 603, 604           | 148                 | 1006            |
| 55 (P C)             | 986                  | 106                   | 602           | 406             | 1087, 1089         | 150                 | 1219            |
| 57                   | 722                  | 109                   | 400           | 408             | 916                | 163                 | 165, 216, 334   |
| 62                   | 55, 655              | 111                   | 598           | 423             | 458, 1276          | 172                 | 1288            |
| 66                   | 868, 930             | 113                   | 599           | 428             | 1214               | 174                 | 801             |
| 70                   | 628                  | 120                   | 1162          | 432             | 405                | 175                 | 10              |
| 73                   | 407, 680             | 122                   | 598, 870      | 434             | 892, 1010          | 178                 |                 |
| 79                   | 1130, 1265, 1277     | 127                   | 1169          | 439             | 892                | 180                 | 1069            |
| 86                   | 363                  | 130                   | 506, 509      | 442 (F B)       | 595                | 183                 | 544             |
| 92                   | 351                  | 133                   | 975           | 445             | 1241               | 185                 | 771             |
| 98                   | 743                  | 137                   | 1166          | 448             | 1163               | 187                 | 1097            |
| 104                  | 421, 423, 432        | 140                   | 373           | 451             | 386                | 190                 | 687, 1096       |
| 114                  | 847, 928             | 142                   | 422           | 460             | 1130               | 193                 | 1164            |
| 116                  | 90                   | 151                   | 425           | 462             | 666                | 196                 | 5, 827          |
| 118                  | 542                  | 156                   | 991           | 467             | 569                | 198                 | 123             |
| 119                  | 54C, 546             | 158                   | 1162          | 467             | 568                | 200                 | 306, 1251       |
| 121                  | 919                  | 160                   | 845           | 467             | 966, 1170          | 203                 | 330, 605, 1211  |
| 127                  | 58, 1226             | 164                   | 1164          | 467             | Lah. Law Journal.  | 210                 | 813             |
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| 140                  | 45                   | 168                   | 40, 51        | 467             | 326                | 214                 | 780             |
| 143                  | 70                   | 171                   | 756           | 467             | 1171               | 217                 | 628, 1104, 1200 |
| 145                  | 68, 812, 1185        | 173                   | 1168          | 467             | 341                | 224                 | 438, 590        |
| 157                  | 80                   | 176                   | 601           | 467             | 323                | 228                 | 1066            |
| 160                  | 1086                 | 179                   | 1077          | 467             | 209                | 230                 | 574             |
| 170                  | 583, 591, 860, 1037  | 182                   | 646           | 467             | 325                | 234                 | 1224            |
| 252                  | 1085                 | 185                   | 224, 386      | 467             | 5, 1097            | 236                 | 738             |
| 264                  | 84                   | 187                   | 266           | 467             | 1                  | 238                 | 262, 411        |
| 277                  | 388, 644, 1130       | 189                   | 601, 1211     | 467             | 1162               | 246                 | 598, 870        |
|                      |                      | 192                   | 970           | 467             | 321                | 251                 | 165             |
|                      |                      | 195                   | 1168          | 467             | 558                | 253                 | 595             |

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| 5 L. L. J.—(Contd.)  |                 | 46 Mad.—(Contd.) |                   | 46 Mad.—(Contd.)    |                 | 44 M. L. J.—(Contd.) |                      |
| 257                  | 1193            | 135              | 168               | 929                 | 1005            | 274                  | 593, 732, 983        |
| 259                  | 265             | 148              | 1213, 1220        | 938                 | 233, 1119       | 279                  | 366                  |
| 262                  | 307             | 165              | 569               | 948                 | 1229            | 282                  | 258                  |
| 266                  | 1225            | 167              | 746               | 955                 | 388             | 284                  | 1135                 |
| 269                  | 377             | 177              | 715, 960          | 958                 | 228             | 285                  | 612                  |
| 271                  | 590             | 185              | 547               | Madras Law Journal. |                 | 290                  | 795, 797             |
| 272                  | 1056            | 190              | 1233, 1241, 1244, | 44 M. L. J.—        | 235, 240, 958   | 299                  | 344                  |
| 276                  | 517             |                  | 1308              | 1                   |                 | 303                  | 1148                 |
| 279                  | 195             | 253              | 530, 575          | 23                  |                 | 309                  | 747                  |
| 287                  | 862             | 257              | 1046              | 27                  | 553             | 318                  | 909                  |
| 289                  | 896             | 259              | 877               | 29                  | 846             | 320                  | 511                  |
| 292                  | 599, 781        | 300              | 202, 727, 1207    | 32                  | 856             | 322                  | 261                  |
| 296                  | 266             | 349              | 1189, 1198        | 34                  | 1269            | 325                  | 318                  |
| 298                  | 1158            | 360              | 795, 797          | 35                  | 723, 730, 962   | 328                  | 509                  |
| 304                  | 598             | 373              | 768, 1194         | 39                  | 242             | 337                  | 1018                 |
| 307                  | 1217            | 382              | 956               | 41                  | 952             | 344                  | 957                  |
| 310                  | 900             | 405              | 960, 1142, 1146,  | 43                  | 448             | 349                  | 725                  |
| 317                  | 585             |                  | 1147              | 45                  | 1189, 1198      | 357                  | 707                  |
| 322                  | 1063            | 415              | 192, 1007         | 53                  | 1311            | 359                  | 392                  |
| 325                  | 057, 1076       | 423              | 725               | 56                  | 569             | 361                  | 1100                 |
| 329                  | 1055            | 435              | 1189              | 60                  | 326             | 362                  | 1271                 |
| 332                  | 789             | 449              | 543               | 62                  | 721             | 363                  | 1002                 |
| 335                  | 1169            | 476              | 947               | 64                  | 945             | 366                  | 559                  |
| 338                  | 1168            | 478              | 1252              | 66                  | 503             | 367                  | 948                  |
| 345                  | 373             | 488              | 896               | 67                  | 518             | 382                  | 447, 979             |
| 346                  | 595             | 506              | 195               | 69                  | 237, 950        | 385                  | 1189                 |
| 351                  | 1207            | 525              | 7 164, 916        | 74                  | 562             | 386                  | 632                  |
| 355                  | 991             | 536              | 235, 240, 958     | 77                  | 335             | 388                  | 1120                 |
| 357                  | 455, 1243       | 567              | 980, 981          | 80                  | 192             | 396                  | 761                  |
| 361                  | 425             | 574              | 234, 340          | 84                  | 530, 547, 575   | 407                  | 1046                 |
| 366                  | 910, 1157, 1191 | 579              | 909               | 87                  | 923             | 411                  | 1121                 |
| 370                  | 502             | 583              | 706               | 90                  | 1204            | 413                  | 195                  |
| 372                  | 506, 509        | 592              | 957               | 91                  | 948             | 424                  | 221                  |
| 375                  | 1071            | 597              | 593, 983          | 100                 | 233, 1119       | 427                  | 1184                 |
| 377                  | 1074            | 605              | 1039              | 107                 | 1213, 1220      | 428                  | 712, 983             |
| 381                  | 1168            | 631              | 1236              | 116                 | 1208            | 431                  | 469, 875, 929        |
| 384                  | 375, 599        | 650              | 982               | 119                 | 525             | 437                  | 858                  |
| 389                  | 933             | 659              | 1244              | 122                 | 703             | 443                  | 170, 325             |
| 392                  | 378             | 673              | 794               | 123                 | 263             | 450                  | 956                  |
| 394                  | 1260            | 679              | 251               | 128                 | 1080            | 465                  | 746                  |
| 398                  | 911             | 685              | 809               | 130                 | 519             | 471                  | 716, 1131            |
| 401                  | 970             | 706              | 794               | 132                 | 668, 696, 823   | 476                  | 730                  |
| 404                  | 599             | 715              | 582               | 138                 | 1075            | 486                  | 987                  |
| 406                  | 1164            | 719              | 546               | 141                 | 309             | 488                  | 1098                 |
| 407                  | 537, 1053       | 721              | 564               | 146                 | 957             | 489                  | 407, 907, 1016       |
| 412                  | 1159            | 723              | 525               | 149                 | 973             | 495                  | 1129                 |
| 414                  | 1068            | 726              | 712               | 161                 | 958             | 498                  | 406, 609             |
| 417                  | 1063            | 734              | 178               | 166                 | 512             | 503                  | 743                  |
| 420                  | 479             | 736              | 306, 318, 320     | 171                 | 746             | 510                  | 1009                 |
| 429                  | 696, 1165       | 751              | 920               | 179                 | 882             | 513                  | 1252                 |
| I L R Madras Series, |                 | 758              | 540               | 184                 | 905             | 515                  | 341, 989, 992, 1224  |
| 46 Mad.—             |                 | 766              | 541               | 187                 | 1094, 1204      | 523                  | 794                  |
| 1                    | 749             | 768              | 543               | 201                 | 947             | 527                  | 1252                 |
| 10                   | 947             | 782              | 166               | 202                 | 234, 340        | 534                  | 1274                 |
| 30                   | 1218            | 791              | 457               | 206                 | 192, 1007       | 557                  | 512                  |
| 35                   | 12              | 808              | 1210              | 212                 | 980, 981        | 561                  | 767                  |
| 47                   | 295, 777        | 811              | 1151              | 217                 | 222             | 567                  | 543                  |
| 54                   | 1121            | 815              | 203, 336          | 226                 | 1218            | 585                  | 1130                 |
| 60                   | 284             | 823              | 759               | 231                 | 946             | 588                  | 311, 920             |
| 64                   | 740, 772, 1259  | 836              | 948               | 234                 | 1087            | 590                  | 302                  |
| 83                   | 249             | 839              | 947               | 236                 | 1243            | 595                  | 1057                 |
| 88                   | 503             | 840              | 632               | 238                 | 174             | 596                  | 125                  |
| 90                   | 1034            | 847              | 1024              | 240                 | 258             | 599                  | 296, 313             |
| 92                   | 677, 952        | 852              | 659               | 243                 | 1083            | 602                  | 365, 678, 1188, 1197 |
| 104                  | 448             | 866              | 446, 646          | 247                 | 1149            | 608                  | 407, 680             |
| 108                  | 992, 1275       | 873              | 6, 636            | 249                 | 205, 256        | 615                  | 764                  |
| 117                  | 653             | 895              | 723, 742          | 251                 | 960, 1146, 1147 | 624                  | 919, 978             |
| 123                  | 237, 950        | 903              | 813               | 258                 | 36              | 631                  | 992, 1275            |
| 133                  | 635             | 919              | 852               | 263                 | 46              | 638                  | 11, 638              |
|                      |                 |                  | 1255              | 271                 | 947             |                      |                      |

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| 44 M. L. J.—(Contd.) |                     | 45 M. L. J.—(Contd.) |                | 45 M. L. J.—(Contd.) |               | 1923 M. W. N.—(Contd.) |                       |
| 642                  | 713                 | 224                  | 540            | 611                  | 861           | 11                     | 374                   |
| 643                  | 178                 | 228                  | 733            | 613                  | 537, 663      | 12                     | 721                   |
| 645                  | 895                 | 230                  | 543            | 617                  | 1131, 1, 44   | 13                     | 448                   |
| 648                  | 500                 | 2, 1                 | 255            | 623                  | 8, 891        | 15                     | 744                   |
| 649                  | 715, 1207           | 233                  | 336            | 630                  | 430           | 19                     | 685                   |
| 652                  | 168                 | 238                  | 829            | 639                  | 852           | 51                     | 192                   |
| 655                  | 1039                | 240                  | 990            | 651                  | 216, 301      | 54                     | 824                   |
| 673                  | 251                 | 243                  | 39             | 653                  | 51, 122       | 56                     | 555                   |
| 677                  | 788                 | 249                  | 1305           | 657                  | 813           | 57 (1)                 | 706, 735, 748,        |
| 680                  | 706                 | 253                  | 226            | 663                  | 209           |                        | 961, 1260             |
| 685                  | 877                 | 254                  | 1098           | 667                  | 1190          | 70                     | 790                   |
| 699                  | 698, 1308           | 255                  | 526            | 675                  | 990           | 104                    | 1037                  |
| 706                  | 43                  | 258                  | 981            | 680                  | 940           | 111                    | 202, 727, 1207        |
| 714                  | 652                 | 263                  | 306, 318, 320  | 682                  | 1249          | 132                    | 1075                  |
| 718                  | 54, 314, 884        | 274                  | 487            | 683                  | 949           | 133                    | 235, 240, 958         |
| 723 (P C)            | 650                 | 279                  | 496            | 684                  | 856           | 148                    | 948                   |
| 728                  | 178, 433, 771, 1281 | 289                  | 607, 1303      | 687                  | 177, 295, 356 | 154                    | 35                    |
| 732                  | 1196                | 295                  | 797, 799       | 689                  | 1141          | 157                    | 234 340               |
| 735 (P C)            | 244                 | 305                  | 528, 984       | 690                  | 325           | 159                    | 231                   |
| 740                  | 910                 | 309                  | 388            | 693                  | 1279          | 160                    | 957                   |
| 745                  | 768, 1194           | 312                  | 252            | 699                  | 659           | 162                    | 318                   |
| 751                  | 784, 786            | 315                  | 193            | 703                  | 228           | 164                    | 366                   |
| 758                  | 49, 51              | 321                  | 1024           | 707                  | 795           | 166                    | 1189                  |
| 766                  | 783                 | 323                  | 245            | 711                  | 796           | 172                    | 788                   |
| 774 (F B)            | 504, 509            | 327                  | 630            | 716                  | 419           | 173                    | 593, 983              |
| 45 M. L. J. —        |                     | 329                  | 659            | 718                  | 855           | 176                    | 953                   |
| 1                    | 778                 | 333                  | 6, 636         | 719                  | 1262          | 186                    | 408                   |
| 12                   | 896                 | 339                  | 823            | 721                  | 948           | 189                    | 839, 841              |
| 23                   | 951                 | 346                  | 166            | 722                  | 1002          | 193                    | 955                   |
| 36                   | 525                 | 359                  | 773, 774       | 724                  | 641           | 194                    | 174                   |
| 39                   | 406                 | 363                  | 967            | 725                  | 229, 724      | 195                    | 1148                  |
| 44                   | 736                 | 385                  | 710, 1099      | 728                  | 37, 654, 1084 | 199                    | 957                   |
| 53                   | 610                 | 389                  | 1245           | 731                  | 809, 947      | 202                    | 747                   |
| 56                   | 488                 | 399                  | 892            | 742                  | 404           | 203                    | 948                   |
| 59                   | 415, 847            | 403                  | 1229           | 749                  | 801           | 211                    | 869                   |
| 66                   | 345, 1120           | 406                  | 313, 321, 1130 | 754                  | 1091          | 212                    | 960, 1142, 1146, 1147 |
| 67                   | 409                 | 409                  | 533            | 763                  | 337, 1131     | 217                    | 707                   |
| 71                   | 157                 | 413                  | 1127           | 770                  | 1247          | 218                    | 1218                  |
| 74                   | 1072                | 424                  | 303            | 776                  | 994           | 222                    | 1447                  |
| 76                   | 339                 | 426                  | 1005           | 779                  | 82            | 223                    | 511                   |
| 78                   | 12                  | 431                  | 773            | 780                  | 1231          | 225                    | 692, 772              |
| 83                   | 1127                | 438                  | 266, 459, 1255 | 791                  | 925           | 230                    | 612                   |
| 91                   | 953                 | 444                  | 652, 698       | 798                  | 659, 1015     | 233                    | 947                   |
| 100                  | 1191                | 453                  | 654, 669, 1310 | 800                  | 465, 522, 561 | 235                    | 1129                  |
| 104                  | 564                 | 460                  | 403, 852       | 804                  | 1144          | 237                    | 258                   |
| 105                  | 1138                | 471                  | 8, 69, 88, 668 | 805                  | 372           | 240                    | 258, 509              |
| 116                  | 1092                | 473                  | 863            | 808                  | 545           | 266                    | 951                   |
| 124                  | 954                 | 478                  | 960            | 811                  | 1104          | 276                    | 713                   |
| 125                  | 1151                | 481                  | 181            | 813                  | 870, 932      | 277                    | 712                   |
| 129                  | 1142                | 489                  | 723, 742       | 817                  | 689, 1124     | 280                    | 1219                  |
| 133                  | 1031                | 497                  | 884            | 822                  | 934           | 282                    | 311                   |



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| 321                    | 794                | 571                    | 166                  | 811                    | 948              | 157               | 1080               |
| 323                    | 706                | 578                    | 1305                 | 814                    | 1046             | 159               | 374                |
| 327                    | 895                | 580                    | 39                   | 815                    | 545              | 161               | 795, 797           |
| 328                    | 1142               | 583                    | 430                  | 817                    | 303              | 169               | 214, 954           |
| 331                    | 339                | 590                    | 226                  | 825                    | 1190             | 174               | 1306               |
| 332                    | 1009               | 591                    | 622, 1016            | 831                    | 1002             | 179               | 1120               |
| 335                    | 416                | 596                    | 43                   | 832                    | 209              | 182               | 309                |
| 343                    | 714                | 603                    | 797                  | 834                    | 864              | 187               | 1149               |
| 344                    | 610                | 609                    | 1242, 1259           | 1270                   | 835              | 157               | 168                |
| 347                    | 156, 715           | 921                    | 614                  | 994                    | 837              | 553               | 1037               |
| 354                    | 234, 292           | 616                    | 1287                 | 838                    | 1144             | 208               | 730, 962           |
| 357                    | 954                | 622                    | 652, 698             | 839                    | 1104             | 213               | 1196               |
| 359                    | 1121               | 626                    | 773, 1231            | 840                    | 1135             | 216               | 1213, 1220         |
| 361                    | 8, 69, 668         | 633                    | 325                  | 841                    | 767, 1027        | 226               | 465, 512           |
| 367                    | 244                | 634                    | 1087                 | 846                    | 611, 635         | 229               | 525                |
| 372                    | 49, 51             | 638                    | 114, 715             | 849                    | 982              | 232               | 1284               |
| 377                    | 730                | 647                    | 1310                 | 860                    | 496              | 235               | 632                |
| 382                    | 764                | 652                    | 778                  | 867                    | 330              | 236               | 1076               |
| 388                    | 1131               | 657                    | 981, 1094, 1288      | 871                    | 944              | 238               | 957                |
| 392                    | 1170               | 660                    | 940                  | 872                    | 949              | 241               | 205, 256           |
| 401                    | 564                | 664                    | 187                  | 873 (P C)              | 1200             | 243               | 905                |
| 403                    | 228                | 668                    | 719                  | 876                    | 464, 1091        | 247               | 527, 545           |
| 406                    | 178, 217, 232      | 670                    | 936                  | 878                    | 1005             | 249               | 950                |
| 408                    | 255                | 672                    | 181, 252             | 882                    | 1120             | 251               | 284, 340           |
| 409                    | 794                | 675                    | 1127                 | 883                    | 809              | 254               | 390, 428, 901, 911 |
| 411                    | 954                | 677                    | 203, 336             | 893                    | 543              | 273               | 947                |
| 413                    | 794                | 679                    | 650, 787             | 894                    | 313, 315, 864    | 274               | 1094, 1204         |
| 415                    | 222                | 681                    | 864                  | 895                    | 1137             | 288               | 761                |
| 421                    | 520                | 682                    | 823                  | 902                    | 723, 742         | 298               | 746                |
| 423                    | 729                | 687                    | 773, 774             | 913                    | 1091             | 303               | 36                 |
| 437 (2)                | 136, 987           | 689                    | 11                   | 919                    | 404              | 308               | 946                |
| 438                    | 767                | 695                    | 533                  | 925                    | 345, 422         | 311               | 511                |
| 441                    | 919, 978           | 697                    | 537                  | 78 I O :—              |                  | 314               | 192, 1007          |
| 444                    | 1072               | 699                    | 902                  | 1                      | 221              | 319               | 159, 1185          |
| 445                    | 406                | 702                    | 68, 812              | 6                      | 446, 646         | 321               | 961                |
| 447                    | 659                | 732                    | 710                  | 14                     | 1249, 1255, 1307 | 322               | 170, 325           |
| 450                    | 950                | 784                    | 403, 852             | 18                     | 855              | 329               | 261                |
| 451                    | 1088               | 739                    | 863                  | 41                     | 1812             | 332               | 747                |
| 452                    | 670                | 741                    | 960                  | 42                     | 869              | 341               | 947                |
| 454                    | 639, 642, 675      | 743                    | 1229                 | 57                     | 892              | 344               | 909                |
| 460                    | 743                | 745                    | 503, 1052            |                        | 17 L W :—        | 346               | 447                |
| 463                    | 306, 318, 320      | 746                    | 869, 1148            | 1                      | 40, 793, 1308    | 348               | 760                |
| 474                    | 302                | 747                    | 818                  | 7                      | 945              | 350               | 1121               |
| 477                    | 543                | 750                    | 659                  | 8                      | 326              | 352               | 366                |
| 489                    | 1236               | 753                    | 177, 295, 356        | 11                     | 788              | 355               | 174                |
| 499                    | 1210               | 754                    | 1141                 | 14                     | 1268, 1278       | 356               | 854                |
| 508                    | 245                | 755                    | 829                  | 18                     | 530, 547, 575    | 357               | 559                |
| 510                    | 387                | 756                    | 990                  | 21                     | 1036, 1049       | 361               | 955                |
| 511                    | 36, 654, 669, 1311 | 758                    | 528, 984             | 25                     | 256              | 363               | 102                |
| 519                    | 540                | 761                    | 388                  | 26                     | 369              | 364               | 1218               |
| 522                    | 979                | 762                    | 365, 678, 1188, 1197 | 31                     | 202, 727, 1207   | 370               | 1083               |
| 524                    | 910                | 766                    | 1249                 | 62                     | 1204             | 374               | 1100               |
| 525                    | 950, 993           | 767                    | 951                  | 64                     | 364              | 375               | 12                 |
| 526 (P C)              | 878                | 768                    | 856                  | 67                     | 703              | 380               | 1002               |
| 528 (P C)              | 856                | 773                    | 245                  | 69                     | 573              | 383               | 992, 1275          |
| 529                    | 193                | 772                    | 51, 122              | 71                     | 46               | 390               | 195                |
| 533                    | 1274               | 775                    | 990                  | 77                     | 448              | 402               | 707                |
| 545                    | 170                | 779                    | 987                  | 79                     | 408              | 405               | 717, 814, 1131     |
| 547                    | 406, 60            | 780                    | 1145                 | 90                     | 635              | 409               | 509                |
| 550                    | 457                | 781                    | 1262                 | 92                     | 721              | 413               | 869                |
| 554                    | 813                | 782                    | 592                  | 94                     | 839, 841         | 415               | 668, 696, 823      |
| 557                    | 712, 799, 1225     | 786                    | 759                  | 100                    | 512              | 422               | 258                |
| 564 (I)                | 888                | 789                    | 992, 1259            | 104                    | 1075             | 424               | 392                |
| 564 (2)                | 462                | 793                    | 967, 974             | 107                    | 744              | 426               | 983                |
| 565                    | 1024               | 796                    | 1062                 | 147                    | 1208             | 429               | 483                |
| 566                    | 235, 414           | 802                    | 607, 1803            | 150                    | 203              | 431               | 951                |
| 567                    | 733                | 803                    | 289                  | 152                    | 883              | 445               | 223                |
| 568                    | 398                | 807                    | 1131, 1244           | 154                    | 1271             | 451               | 1046               |
|                        |                    |                        | 981                  | 155                    | 669              |                   |                    |

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| 17 L. W.—(Contd.) |                     | 18 L. W.—(Contd.) |                | 18 L. W.—(Contd.) |                      | 18 L. W.—(Contd.) |                       |
| 453               | 806                 | 35                | 1148           | 350               | 1045                 | 718               | 1091                  |
| 462               | 569                 | 41                | 846            | 354               | 630                  | 728               | 388, 644, 1130        |
| 467               | 875                 | 44                | 979            | 356               | 823                  | 739               | 216, 301              |
| 473               | 246                 | 48                | 650, 993       | 363               | 388                  | 741               | 1046                  |
| 481               | 1170                | 49                | 670            | 366               | 6, 636               | 743               | 37, 654, 1084         |
| 495               | 610                 | 53                | 348            | 372               | 797                  | 747               | 179, 704              |
| 499               | 469                 | 54                | 255            | 383               | 884, 1016            | 753               | 51, 122               |
| 500               | 1092                | 56                | 878            | 387               | 767                  | 757               | 166                   |
| 509               | 919, 978            | 59                | 856            | 392               | 799                  | 767               | 764                   |
| 514               | 714                 | 61                | 1274           | 399               | 818                  | 776               | 795                   |
| 521               | 156, 715, 921       | 77                | 406            | 404               | 639, 642, 675        | 780               | 931                   |
| 531               | 409                 | 80                | 1130           | 414               | 659                  | 792               | 796                   |
| 535               | 1046                | 82                | 1151           | 418               | 1189, 1198           | 796               | 801                   |
| 536               | 980, 981            | 88                | 726            | 426               | 1138                 | 802               | 244                   |
| 541               | 1219                | 92                | 994            | 437               | 203                  | 808               | 869, 1148             |
| 545               | 987                 | 96                | 794            | 441               | 406, 609             | 809               | 404                   |
| 546               | 136                 | 99                | 330            | 446               | 365, 678, 1188, 1197 | 818               | 466, 520              |
| 547               | 1252                | 105               | 234, 292       | 451               | 248, 347             | 823               | 852                   |
| 555               | 952                 | 109               | 944            | 453               | 295, 417             | 837               | 1144                  |
| 558               | 341, 989, 992, 1224 | 111               | 525            | 465               | 1210                 | 838               | 990                   |
| 566               | 157                 | 113               | 496            | 478               | 540                  | 844               | 948                   |
| 570               | 713                 | 124               | 1200           | 482               | 533                  | 849               | 229                   |
| 572               | 407, 680            | 130               | 949            | 485               | 1229                 | 857               | 804, 1145, 1147, 1148 |
| 577               | 1043                | 132               | 564            | 491               | 169                  | 868               | 1143                  |
| 579               | 1149                | 133               | 562            | 502               | 982                  | 870               | 932                   |
| 580               | 1081                | 135               | 1120           | 515               | 863                  | 874               | 1104                  |
| 582               | 311                 | 137               | 313, 321, 1130 | 517               | 960                  | 876               | 388                   |
| 584               | 794                 | 141               | 1032           | 520               | 325                  | 879               | 809, 947              |
| 588               | 1191                | 146               | 226            | 573               | 687, 814, 946        | 884               | 1142                  |
| 592               | 1039                | 147               | 82             | 525               | 593, 983             | 886               | 550, 661              |
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| 613               | 1252                | 153               | 1305           | 537               | 49, 51               | 895               | 465, 552, 561         |
| 615               | 512                 | 156               | 729            | 545               | 446, 646             | 899               | 528, 984              |
| 618               | 895                 | 160               | 659            | 555               | 743                  | 903               | 920                   |
| 622               | 1135                | 165               | 691            | 560               | 1127                 | 907               | 717, 875              |
| 623               | 229                 | 167               | 1071           | 564               | 416                  | 911               | 419                   |
| 627               | 1098                | 169               | 954            | 564               | 918                  | 918               | 712, 799, 1225        |
| 629               | 3                   | 173               | 719, 721       | 577               | 303                  | 928               | 1245                  |
| 632               | 335                 | 177               | 170            | 588               | 1310                 | 933               | 1085                  |
| 635               | 296, 313            | 181               | 1088           | 599               | 730                  | 940               | 1287                  |
| 638               | 344                 | 188               | 759, 1062      | 607               | 537, 663             | 946               | 518                   |
| 643               | 42, 302             | 193               | 967, 974       | 610               | 1145                 | 949               | 545                   |
| 648               | 50                  | 198               | 228            | 612               | 543                  | 953               | 1255                  |
| 656               | 958                 | 203               | 981            | 613               | 1031                 | 960               | 949                   |
| 661               | 740, 772, 1257      | 209               | 289            | 615               | 313, 315, 864        |                   |                       |
| 674               | 885                 | 210               | 877            | 618               | 951                  | 19 L W :—         |                       |
| 676               | 1009                | 233               | 990            | 620               | 6                    |                   | 1244                  |
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| 683               | 896                 | 237               | 187            | 636               | 791                  | 28                | 1249                  |
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| 712               | 953                 | 256               | 723, 742       | 649               | 864                  | 883               | 702                   |
| 722               | 543                 | 273               | 773, 774       | 651               | 987                  |                   |                       |
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| 750               | 706                 | 282               | 1135, 1139     | 656               | 228                  | 7                 | 813, 846              |
| 755               | 692, 772            | 288               | 614            | 664               | 767, 1027            | 17                | 784, 786              |
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| 147                    | 391            | 211                 | 764           | 389                 | 1269            | 62                     | 1291              |
| 151                    | 1502           | 215                 | 1154          | 390 (Rev)           | 280             | 67                     | 515               |
| 155                    | 1032           | 216                 | 41            | 392                 | 785             | 69                     | 1054              |
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| 170                    | 797            | 221                 | 1108          | 409                 | 734             | 76                     | 575               |
| 180                    | 920            | 223                 | 203, 1288     | 416                 | 390             | 79                     | 1058              |
| 184                    | 209            | 27                  | 859           | 418                 | 415             | 81                     | 1084              |
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| 3                      | 903            | 242                 | 1171          | 433                 | 622             | 91                     | 526               |
| 7                      | 1017           | 244                 | 997           | 441                 | 157             | 92                     | 240               |
| 15                     | 1113           | 246                 | 1233, 1234    | 447                 | 213, 310        | 95                     | 554               |
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| 23                     | 1114           | 252                 | 238, 348      | 464                 | 270, 413        | 105                    | 480               |
| 50                     | 197            | 257                 | 191           | 470                 | 887             | 118                    | 1086              |
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| 73                     | 935            | 276                 | 638           | 496                 | 979             | 137                    | 1312              |
| 75                     | 1152           | 277                 | 388           | 503                 | 971             | 138                    | 1156              |
| 78                     | 1233           | 278                 | 1149          | 505                 | 787             | 140                    | 573               |
| 82                     | 1109           | 280                 | 934           | 510                 | 897             | 142                    | 499               |
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| 97                     | 441            | 294                 | 205           | 526                 | 182, 244        | 203                    | 518               |
| 99                     | 972            | 298                 | 283, 290      | 529                 | 623             | 205                    | 1064              |
| 105                    | 647            | 301                 | 226           | 532                 | 155, 685        | 207                    | 505               |
| 113                    | 898            | 304                 | 352           | 539                 | 1152            | 210                    | 664               |
| 115                    | 1111           | 305                 | 348           | 540                 | 430             | 213                    | 506               |
| 116                    | 1109           | 306                 | 1103          | 543                 | 395             | 215                    | 527               |
| 117                    | 296            | 311                 | 793           | 545                 | 747, 749        | 216                    | 473               |
| 119                    | 420            | 314                 | 176           | 550                 | 1118            | 218                    | 1057              |
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| 128                    | 1204           | 317                 | 885           | 555                 | 647, 1247       | 226                    | 1300              |
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| 132                    | 1115           | 324                 | 975           | 561                 | 212, 962        | 233                    | 526               |
| 134                    | 765            | 326                 | 755           | 567                 | 1300            | 234                    | 1040              |
| 136                    | 1150           | 329                 | 762           | 570                 | 1112, 1170      | 235                    | 1156              |
| 137                    | 285            | 331                 | 47            | 574                 | 993             | 237                    | 473, 762          |
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| 141                    | 1301           | 337                 | 1300          | 581                 | 418             | 241                    | 470               |
| 142                    | 198            | 339                 | 999           | 583                 | 169, 1003       | 245                    | 688, 1082         |
| 144                    | 1149           | 342                 | 1109          | 587                 | 1298            | 248                    | 465, 501          |
| 169                    | 263            | 347                 | 205           | 591                 | 188, 217, 232   | 251                    | 466               |
| 172                    | 1153           | 352                 | 1118          | 596                 | 1011            | 252                    | 590               |
| 174                    | 1728           | 353                 | 345           | 598                 | 759             | 253                    | 1078              |
| 176                    | 264, 908       | 355                 | 1117          | 601                 | 779             | 259                    | 468               |
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| 40                       | 712                      | 174                      | 649                      | 286                      | 27, 1020                 | 404                      | 844                      |
| 41                       | 1296                     | 175                      | 1024                     | 287                      | 826                      | 406                      | 17                       |
| 43                       | 124                      | 177                      | 290                      | 282                      | 127                      | 407                      | 21                       |
| 44                       | 1019                     | 178                      | 213                      | 290                      | 18                       | 408                      | 18                       |
| 45                       | 1293                     | 179                      | 1024                     | 291                      | 27                       | 409                      | 20                       |
| 46                       | 35                       | 180                      | 831                      | 298                      | 450, 1230                | 410                      | 236, 335                 |
| 48                       | 24                       | 181                      | 21                       | 300                      | 19                       | 411                      | 253                      |
| 50                       | 827                      | 182                      | 22, 890                  | 301                      | 18                       | 414                      | 655                      |
| 52                       | 1294                     | 185                      | 122                      | 302                      | 680                      | 415                      | 643                      |
| 54                       | 648                      | 188                      | 28                       | 305                      | 1293                     | 416                      | 848                      |
| 56                       | 28                       | 189                      | 22                       | 306                      | 16, 29                   | 417                      | 21                       |
| 58                       | 28                       | 190                      | 837                      | 308                      | 1258                     | 420                      | 834                      |
| 59                       | 18                       | 192                      | 838                      | 310                      | 837                      | 421                      | 1197                     |
| 63                       | 1012                     | 193                      | 32                       | 311                      | 163                      | 425                      | 19                       |
| 64                       | 1019                     | 195                      | 22                       | 316                      | 708                      | 428                      | 14                       |
| 65                       | 1                        | 197                      | 32                       | 317                      | 846                      | 429                      | 14                       |
| 67                       | 401                      | 198                      | 848, 1291                | 318                      | 27                       | 430                      | 25                       |
| 68                       | 16                       | 200                      | 37                       | 321                      | 33                       | 431                      | 1294                     |
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| 74                       | 1021                     | 206                      | 17                       | 328                      | 1020                     | 445                      | 17                       |
| 75                       | 1013                     | 208                      | 1011                     | 329                      | 28                       | 447                      | 14                       |
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| 94                       | 1012                     | 225                      | 30                       | 350                      | 1022                     | 309                      | 409                      |
| 113                      | 151                      | 227                      | 1295                     | 352                      | 29                       |                          |                          |
| 115                      | 832                      | 229                      | 843                      | 353                      | 647                      |                          |                          |
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| 133                      | 826                      | 248                      | 1020                     | 370                      | 1292                     | 52                       | 973                      |
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| 142                      | 624, 1020                | 252                      | 18                       | 474                      | 127                      | 86                       | 901                      |
| 145                      | 1296                     | 253                      | 831                      | 376                      | 37, 1294                 | 98                       | 979                      |
| 146                      | 32                       | 259                      | 1297                     | 377                      | 29                       | 109                      | 846                      |
| 147                      | 831                      | 261                      | 20                       | 378                      | 208                      | 111                      | 716, 814, 1131           |
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| 149                      | 151                      | 264                      | 17                       | 383                      | 1212                     | 129                      | 764                      |
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| 153                      | 829                      | 269                      | 840                      | 387                      | 13                       | 153                      | 919, 978                 |
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| 178 951                         |                         | 100 100                         |                           |                               | 856 128 (P.C.)                   | 388, 644, 1130        |      |
| 190 1046                        | <b>33 M L T. (P.C.)</b> | 1237 101                        |                           |                               | 855 136                          | 773, 774              |      |
| 191 713                         | 209 (P.C.)              | 1806 103                        |                           |                               | 138 138                          | 714, 799, 1225        |      |
| 197 1009                        | 212                     | 1305 106                        |                           |                               | 146 146                          | 979                   |      |
| 195 983                         | 214                     | 884, 1016 110                   |                           |                               | 148 (P.C.)                       | 797                   |      |
| 198 195                         | 216                     | 1237 119                        |                           |                               | 156 (P.C.)                       | 37, 116, 653          |      |
| 212 258                         | 219                     | 794 122                         |                           |                               | 795 160                          | 622, 1016             |      |
| 214 509                         | 225                     | 988 126                         |                           |                               | 216, 301 167 (P.C.)              | 813                   |      |
| 217 546                         | 228                     | 226 126                         |                           |                               | 990 171                          | 1287                  |      |
| 217 (2) 875                     | 232                     | 1130 130                        |                           |                               | 404 175 (P.C.)                   | 920                   |      |
| 222 1189                        | 233                     | 1347 137                        |                           |                               | 931 178 (P.C.)                   | 337, 1131             |      |
| 230 895                         | 241                     | 46 152                          |                           |                               | 801 183                          | 6                     |      |
| 232 366                         | 246                     | 1289 156                        |                           |                               | 537, 663 184                     | 203                   |      |
| 234 951, 1081                   | 257                     | 1225 159                        |                           |                               | 531 187                          | 209                   |      |
| 236 896                         | 267                     | 712, 799, 1225 159              |                           |                               | 1091 189 (P.C.)                  | 1131, 1244            |      |
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| I                              | 903              | 123                    | 1263            | 263 (2)                | 1302                 | 360                    | 548        |
| 7                              | 994              | 124                    | 190             | 265                    | 1233                 | 361 (1)                | 912        |
| 10                             | 56               | 126                    | 523             | 267 (1)                | 1291                 | 361 (2)                | 1310       |
| 11 (1)                         | 693              | 128                    | 1115            | 267 (2)                | 47                   | 362                    | 216, 624   |
| 11 (2)                         | 258, 815, 1266   | 129                    | 846, 1107       | 268                    | 933                  | 363                    | 449        |
| 12                             | 973              | 134                    | 31, 831         | 269                    | 235, 1302            | 364                    | 869        |
| 14 (1)                         | 721              | 135                    | 1113            | 270                    | 1150                 | 365                    | 842        |
| 14 (2)                         | 25               | 137 (1)                | 520             | 271 (2)                | 995                  | 366                    | 768        |
| 15                             | 155              | 137 (2)                | 172             | 273                    | 420                  | 367 (1)                | 841        |
| 17                             | 1030, 1032       | 139                    | 51              | 276                    | 575                  | 367 (2)                | 25         |
| 18                             | 20               | 140 (1)                | 643             | 277                    | 523, 1042            | 368                    | 13, 164    |
| 20                             | 733              | 140 (2)                | 997             | 281                    | 28                   | 369                    | 1298       |
| 22 (2)                         | 897              | 141                    | 701             | 282 (1)                | 1108                 | 371                    | 1301       |
| 23                             | 780              | 145                    | 610, 1179, 1180 | 282 (2)                | 884                  | 372                    | 13         |
| 24                             | 1275             | 146                    | 890             | 284                    | 765                  | 373                    | 38         |
| 25                             | 7, 475, 913      | 149                    | 508             | 285                    | 521, 578, 1073, 1086 | 374                    | 14         |
| 28                             | 690, 787         | 150                    | 1108            | 286                    | 1301                 | 375                    | 1109       |
| 29                             | 935              | 151                    | 898             | 287                    | 758, 1223            | 377                    | 1293       |
| 30                             | 285              | 153                    | 290             | 291 (1)                | 5                    | 378                    | 1152, 1294 |
| 31                             | 49               | 159                    | 1144            | 291 (2)                | 236, 241             | 382 (1)                | 214        |
| 33 (1)                         | 1138             | 161 (1)                | 1204            | 292                    | 312                  | 382 (2)                | 851        |
| 33 (2)                         | 1035             | 161 (2)                | 1114            | 293 (1)                | 1029                 | 383                    | 503        |
| 34                             | 17, 1071         | 164                    | 778             | 293 (2)                | 1141                 | 384                    | 934        |
| 35                             | 507              | 171                    | 1265            | 294                    | 1113                 | 386                    | 1155       |
| 41                             | 450              | 175 (1)                | 1276            | 295 (1)                | 826, 1012            | 387 (1) (F B)          | 785        |
| 43                             | 633              | 175 (2)                | 1054            | 295 (2)                | 831                  | 387 (2)                | 826        |
| 44                             | 859              | 176                    | 1097            | 296                    | 1114                 | 392                    | 233        |
| 48                             | 1112, 1113, 1258 | 179                    | 726             | 297                    | 1228                 | 394                    | 184        |
| 50                             | 30, 1151         | 183                    | 1301            | 298 (1)                | 345                  | 396                    | 859        |
| 52                             | 1113             | 186 (F B.)             | 1274, 1279      | 298 (2)                | 753                  | 397                    | 1263       |
| 53                             | 680, 695         | 189                    | 323             | 301                    | 1179                 | 398 (1)                | 744        |
| 54                             | 1223             | 190                    | 282             | 304                    | 986                  | 398 (2)                | 29         |
| 55                             | 975              | 192                    | 786             | 306                    | 459, 736, 1136       | 399                    | 6          |
| 56                             | 417              | 193 (1)                | 711             | 310                    | 217                  | 401 (1)                | 34         |
| 57                             | 1114             | 193 (2)                | 577             | 311                    | 263                  | 401 (2)                | 22         |
| 58                             | 647              | 197                    | 1056            | 313                    | 30, 31               | 402                    | 23         |
| 63                             | 778              | 202                    | 752             | 318                    | 317                  | 403                    | 643        |
| 64                             | 879              | 203                    | 1152            | 319 (1)                | 198                  | 404 (1)                | 594        |
| 65                             | 393, 1011        | 204                    | 935             | 319 (2)                | 1149                 | 404 (2)                | 428        |
| 67                             | 446              | 206                    | 647             | 321                    | 764, 908             | 405                    | 193        |
| 71                             | 1177             | 210                    | 739             | 322                    | 664                  | 406                    | 845        |
| 75                             | 923              | 211                    | 1298            | 325                    | 1054                 | 407                    | 1008       |
| 77                             | 647              | 213                    | 328, 331, 367   | 327 (1)                | 560                  | 408                    | 1154       |
| 78                             | 227              | 214                    | 285             | 327 (2)                | 684                  | 409                    | 282, 1095  |
| 79 (1)                         | 1177             | 216                    | 1134            | 329                    | 970, 1044            | 411                    | 645, 1249  |
| 79 (2)                         | 285              | 218 (2)                | 30              | 331                    | 964                  | 412                    | 1100       |
| 81 (1)                         | 1214             | 220                    | 734             | 332 (1)                | 526                  | 414 (1)                | 1109       |
| 81 (2)                         | 541, 575         | 225                    | 405, 609        | 332 (2)                | 515                  | 414 (2)                | 31         |
| 83                             | 1055             | 229                    | 775             | 333                    | 1072                 | 415                    | 940        |
| 84                             | 1191             | 230                    | 972             | 334                    | 452                  | 416                    | 448        |
| 85                             | 553              | 231                    | 262             | 335                    | 31                   | 417 (1)                | 378        |
| 86                             | 460              | 232                    | 156, 1103       | 337                    | 216                  | 417 (2)                | 846        |
| 87                             | 1056             | 234 (1)                | 350             | 338                    | 169, 1188            | 418                    | 924        |
| 88 (1)                         | 523              | 234 (2)                | 741             | 340                    | 14                   | 419                    | 23         |
| 88 (2)                         | 1064             | 235                    | 1178            | 341                    | 207, 733             | 420 (1)                | 1152       |
| 90                             | 497              | 242                    | 383, 757        | 342                    | 899                  | 420 (2)                | 677        |
| 91                             | 536, 537, 653    | 247                    | 607, 1129       | 343                    | 24, 216              | 421                    | 817, 829   |
| 109                            | 793              | 248                    | 199             | 344                    | 30                   | 423                    | 358        |
| 112                            | 274, 1187        | 249                    | 719             | 345                    | 1009                 | 424                    | 764        |
| 113                            | 15               | 250                    | 176             | 346                    | 31                   | 425                    | 148        |
| 115                            | 182              | 251                    | 1110            | 349 (1)                | 247                  | 426                    | 1176       |
| 117                            | 644              | 254                    | 972             | 349 (2)                | 255                  | 428                    | 1153       |
| 118                            | 230, 461         | 255                    | 1109            | 352                    | 584, 663             | 429 (1)                | 400        |
| 120                            | 197              | 256                    | 1118            | 355 (1)                | 972                  | 429 (2)                | 681        |
| 122 (1)                        | 554              | 257                    | 1115            | 355 (2)                | 532                  | 430                    | 1101       |
| 122 (2)                        | 1175             | 260                    | 27              | 356                    | 859                  | 431                    | 1084       |
|                                |                  | 261                    | 1109            | 357 (1)                | 1041                 | 432                    | 529        |
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| 435                    | 309           | 517                    |                  | 27, 597                | 502            | 89                     | 674           |
| 437                    | 814           | 518                    |                  | 41, 598                | 1086           | 92                     | 437, 440      |
| 438                    | 1194          | 519                    |                  | 1107, 599              | 1312           | 96                     | 1232          |
| 439                    | 35            | 520                    |                  | 97, 600                | 940            | 105                    | 506           |
| 440                    | 968           | 522                    |                  | 754, 601               | 670            | 107                    | 1122, 1243    |
| 441                    | 125, 672, 688 | 523 (1)                |                  | 1108, 603 (1)          | 253            | 113                    | 278, 431, 899 |
| 442                    | 208           | 523 (2)                |                  | 821, 603 (2)           | 377, 1197      | 119                    | 1240          |
| 443 (1)                | 1226          | 525                    |                  | 1107, 605 (1)          | 1178           | 125                    | 437, 438      |
| 443 (2)                | 406           | 526                    |                  | 1112, 605 (2)          | 1149           | 130                    | 769           |
| 445                    | 449           | 527                    |                  | 149, 606               | 482, 558, 1053 | 137                    | 110           |
| 446                    | 448           |                        |                  | 608                    | 1059           | 142                    | 1230          |
| 447                    | 1             | 529 (1)                |                  | 740, 609 (1)           | 549            | 145                    | 167           |
| 448                    | 12, 788       | 529 (2)                |                  | 678, 609 (2)           | 1312           | 147                    | 102           |
| 449 (1)                | 996           | 530                    | 619, 1107        | 610                    | 563            | 148                    | 730           |
| 449 (2)                | 441           | 531                    | 1219             | 612                    | 672            | 155                    | 708           |
| 451                    | 13            | 532 (1)                | 3                | 613 (1)                | 926            | 163                    | 685           |
| 452                    | 600, 913      | 532 (2)                | 841              | 613 (2)                | 155            | 169                    | 692           |
| 453                    | 21            | 534                    | 34               |                        |                | 170                    | 1204          |
| 454                    | 1260          | 535                    | 759              | [A. I. R.] Bombay.     |                | 172                    | 1237          |
| 456                    | 153           | 536                    | 870              |                        |                | 173                    | 630           |
| 457                    | 1269          | 537                    | 820              | 1                      | 1171           | 176                    | 220           |
| 458                    | 124           | 538 (1)                | 249, 276         | 8                      | 404            | 177                    | 627           |
| 460 (1)                | 385           | 538 (2)                | 1180             | 12                     | 190            | 183                    | 670           |
| 460 (2)                | 252           | 539                    | 190              | 13                     | 1218           | 187                    | 1199          |
| 462                    | 322           | 540                    | 34               | 15                     | 1217           | 190                    | 630           |
| 463                    | 225           | 541                    | 390              | 16 (1)                 | 1              | 193                    | 930           |
| 464 (1)                | 814           | 542                    | 637              | 16 (2)                 | 785            | 194 (1)                | 537           |
| 464 (2)                | 377           | 543                    | 1154             | 17                     | 729            | 194 (2)                | 399           |
| 465 (1)                | 173           | 544 (1)                | 282              | 22                     | 576            | 196                    | 802           |
| 465 (2)                | 234           | 544 (2)                | 1087             | 23 (1)                 | 227            | 198                    | 467           |
| 466                    | 1140          | 545                    | 1004             | 23 (2)                 | 1025           | 199                    | 1001          |
| 469                    | 497           | 547                    | 21               | 24                     | 278            | 200                    | 1160          |
| 470                    | 181           | 548                    | 526              | 26                     | 146            | 201 (1)                | 557           |
| 471                    | 938           | 549                    | 285, 1101        | 27                     | 281            | 201 (2)                | 264, 903      |
| 473 (1)                | 818           | 551                    | 283, 290         | 28                     | 900            | 203                    | 162           |
| 473 (2)                | 553           | 553                    | 831              | 29                     | 399            | 207                    | 939           |
| 474                    | 544           | 554                    | 164              | 30 (1)                 | 107            | 208                    | 684           |
| 476                    | 470, 571      | 556                    | 34, 149          | 30 (2)                 | 307            | 213                    | 741, 944      |
| 479 (1)                | 567           | 557                    | 12               | 32                     | 353            | 214                    | 185, 228      |
| 479 (2)                | 515           | 558                    | 23, 32           | 33 (1)                 | 109            |                        |               |
| 480                    | 1211          | 559                    | 33               | 33 (-)                 | 881, 1122      | 216 (1)                | 1305          |
| 483 (1)                | 577           | 560                    | 35               | 35                     | 52             | 216 (2)                | 790           |
| 483 (2)                | 519           | 562                    | 16, 21, 273, 626 | 36                     | 629            | 218                    | 204, 883      |
| 484 (1)                | 477           | 563                    | 32, 1185         | 37                     | 1195           | 226                    | 1190          |
| 484 (2)                | 554           | 565                    | 1245             | 39                     | 220            | 228                    | 112           |
| 485                    | 966           | 566                    | 923              | 40                     | 331            | 233                    | 1147          |
| 486                    | 836           | 567                    | 709              | 41 (1)                 | 268            | 234                    | 853           |
| 487                    | 972           | 568                    | 610              | 41 (2)                 | 702            | 236                    | 679           |
| 488 (1)                | 1303          | 569                    | 29, 816          | 42 (1)                 | 1266           | 237                    | 1230          |
| 488 (2)                | 734           | 570                    | 754              | 42 (2)                 | 971            | 241                    | 1006          |
| 489                    | 815           | 571                    | 966              | 44 (1)                 | 268            | 242                    | 403           |
| 490 (1)                | 240           | 572                    | 827              | 44 (2)                 | 1050           | 244                    | 765           |
| 490 (2) (F B)          | 152, 750, 807 | 573                    | 387              | 51                     | 3              | 245                    | 1125          |
| 494                    | 300           | 574                    | 182              | 54                     | 823            | 247                    | 347           |
| 495                    | 155, 685      | 576                    | 767              | 59                     | 223            | 248                    | 111           |
| 499                    | 997           | 577                    | 660              | 60                     | 110            | 249                    | 805, 1098     |
| 500                    | 913           | 579                    | 388              | 62                     | 184, 893       | 253 (1)                | 297           |
| 502                    | 396           | 580                    | 233, 348         | 63                     | 264            | 254                    | 214           |
| 503                    | 317           | 583                    | 366, 1233, 1234  | 65                     | 659            | 255                    | 472           |
| 504                    | 415           | 584                    | 30               | 66                     | 306            | 260                    | 1039          |
| 507                    | 293, 1288     | 585                    | 1247             | 67                     | 198            | 261                    | 561, 619      |
| 508                    | 1111          | 586                    | 1266             | 70                     | 104            | 262                    | 518           |
| 509                    | 996           | 590                    | 419              | 71                     | 659            | 264 (1)                | 369           |
| 511                    | 1118          | 591                    | 125, 622         | 73                     | 287            | 264 (2)                | 551           |
| 513                    | 1111          | 592                    | 415              | 74                     | 549            | 265 (1)                | 746           |
| 514                    | 1253          | 595                    | 738, 762         | 75                     | 424, 431       | 265 (2)                | 768           |
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| 271                      | 1215  | 271                      | 1215                 | 271                      | 135 (2) | 294 (2)                  | 70             |
| 272                      | 645   | 272                      | 1212                 | 272                      | 138     | 296                      | 1094           |
| 276                      | 191   | 276                      | 425                  | 276                      | 141     | 297                      | 148            |
| 281 (1)                  | 1194  | 281 (1)                  | 427                  | 281 (1)                  | 142     | 298                      | 82             |
| 281 (2)                  | 1100  | 281 (2)                  | 428                  | 281 (2)                  | 149 (1) | 299                      | 658            |
| 284                      | 634   | 284                      | 429                  | 284                      | 149 (2) | 302                      | 194, 302       |
| 289                      | 107   | 289                      | 431                  | 289                      | 152     | 303                      | 486            |
| 290                      | 241   | 290                      | 432                  | 290                      | 154     | 305                      | 1124           |
| 293                      | 676   | 293                      | 437                  | 293                      | 157     | 306                      | 452, 611, 1240 |
| 294                      | 1028  | 294                      | 440                  | 294                      | 160     | 307                      | 914            |
| 296 (1)                  | 621   | 296 (1)                  | 441                  | 296 (1)                  | 162     | 309                      | 145            |
| 296 (2)                  | 1201  | 296 (2)                  | 449                  | 296 (2)                  | 163     | 310 (1)                  | 850            |
| 297                      | 727   | 297                      | 450                  | 297                      | 169     | 310 (2)                  | 777            |
| 299 (1)                  | 932   | 299 (1)                  | 452                  | 299 (1)                  | 176 (1) | 311                      | 867            |
| 299 (2)                  | 916   | 299 (2)                  | 453                  | 299 (2)                  | 176 (2) | 313 (1)                  | 292, 713       |
| 300                      | 613   | 300                      | 454                  | 300                      | 177     | 313 (2)                  | 297            |
| 301                      | 729   | 301                      | 456                  | 301                      | 179     | 314                      | 100            |
| 302                      | 620, 726                                      | 302                      | 458                  | 302                      | 180     | 315 (1)                  | 492            |
| 303                      | 334   | 303                      | 459                  | 303                      | 181     | 315 (2)                  | 453            |
| 304                      | 716   | 304                      | 461                  | 304                      | 182     | 315 (1)                  | 698            |
| 305                      | 104, 259                                      | 305                      | 462                  | 305                      | 189     | 316 (1)                  | 704            |
| 321                      | 630, 631, 642, 653, 634, 811, 818, 1101, 1105 | 321                      | 467                  | 321                      | 192     | 316 (2)                  | 339            |
| 358                      | 1208  | 358                      | 471                  | 358                      | 194     | 317                      | 869            |
| 359                      | 834   | 359                      | 472 (2)              | 359                      | 195     | 318                      | 628            |
| 361                      | 685, 923                                      | 361                      | 473                  | 361                      | 196     | 319 (1)                  | 123            |
| 364                      | 676, 942                                      | 364                      | 478                  | 364                      | 198     | 319 (2)                  | 370            |
| 365                      | 45  | 365                      | 480                  | 365                      | 200     | 320                      | 503            |
| 366                      | 937   | 366                      | 480                  | 366                      | 207     | 321                      | 217            |
| 368                      | 341   | 368                      | 560                  | 368                      | 208     | 322 (1)                  | 232            |
| 369                      | 888   | 369                      | [A. I. R.]           | 369                      | 212     | 322 (2)                  | 159            |
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| 371                      | 179   | 371                      | 877, 919, 924.       | 371                      | 217     | 324                      | 1209           |
| 372                      | 435   | 372                      | 1142, 1232           | 372                      | 220     | 325                      | 455            |
| 379                      | 616, 710                                      | 379                      | 636, 637             | 379                      | 221     | 327 (1)                  | 67             |
| 381                      | 180   | 381                      | 521, 527             | 381                      | 223     | 327 (2)                  | 99, 185        |
| 382                      | 114, 1224                                     | 382                      | 55, 67, 70, 449      | 382                      | 227     | 333                      | 89, 386        |
| 383                      | 629   | 383                      | 655, 727, 772, 774   | 383                      | 228     | 339                      | 135            |
| 385                      | 782   | 385                      | 1134                 | 385                      | 233     | 345                      | 187, 1031      |
| 386                      | 281   | 386                      | 72, 409, 714         | 386                      | 240     | 351                      | 621, 1310      |
| 387                      | 112   | 387                      | 741                  | 387                      | 247     | 354                      | 849            |
| 389                      | 117   | 389                      | 1206                 | 389                      | 252     | 358                      | 926            |
| 391                      | 185   | 391                      | 683                  | 391                      | 256     | 358                      | 215, 813       |
| 392                      | 196   | 392                      | 135                  | 392                      | 261     | 361                      | 165            |
| 393                      | 1119  | 393                      | 64, 628, 1196        | 393                      | 265     | 362                      | 1221, 1223     |
| 394                      | 109   | 394                      | 9, 510               | 394                      | 268     | 364                      | 78             |
| 395                      | 280   | 395                      | 430, 867             | 395                      | 278     | 365                      | 92             |
| 396                      | 179, 702                                      | 396                      | 648, 1220            | 396                      | 279     | 368                      | 72             |
| 398                      | 832, 1102                                     | 398                      | 1126                 | 398                      | 281     | 370                      | 967            |
| 399                      | 308   | 399                      | 1203                 | 399                      | 282 (1) | 373                      | 74             |
| 400                      | 188   | 400                      | 837, 842             | 400                      | 282 (2) | 375                      | 70, 656, 847   |
| 401                      | 337   | 401                      | 792                  | 401                      | 283 (1) | 377                      | 710            |
| 402                      | 229   | 402                      | 81, 810              | 402                      | 283 (2) | 378                      | 658, 699       |
| 403                      | 1245  | 403                      | 616, 669, 708, 769   | 403                      | 285     | 379                      | 159, 914       |
| 404                      | 296   | 404                      | 787                  | 404                      | 286     | 382                      | 1224           |
| 407                      | 107   | 407                      | 827, 926, 1210       | 407                      | 287     | 385                      | 218, 375       |
| 408                      | 1133  | 408                      | 324, 810, 913        | 408                      | 288     | 387                      | 224            |
| 409                      | 803   | 409                      | 56                   | 409                      | 289     | 389                      | 936            |
| 410                      | 1218  | 410                      | 483, 487, 713        | 410                      | 291 (1) | 392                      | 918            |
| 411                      | 974   | 411                      | 531                  | 411                      | 291 (2) | 394                      | 316            |
| 412 (1)                  | 1105  | 412 (1)                  | 1206                 | 412 (1)                  | 292 (1) | 397                      | 1179           |
| 412 (2)                  | 1221  | 412 (2)                  | 80, 622, 838         | 412 (2)                  | 292 (2) | 401                      | 501            |
| 414                      | 255   | 414                      | 506, 529             | 414                      | 294 (1) | 402                      | 680            |
| 415                      | 921   | 415                      | 855                  | 415                      | 294 (2) | 403 (1)                  | 1038           |
| 416                      | 114   | 416                      | 517, 534             | 416                      | 294 (3) | 403 (2)                  | 527            |
| 417                      | 821   | 417                      | 83                   | 417                      | 299     | 405                      | 66             |
| 419                      | 979   | 419                      | 391                  | 419                      | 290     | 406                      | 460            |
| 420                      | 935   | 420                      | 1309                 | 420                      | 291 (1) | 407                      | 524            |
| 421                      | 240   | 421                      | 357, 1183            | 421                      | 292 (1) | 409                      | 742            |
|                          |   |                          | 858, 977, 1255, 1279 |                          | 292 (2) | 410                      | 393            |
|                          |   |                          | 135 (1)              |                          | 294 (1) |                          |                |



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| 417                    | 679                   | 590                    | 1097           | 727                    | 538, 540       | 84                     | 1179                 |
| 419                    | 115                   | 594                    | 1077           | 732                    | 67             | 85                     | 400, 401             |
| 423                    | 783, 1218             | 595                    | 522, 522, 1083 | 747                    | 591            | 88                     | 563, 1056            |
| 425                    | 174, 616              | 598                    | 569            |                        |                | 89 (1)                 | 722                  |
| 426                    | 635                   | 599                    | 460            |                        |                | 89 (2)                 | 518                  |
| 427                    | 1123                  | 600                    | 76, 81         |                        |                | 90                     | 499                  |
| 428                    | 68                    | 601                    | 894            | 1                      | 1122           | 91                     | 1047                 |
| 429                    | 878                   | 603                    | 131            | 4                      | 338            | 92                     | 1087                 |
| 431                    | 91                    | 606                    | 377            | 6                      | 603, 731       | 93                     | 1288                 |
| 432                    | 1197, 1288            | 608                    | 649            | 8                      | 151, 620       | 94                     | 1167                 |
| 433                    | 50                    | 609                    | 67             | 10                     | 55             | 95                     | 873                  |
| 435                    | 92                    | 611                    | 88             | 11 (1)                 | 1090           | 96                     | 742, 870, 879        |
| 436                    | 416                   | 612                    | 228, 247       | 11 (2)                 | 208, 605, 882  | 97 (1)                 | 372, 852             |
| 438                    | 59                    | 615                    | 266, 422, 784  | 12                     | 1161           | 97 (2)                 | 237                  |
| 439                    | 1212                  | 619                    | 171            | 14                     | 1159           | 98                     | 401                  |
| 444                    | 1132, 1133            | 622                    | 721            | 15                     | 571            | 100                    | 397                  |
| 445                    | 414                   | 624                    | 91, 335        | 16                     | 161, 660       | 102                    | 979                  |
| 450                    | 590                   | 626                    | 353            | 17                     | 741, 779       | 103                    | 341                  |
| 451                    | 224                   | 629                    | 157            | 20                     | 770            | 104                    | 1038, 590            |
| 453                    | 534, 1038, 1044       | 631                    | 1123           | 21                     | 1101           | 105                    | 1214                 |
| 456                    | 584                   | 639                    | 359            | 22                     | 126            | 106                    | 922                  |
| 458                    | 662                   | 641                    | 413, 1250      | 23                     | 902, 918       | 108                    | 1219                 |
| 460                    | 1039                  | 644                    | 822            | 24                     | 813            | 115                    | 1031                 |
| 463                    | 576, 700              | 645                    | 615            | 25                     | 928            | 117                    | 425, 430             |
| 467                    | 646                   | 647                    | 519, 533, 589  | 26                     | 728            | 121                    | 608                  |
| 469                    | 95                    | 649                    | 477            | 27                     | 1193           | 122                    | 5, 827               |
| 470                    | 538                   | 650                    | 1133           | 28                     | 602            | 123                    | 660                  |
| 483 (1)                | 493                   | 651                    | 571            | 29                     | 1006           | 124                    | 689                  |
| 483 (2)                | 485                   | 652                    | 549            | 30                     | 383            | 125                    | 596                  |
| 484                    | 887                   | 654                    | 516            | 31 (1)                 | 527, 712       | 127                    | 1162                 |
| 485                    | 658, 731, 772         | 656                    | 347            | 31 (2)                 | 1112, 1185     | 128                    | 882, 969             |
| 496                    | 151                   | 657                    | 561            | 35 (1)                 | 1071           | 129                    | 356, 1277            |
| 499                    | 788                   | 659                    | 886            | 35 (2)                 | 125            | 132                    | 331                  |
| 501                    | 1025                  | 662                    | 515            | 36 (1)                 | 1082           | 133                    | 1161                 |
| 505                    | 849                   | 665                    | 83             | 36 (2)                 | 504            | 135                    | 453, 885             |
| 506                    | 260                   | 667                    | 99             | 37                     | 605            | 138                    | 439, 671             |
| 507                    | 909                   | 668                    | 539            | 38                     | 1154           | 141                    | 150                  |
| 513                    | 821, 825              | 669                    | 848            | 39                     | 372, 1154      | 142                    | 598                  |
| 516                    | 365                   | 670                    | 1193           | 40                     | 696, 1062      | 143                    | 1228                 |
| 517                    | 478, 531, 583, 684    | 672                    | 966, 1073      | 41                     | 874            | 144 (1)                | 872                  |
| 520                    | 71                    | 673                    | 95             | 42                     | 591            | 144 (2)                | 361                  |
| 521                    | 380                   | 674                    | 556            | 43                     | 1049           | 145                    | 325                  |
| 524                    | 851, 1218, 1280, 1283 | 675                    | 64             | 45                     | 1091           | 146                    | 154                  |
| 527                    | 66, 73, 84, 85, 1237  | 676                    | 330            | 46                     | 483            | 147 (1)                | 286                  |
| 532                    | 1144                  | 677                    | 857            | 47                     | 361            | 147 (2)                | 249, 255 1107        |
| 535                    | 962, 1248             | 679                    | 828, 1246      | 48                     | 360, 364       | 150 (1)                | 208, 672             |
| 536                    | 56                    | 681                    | 999            | 52                     | 321            | 150 (2)                | 156, 804, 1241       |
| 538                    | 183                   | 682                    | 834, 1280      | 53                     | 206, 213, 916  | 151                    | 302, 402, 862        |
| 552                    | 283                   | 683                    | 1281           | 54                     | 989            | 153                    | 697                  |
| 553                    | 133                   | 685                    | 346            | 56                     | 213, 427       | 155 (1)                | 1041                 |
| 557                    | 548                   | 689                    | 1139           | 58 (1)                 | 804            | 155 (2)                | 1042                 |
| 558                    | 369                   | 690                    | 576            | 58 (2)                 | 401, 875, 898  | 158                    | 555, 568, 1073, 1074 |
| 559                    | 86                    | 691                    | 843            | 61                     | 1125           | 160                    | 1048                 |
| 561                    | 62, 65                | 692                    | 345            | 65                     | 607            | 161                    | 1078                 |
| 562                    | 563                   | 694                    | 1214, 1216     | 66                     | 1079           | 163                    | 550, 566, 1051       |
| 563                    | 784                   | 699                    | 94             | 68                     | 1083           | 167                    | 654, 1074            |
| 567                    | 991, 1151             | 701                    | 75             | 69                     | 229            | 169                    | 1078                 |
| 568                    | 1153                  | 703                    | 1122           | 70                     | 1164           | 170                    | 1068                 |
| 569                    | 615, 710              | 704                    | 625            | 71 (1)                 | 1180           | 171                    | 376                  |
| 570                    | 681, 1094             | 705                    | 880            | 71 (2)                 | 68, 1200, 1269 | 172 (1)                | 1042                 |
| 572                    | 944                   | 707                    | 136            | 72                     | 1179           | 172 (2)                | 842                  |
| 575                    | 782, 790              | 708                    | 1204, 1206     | 73                     | 568            | 174                    | 673, 685             |
| 577                    | 486                   | 714                    | 63             | 74 (1)                 | 9, 991         | 175                    | 606, 732             |
| 578                    | 277, 901, 911         | 715                    | 97             | 74 (2)                 | 1167           | 175                    | 592, 594             |
| 579                    | 522, 534              | 716                    | 148            | 75                     | 451, 893, 1167 | 184                    | 967                  |
| 582                    | 315                   | 719                    | 1286           | 76                     | 579            | 186                    | 1062                 |
| 584                    | 689                   | 723                    | 567            | 79                     | 53, 468        | 189                    | 1061                 |
| 585                    | 191                   | 724                    | 530            | 81 (1)                 | 492            | 193                    | 599                  |
| 589                    | 481                   | 725                    | 524, 586       | 81 (2)                 | 1160           | 194 (1)                | 46                   |

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| 194 (2)                | 526            | 238 (1)                | 1158             | 380                    | 574            | 467                    | 599                |
| 195                    | 580, 1065      | 288 (2)                | 175, 1134        | 381                    | 189, 932       | 470                    | 333                |
| 197                    | 472            | 289                    | 448              | 382 (1)                | 452            | 471                    | 261                |
| 203                    | 265            | 290                    | 617, 1104        | 383                    | 175            | 473                    | 443, 904           |
| 205                    | 1220           | 291                    | 1038             | 384                    | 669            | 475                    | 335, 340           |
| 206                    | 209            | 292 (2)                | 848              | 385                    | 686, 1078      | 476                    | 603, 604           |
| 207                    | 1118           | 293                    | 665              | 388                    | 1007           | 478                    | 1250, 1251         |
| 208 (1)                | 209            | 294                    | 1040             | 389 (2)                | 663, 1079      | 480                    | 756                |
| 208 (2)                | 874            | 295 (1)                | 1081             | 391                    | 1063           | 481                    | 419, 1226          |
| 209                    | 1311           | 295 (2)                | 1168             | 392                    | 678, 765, 1188 | 483                    | 694                |
| 210                    | 596            | 296                    | 443              | 394 (1)                | 519            | 484                    | 866                |
| 211                    | 854            | 299 (1)                | 991              | 394 (2)                | 602, 1165      | 485                    | 604                |
| 212                    | 341            | 299 (2)                | 1159             | 395                    | 598            | 487                    | 500, 501           |
| 213                    | 321            | 301 (1)                | 679              | 396                    | 1006           | 488                    | 580                |
| 216                    | 216            | 301 (2)                | 234              | 398                    | 780            | 490                    | 372                |
| 218                    | 1159           | 302 (1)                | 801              | 399                    | 735            | 491                    | 214, 698, 1222     |
| 219                    | 920            | 302 (2)                | 282              | 401                    | 606, 1211      | 493                    | 1067               |
| 222                    | 1277           | 303 (1)                | 1112             | 402                    | 268, 874       | 495                    | 10                 |
| 223                    | 1055           | 303 (2)                | 390              | 403                    | 602            | 497 (1)                | 771                |
| 224                    | 323            | 304                    | 791              | 404                    | 358, 683       | 497 (2)                | 206, 603, 1192     |
| 225                    | 542, 1093      | 305                    | 600              | 405                    | 1169           | 499                    | 970                |
| 227                    | 361            | 307                    | 597, 1095        | 408                    | 1060           | 501                    | 596                |
| 230                    | 218            | 308 (2)                | 451              | 409                    | 830            | 502 (1)                | 970                |
| 236 (1)                | 208            | 309                    | 248, 456, 994    | 410                    | 502            | 502 (2)                | 208, 686, 729      |
| 236 (2)                | 1069           | 310                    | 1110, 1164       | 411                    | 48, 50, 394    | 503                    | 372                |
| 238 (1)                | 1075           | 311                    | 929              | 412                    | 232, 1169      | 504                    | 203                |
| 238 (2)                | 661            | 312                    | 1068             | 413                    | 826            | 505                    | 272                |
| 239 (1)                | 210            | 313                    | 1068             | 414                    | 229            | 506 (1)                | 722                |
| 239 (2)                | 362            | 315                    | 662, 1065        | 415                    | 1070           | 506 (2)                | 240, 242           |
| 242                    | 1186           | 317                    | 1059             | 416                    | 1039           | 508                    | 578                |
| 243                    | 997            | 318 (1)                | 1281             | 417                    | 1161, 1162     | 509                    | 1087               |
| 244                    | 694            | 319                    | 1066             | 419                    | 475            | 509                    | 1089               |
| 245                    | 599, 781       | 321                    | 1081, 1290       | 420                    | 528            | 510                    | 1222               |
| 247                    | 8              | 322                    | 1049             | 422                    | 60, 384        | 511                    | 991                |
| 248                    | 155, 694       | 325                    | 1063             | 423                    | 366, 1251      | 512                    | 1077               |
| 249                    | 636            | 326                    | 1048, 1037, 1067 | 425 (1)                | 218            | 513 (1)                | 52                 |
| 250                    | 294            | 327                    | 1080, 1159       | 425 (2)                | 813            | 513 (2)                | 207, 452           |
| 253                    | 486            | 329 (1)                | 1079             | 427                    | 171, 410       | 514                    | 179, 304, 373, 703 |
| 254 (1)                | 898            | 329 (2)                | 556, 580         | 428                    | 862            | 516                    | 589, 1069          |
| 254 (2)                | 993            | 330                    | 498, 1075        | 429                    | 497            | 517                    | 601, 1211          |
| 256                    | 293            | 332                    | 1012, 1075       | 431 (1)                | 651            | 518                    | 197                |
| 257 (1)                | 1166           | 333                    | 511, 592         | 431 (2)                | 286            | 519                    | 916                |
| 257 (2)                | 1504           | 335                    | 697              | 432                    | 1176           | 521                    | 1168               |
| 259 (1)                | 38             | 336                    | 1067             | 434                    | 53, 664        | 522                    | 447, 683           |
| 259 (2)                | 1112           | 337                    | 517              | 436                    | 656, 684       | 523                    | 154, 595           |
| 260                    | 1014           | 339                    | 683, 1117        | 438 (1)                | 889            | 524                    | 241                |
| 261                    | 192, 1286      | 340                    | 1090             | 438 (2)                | 657, 1070      | 525                    | 479                |
| 262                    | 1164           | 341                    | 506, 507         | 440                    | 1125           | 529                    | 808, 1164          |
| 264                    | 573            | 342                    | 712, 1120        | 441                    | 1049, 1065     | 530                    | 273, 1039          |
| 267                    | 52             | 344                    | 546              | 443                    | 215            | 532                    | 207, 211, 597, 686 |
| 270                    | 536            | 345                    | 497, 697         | 445 (1)                | 176, 286       | 534                    | 6, 1161            |
| 271                    | 749, 915       | 347                    | 684              | 445 (2)                | 702            | 535                    | 378                |
| 272                    | 988            | 350                    | 904              | 446                    | 368            | 536                    | 1075               |
| 273                    | 1162           | 352                    | 1212             | 447                    | 367            | 537                    | 1062               |
| 274                    | 1072           | 353                    | 789              | 448                    | 1071           | 539                    | 541, 1061          |
| 275                    | 454, 825, 862  | 355                    | 595              | 451                    | 592, 606       | 541                    | 408, 619           |
| 278 (2)                | 711            | 356                    | 687, 1090        | 452                    | 1166           | 544                    | 1207               |
| 279                    | 517            | 357                    | 735              | 453                    | 433            | 546                    | 291, 332           |
| 281 (2)                | 1279           | 359                    | 1266             | 454                    | 40, 51         | 548                    | 289, 433, 680      |
| 282 (1)                | 572            | 369                    | 462, 726, 767    | 455                    | 815            | 551                    | 215, 746, 819      |
| 282 (2)                | 230, 239, 1158 | 371                    | 834              | 456                    | 801            | 553                    | 595                |
| 283                    | 720            | 372                    | 768, 1198        | 458 (1)                | 527            | 557                    | 149, 261           |
| 284 (1)                | 820            | 373                    | 246              | 458 (2)                | 1163           | 559                    | 600                |
| 284 (2)                | 605, 1158      | 374                    | 455, 1223        | 459                    | 1002           | 560                    | 1305               |
| 286 (1)                | 1039           | 376                    | 594, 726         | 462 (1)                | 1167           | 564                    | 176                |
| 286 (2)                | 224            | 377                    | 719              | 462 (2)                | 759, 763, 770  | 565                    | 173                |
| 287                    | 324            | 379                    | 1157             | 465                    | 801            | 566                    | 688, 1082          |
|                        |                |                        | 971              | 466                    | 52             | 568                    | 1157               |

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| 569                           | 776             | 673                           | 1155             | 87 (1)                        | 506                 | 246                           | 835                   |
| 572                           | 777             | 674                           | 969, 970         | 87 (2)                        | 494                 | 248                           | 768                   |
| 575                           | 343             | 675                           | 271, 1098        | 88 (1)                        | 240                 | 254                           | 237, 950              |
| 579                           | 604, 951        | 678                           | 189              | 88 (2)                        | 7, 164, 916         | 257                           | 168                   |
| 581                           | 1191            | 679                           | 969              | 92                            | 249                 | 262                           | 5, 73, 748, 766, 1260 |
| 584                           | 353             | 680                           | 104              | 94                            | 1047                | 263 (1)                       | 1013                  |
| 585                           | 210, 687        | 683                           | 468, 689         | 95                            | 551                 | 270                           | 229                   |
| 587                           | 1208            | 684                           | 348, 878         | 95                            | 1025                | 272                           | 863                   |
| 589                           | 1155            | 685 (1)                       | 573              | 103                           | 423, 429, 431, 1096 | 275                           | 659                   |
| 590                           | 276, 1256       | 685 (2)                       | 736              | 108                           | 406, 923            | 276 (1)                       | 553                   |
| 591                           | 278             | 686                           | 1163             | 109                           | 171                 | 276 (2)                       | 1208                  |
| 592                           | 318, 321, 323   | 687                           | 580              | 113                           | 373                 | 278                           | 882                   |
| 593                           | 1226            | 689 (1)                       | 556              | 114 (1)                       | 12                  | 280                           | 980, 981              |
| 594                           | 639, 1226       | 689 (2)                       | 417              | 114 (2)                       | 869                 | 282                           | 1284                  |
| 595 (I)                       | 667             | 691                           | 1006             | 120                           | 756                 | 284                           | 1213, 1220            |
| 595 (2)                       | 304, 770        | 692                           | 1045             | 125                           | 222                 | 288                           | 1094, 1204            |
| 597                           | 1234            | 693                           | 305, 1100        | 129                           | 362                 | 295                           | 309                   |
| 598                           | 586, 1063       | 694                           | 1214             | 131                           | 1231                | 297                           | 1189, 1198            |
| 600                           | 260             | 695                           | 212              | 133                           | 470                 | 301                           | 46                    |
| 601 (I)                       | 719, 907        | 696                           | 878              | 134 (1)                       | 555                 | 304                           | 364                   |
| 601 (2)                       | 549, 558        |                               |                  | 134 (2)                       | 236                 | 306                           | 214, 954              |
| 603                           | 580, 1127       | [A. I. R.] 1923 Mad.          |                  | 135                           | 308                 | 308                           | 948                   |
| 604                           | 603             | 1                             | 677, 952         | 136                           | 504, 509            | 313                           | 1218                  |
| 605                           | 311, 890        | 9                             | 634              | 141                           | 1087, 1184          | 316                           | 1243                  |
| 607                           | 653, 668        | 11                            | 4, 367, 650, 142 | 488                           |                     | 317 (1)                       | 703                   |
| 608 (I)                       | 631             |                               | 690, 728, 821    | 144                           | 547                 | 317 (2)                       | 1007                  |
| 608 (2)                       | 1101            | 13                            | 370              | 147                           | 295, 777            | 320                           | 947                   |
| 609                           | 1172            | 15                            | 481              | 153                           | 170, 982            | 321                           | 234, 340              |
| 611                           | 208, 628        | 17                            | 427              | 160 (1)                       | 1194                | 323                           | 1120                  |
| 612                           | 873             | 19                            | 461              | 160 (2)                       | 9, 704, 921         | 324                           | 569                   |
| 615                           | 238             | 20                            | 699              | 163                           | 199, 676, 717       | 326                           | 573                   |
| 617                           | 52              | 23                            | 908              | 168                           | 785, 922            | 327                           | 527, 545              |
| 619                           | 1038, 1060      | 24                            | 488              | 169                           | 329                 | 329                           | 1076                  |
| 621                           | 1080            | 25                            | 305, 324         | 171                           | 242                 | 330                           | 961                   |
| 622                           | 1090            | 27                            | 270              | 177                           | 1090                | 331 (1)                       | 374                   |
| 623                           | 362             | 28                            | 912, 982         | 178                           | 237, 1245           | 331 (2)                       | 256                   |
| 625                           | 607             | 29                            | 961              | 180 (1)                       | 654                 | 332                           | 668, 823              |
| 626                           | - 206, 216, 607 | 30                            | 227, 228         | 180 (2)                       | 260                 | 335                           | 788                   |
| 628                           | 272             | 31                            | 824, 1071        | 181                           | 489                 | 337                           | 205, 256              |
| 629                           | 247             | 32                            | 235, 653         | 182                           | 519                 | 338                           | 465, 512              |
| 630                           | 654, 650        | 34                            | 790              | 184                           | 685                 | 339                           | 946                   |
| 632                           | 177, 458, 1276  | 36                            | 740, 772, 1259   | 185                           | 1311                | 340                           | 246                   |
| 634                           | 413             | 43                            | 234              | 187 (1)                       | 530, 547, 575       | 344                           | 408                   |
| 636                           | 900             | 44                            | 957              | 187 (2)                       | 1057                | 347                           | 905                   |
| 638                           | 257, 1007       | 46                            | 908              | 188 (1)                       | 1036, 1049          | 349                           | 1268, 1278            |
| 641                           | 126             | 48                            | 315              | 188 (2)                       | 1034                | 350                           | 1135                  |
| 642                           | 599, 928, 1161  | 50 (1)                        | 946              | 191                           | 858                 | 351                           | 174                   |
| 643                           | 1166            | 50 (2)                        | 500              | 192                           | 961                 | 352                           | 203                   |
| 645                           | 374, 901        | 51                            | 544              | 204                           | 235, 240, 658       | 353                           | 883                   |
| 646                           | 1241            | 52                            | 367, 965         | 206                           | 369                 | 354 (1)                       | 1271                  |
| 647                           | 328, 446        | 54                            | 835              | 207                           | 503                 | 354 (2)                       | 1149                  |
| 648                           | 806, 1156       | 55                            | 1121             | 209                           | 790                 | 355                           | 960, 1142, 1146, 1147 |
| 649                           | 1308            | 57                            | 254              | 211                           | 1208                | 359                           | 721                   |
| 652 (1)                       | 260             | 58                            | 311, 1100        | 212                           | 655                 | 360                           | 958                   |
| 652 (2)                       | 1138, 1278      | 59                            | 513, 555         | 215                           | 701                 | 364 (1)                       | 1080                  |
| 654                           | 1111            | 60                            | 490              | 222                           | 745                 | 364 (2)                       | 947                   |
| 655                           | 809, 1215       | 63                            | 284              | 224                           | 48, 50              | 365                           | 1083                  |
| 657                           | 1228            | 64                            | 429              | 225                           | 199                 | 367                           | 326                   |
| 658                           | 383             | 67                            | 741              | 227                           | 688                 | 368                           | 945                   |
| 659                           | 1280            | 71                            | 1257             | 228                           | 374                 | 368                           | 1204                  |
| 660                           | 206, 747        | 72                            | 942              | 229 (1)                       | 562                 | 369 (1)                       | 1037                  |
| 662                           | 585             | 76                            | 308              | 229 (2)                       | 1235                | 369 (2)                       | 950                   |
| 663                           | 558, 567        | 79                            | 336              | 230                           | 368                 | 375 (1)                       | 682                   |
| 665                           | 998             | 81                            | 1195             | 232                           | 192                 | 375 (2)                       | 202, 727, 1207        |
| 666                           | 536, 1080       | 82                            | 872              | 237 (1)                       | 222                 | 376                           | 390, 428, 901, 911    |
| 668                           | 782             | 83                            | 1149             | 237 (2)                       | 327, 333            | 392                           | 928                   |
| 669                           | 208, 734, 738   | 84                            | 1307             | 238                           | 557, 570            | 399                           | 744                   |
| 671                           | 306             | 85 (1)                        | 1031             | 241                           | 980                 | 402                           | 795, 797              |
| 672                           | 910             | 85 (2)                        | 385              | 246                           | 397                 | 422                           | 956                   |
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| A. I. R. Mad.—(Contd.) |                     | A. I. R. Mad —(Contd.)  |                    | A. I. R. Nag.—(Contd.) |                 | A. I. R. Nag.—(Contd.) |                |
| 434                    | 258                 | 600                     | 512                | 26                     | 101             | 139 (2)                | 101, 833       |
| 435                    | 1119                | 602                     | 221                | 27                     | 724, 1132       | 130                    | 613            |
| 439                    | 525                 | 603                     | 1040               | 30                     | 7               | 132                    | 969            |
| 440                    | 1002                | 604                     | 712                | 31                     | 848             | 133                    | 871            |
| 442 (1)                | 260                 | 606                     | 1043               | 32                     | 679             | 135                    | 682            |
| 442 (2)                | 707                 | 608                     | 146                | 33                     | 140             | 137 (I)                | 1031           |
| 443                    | 223                 | 609 (F B.)              | 543                | 34                     | 780             | 147 (2)                | 1001           |
| 444                    | 36                  | 618                     | 469                | 35                     | 140             | 139 (I)                | 185            |
| 447                    | 1189                | 619                     | 296, 313           | 36                     | 719             | 139 (2)                | 844            |
| 452                    | 593, 983            | 621                     | 1191               | 37                     | 1237            | 140                    | 423            |
| 454                    | 983                 | 623                     | 954                | 39                     | 1053            | 141                    | 140            |
| 459                    | 839, 841            | 624                     | 11, 638            | 41                     | 1133            | 142                    | 1144           |
| 461                    | 909                 | 626                     | 416                | 43                     | 346, 686        | 144                    | 139            |
| 462                    | 1148                | 633                     | 3                  | 46                     | 681             | 145                    | 1133           |
| 465                    | 344                 | 634                     | 885                | 47                     | 902, 1186, 1215 | 146                    | 1035, 1080     |
| 467                    | 747                 | 635                     | 706                | 48                     | 419             | 149                    | 707            |
| 472 (1)                | 483                 | 638                     | 302                | 51                     | 141             | 150                    | 1185           |
| 473                    | 509                 | 641                     | 1138               | 52                     | 325             | 151                    | 745            |
| 475                    | 951                 | 647                     | 251                | 53                     | 470             | 153                    | 137            |
| 481                    | 447                 | 649                     | 157                | 55 (1)                 | 467             | 155                    | 557            |
| 482                    | 366                 | 652                     | 896                | 55 (2)                 | 987, 1243       | 158 (1)                | 524            |
| 484 (1)                | 1121                | 659                     | 317                | 56                     | 792             | 158 (2)                | 578            |
| 484 (2)                | 539                 | 660                     | 546                | 58                     | 288, 656        | 161 (1)                | 1258           |
| 485                    | 854                 | 661                     | 715, 1207          | 60                     | 623, 996, 1277  | 161 (2)                | 184            |
| 487 (1)                | 159, 1135           | 663                     | 234, 792           | 62                     | 125, 657, 1010  | 162                    | 247            |
| 487 (2)                | 318                 | 665                     | 895                | 63                     | 1308            | 163                    | 833            |
| 489                    | 869                 | 666                     | 500                | 64 (1)                 | 147             | 164                    | 136, 666       |
| 490                    | 957                 | 667                     | 877                | 64 (2)                 | 1035            | 166                    | 397            |
| 492                    | 800                 | 674                     | 639, 642, 675      | 65                     | 215             | 167                    | 173            |
| 497                    | 948                 | 679                     | 330                | 66                     | 711             | 169                    | 676            |
| 500                    | 12                  | 682                     | 704                | 67 (2)                 | 1244            | 171                    | 1186           |
| 502                    | 392                 | 684                     | 794                | 69 (1)                 | 89              | 174                    | 1172           |
| 503                    | 231                 | 685                     | 954                | 69 (2)                 | 100             | 177                    | 1253           |
| 504                    | 511                 | 686                     | 944                | 70                     | 771             | 180                    | 561            |
| 505                    | 195                 | 687                     | 1072               | 71                     | 610, 1198       | 181                    | 918            |
| 511                    | 612                 | 688                     | 465                | 75                     | 776, 1190       | 182                    | 268            |
| 514                    | 170, 325            | 689                     | 1151               | 76                     | 678, 1195       | 187                    | 893            |
| 517                    | 725                 | 693                     | 400                | 78                     | 306             | 188                    | 731            |
| 521                    | 261                 | 694                     | 496                | 79                     | 643             | 192                    | 127, 637       |
| 523 (1)                | 102                 | 700                     | 981                | 80                     | 1140            | 193                    | 1283           |
| 523 (2) F. R           | 1039                | 703                     | 193                | 81                     | 1027            | 195                    | 130, 300, 1250 |
| 533                    | 1274                | 706                     | 982                | 83                     | 278, 967        | 197                    | 138            |
| 545                    | 156, 715            | 707                     | 504                | 85                     | 806             | 198                    | 386            |
| 553                    | 341, 989, 992, 1224 | 708                     | 808                | 86                     | 136             | 199                    | 720            |
| 557                    | 987                 | 711                     | 729                | 88                     | 1241            | 201                    | 744            |
| 558                    | 1252                | 713                     | 1127               | 91 (1)                 | 1013            | 208                    | 586            |
| 562                    | 311                 | 718                     | 670                | 91 (2)                 | 1281            | 209                    | 327            |
| 563                    | 1219                | 719                     | 525                | 93                     | 139             | 210                    | 246            |
| 565                    | 610                 | [A. I. R.] 1923 Nagpur. | 94                 | 94                     | 914             | 211                    | 451            |
| 567                    | 1184                | 1                       | 159, 734           | 95                     | 924             | 214                    | 846            |
| 568                    | 692, 772            | 2                       | 928                | 96                     | 101, 271        | 219                    | 705            |
| 572                    | 715                 | 4                       | 140                | 98                     | 1145            | 222                    | 998            |
| 574                    | 794                 | 5                       | 101                | 100                    | 432             | 223                    | 1177           |
| 576                    | 339                 | 6                       | 362                | 101 (I)                | 554, 1048       | 225                    | 1269           |
| 577                    | 1252                | 7 (1)                   | 837                | 101 (2)                | 937             | 227                    | 141, 812       |
| 578                    | 875                 | 7 (2)                   | 732                | 103 (I)                | 328             | 229                    | 913            |
| 581                    | 1098                | 11 (1)                  | 942                | 103 (2)                | 1252            | 230                    | 742            |
| 582                    | 409                 | 11 (2)                  | 194                | 105                    | 986             | 234                    | 1002           |
| 584                    | 168                 | 13                      | 270, 286, 930      | 107                    | 790, 1304       | 236                    | 158            |
| 585                    | 1142                | 15                      | 1442, 1247         | 108                    | 210             | 237                    | 306            |
| 587                    | 1092                | 16                      | 101                | 109                    | 236, 905        | 239                    | 225            |
| 592                    | 1046                | 17                      | 1251               | 111                    | 128             | 241                    | 273, 881       |
| 593                    | 1009                | 18                      | 243, 251, 307, 320 | 112                    | 141             | 243                    | 850            |
| 594                    | 1149                | 20                      | 296                | 115 (I)                | 202             | 246                    | 868            |
| 595                    | 713                 | 21                      | 364                | 115 (2)                | 1261            | 247                    | 140            |
| 596                    | 1130                | 22                      | 657                | 121 (I)                | 737             | 248                    | 537, 659       |
| 597                    | 1081                | 23                      | 734                | 121 (2)                | 727             | 251                    | 588            |
| 598                    | 983                 | 24                      | 1276               | 124                    | 35, 407         | 255                    | 446            |
|                        |                     |                         |                    |                        | 213             | 257                    | 1143           |

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| 258                           | 507                  | 29                             | 642                | 181                           | 43                  | 103                             | 534                 |
| 260                           | 565                  | 30                             | 176                | 182                           | 750                 | 104                             | 474                 |
| 261                           | 140, 844             | 31                             | 762, 766, 933      | 185                           | 709, 1017, 1018     | 111                             | 649, 677            |
| 262                           | 969                  | 32                             | 582                | 206                           | 342                 | 113                             | 455                 |
| 264                           | 158                  | 35 (1)                         | 1300               | 208                           | 809                 | 114                             | 371                 |
| 265                           | 654, 780             | 36                             | 1136               | 209                           | 1262                | 115                             | 593                 |
| 272                           | 222                  | 37                             | 408                | 212                           | 1176                | 116                             | 573                 |
| 273                           | 350                  | 38 (1)                         | 1153               | 214                           | 965                 | 121                             | 1077                |
| 274                           | 68                   | 38 (2)                         | 276                | 216                           | 1297                | 122                             | 781, 784, 1258      |
| 281                           | 1106                 | 39                             | 497                | 227                           | 751, 722            | 129                             | 293                 |
| 282                           | 310                  | 42 (1)                         | 1020               | 235                           | 394, 395            | 130                             | 779                 |
| 283                           | 218                  | 42 (2)                         | 1025               | 236                           | 357                 | 131                             | 480                 |
| 284                           | 1229                 | 44 (1)                         | 453                | 237                           | 1243                | 134                             | 181                 |
| 285                           | 1151                 | 44 (2)                         | 475                | 238                           | 872, 1021           | 135                             | 144                 |
| 286                           | 137                  | 45                             | 681                | 240                           | 176                 | 137                             | 455                 |
| 287                           | 137, 451             | 47                             | 625, 1019          | 241                           | 353, 421, 613       | 140                             | 873                 |
| 288                           | 773, 774             | 49                             | 219                | 242                           | 337, 1103           | 142                             | 587                 |
| 289                           | 190                  | 50 (1)                         | 387                | 246                           | 920                 | 143                             | 190, 737            |
| 290                           | 1136, 1139           | 52                             | 917                | 247                           | 984                 | 149                             | 146                 |
| 291                           | 419                  | 54                             | 762                | 251                           | 740                 | 150                             | 464                 |
| 292                           | 1150                 | 55 (1)                         | 279                | 252                           | 252, 335, 459, 1236 | 162                             | 309, 462            |
| 293                           | 244                  | 55 (2)                         | 1016               | 254                           | 412, 975, 1102      | 153 (1)                         | 564                 |
| 295                           | 635                  | 56 (1)                         | 550                | 265                           | 756, 1017, 1248     | 154                             | 213                 |
| 296                           | 408                  | 56 (2)                         | 472                | 271                           | 231                 | 155                             | 1199                |
| 297                           | 493                  | 57                             | 641                | [A. I. R.] 1923 Patna :—      |                     |                                 | 279                 |
| 298                           | 202                  | 59                             | 287, 700           | 1                             | 1045, 1045          | 157                             | 546                 |
| 300                           | 736                  | 61                             | 602, 668, 743, 917 | 13                            | 498, 158, 582, 661  | 158                             | 585                 |
| 301                           | 427                  | 80                             | 965, 1138          | 22                            | 703, 942            | 159                             | 316, 938            |
| 305                           | 721                  | 91                             | 1115               | 25                            | 778, 1174           | 162                             | 1026, 1027          |
| 306                           | 891                  | 93                             | 223                | 28                            | 458                 | 163                             | 667, 838            |
| 307                           | 138, 961             | 97                             | 1061               | 29                            | 145                 | 165                             | 716, 741, 1284 1285 |
| 309                           | 1150                 | 98                             | 391                | 30                            | 707                 | 174                             | 91                  |
| 310                           | 219, 456, 457, 844   | 100                            | 614                | 31                            | 491, 495, 1098      | 180                             | 180, 703            |
| 311                           | 350                  | 101                            | 153, 915           | 33                            | 961                 | 185 (1)                         | 856                 |
| 313                           | 1055                 | 102                            | 206, 602           | 37                            | 660, 687            | 185 (2)                         | 865                 |
| 314                           | 1178                 | 108                            | 372                | 41                            | 95                  | 187                             | 411, 412            |
| 317                           | 731                  | 109                            | 380                | 44                            | 10 1                | 197                             | 755                 |
| 320                           | 354                  | 112                            | 1060               | 45                            | 320                 | 199                             | 998, 1270           |
| 321                           | 100, 880             | 113                            | 363                | 49                            | 177                 | 201                             | 922                 |
| 322                           | 37, 673, 1310        | 114                            | 625, 1196, 1200    | 50                            | 1049                | 203                             | 650                 |
| 324                           | 419, 1129            | 117                            | 1292               | 53                            | 491                 | 205                             | 123, 1256           |
| 326                           | 138                  | 118                            | 236, 347           | 56                            | 144                 | 206                             | 71, 837             |
| 327                           | 185, 294             | 119                            | 237, 340, 677      | 58                            | 529, 1088           | 209                             | 860                 |
| 329                           | 100                  | 121                            | 1116               | 62                            | 927                 | 213                             | 90, 91              |
| 330                           | 101                  | 139                            | 411, 756           | 64                            | 698                 | 215                             | 386                 |
| 332                           | 425, 887             | 142                            | 531                | 65                            | 144                 | 217                             | 1114                |
| 333                           | 707                  | 143                            | 993, 1260          | 71                            | 640                 | 218 (1)                         | 249                 |
| 334                           | 311, 748, 1251       | 146                            | 242                | 72                            | 755                 | 218 (2)                         | 1205                |
| 336                           | 137, 1001, 1014      | 147                            | 750, 754, 1113     | 76                            | 964                 | 223                             | 231, 384            |
| [A. I. R.] 1923 Oudh :—       |                      | 150                            | 752                | 82                            | 142, 305, 485       | 224                             | 299, 701            |
| 1                             | 1001, 1014           | 152                            | 479                | 83                            | 1173                | 226                             | 374                 |
| 3                             | 54, 437, 733         | 153                            | 239                | 84                            | 145                 | 228                             | 574                 |
| 4                             | 581, 1051, 1054      | 154                            | 1140               | 85                            | 570                 | 231                             | 345                 |
| 8 (1)                         | 411                  | 155                            | 177                | 86                            | 142                 | 236                             | 850                 |
| 8 (2)                         | 557                  | 156                            | 934                | 87                            | 89                  | 238                             | 560                 |
| 9                             | 941                  | 158                            | 432                | 88                            | 622                 | 239                             | 243, 279, 894       |
| 11                            | 237                  | 159                            | 1018               | 89                            | 889                 | 242 (1)                         | 905                 |
| 14                            | 40, 1021             | 161                            | 489, 572           | 90                            | 544                 | 242 (2)                         | 343, 618, 1264      |
| 15                            | 436                  | 162                            | 433                | 91                            | 233, 1102           | 259                             | 901, 906, 1126      |
| 16                            | 181, 706, 748, 1022  | 163                            | 465                | 94                            | 539, 696            | 268                             | 754, 990            |
| 18                            | 241, 279             | 165                            | 477                | 95                            | 79                  | 275                             | 212                 |
| 19                            | 658, 660, 902, 904   | 167                            | 1046               | 96 (1)                        | 821                 | 276                             | 75, 93, 94          |
| 21                            | 190                  | 172                            | 572                | 96 (2)                        | 1132                | 285                             | 442, 897, 1173      |
| 22                            | 480                  | 173                            | 250                | 98                            | 73, 687             | 290                             | 349, 351            |
| 23                            | 445                  | 175                            | 1022               | 100                           | 925, 929            | 292                             | 135, 541            |
| 24                            | 621                  | 176                            | 409                | 101                           | 456                 | 293                             | 405                 |
| 26                            | 724                  | 177                            | 283, 377           | 102 (1)                       | 90                  | 295                             | 843                 |
| 27                            | 848, 915, 1019, 1023 | 180                            | 590                | 102 (2)                       | 307                 | 296                             | 987                 |
|                               |                      |                                |                    |                               | 507                 | 297 (1)                         | 1083                |

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| 297 (2)                | 578, 579                  | 487                     | 1175            | 51                      | 1257                  | 149                     | 1145 |
| 298                    | 897                       | 490                     | 239, 317, 998   | 52                      | 1191                  | 150                     | 119  |
| 299                    | 1047                      | 492                     | 58, 649         | 54                      | 1215                  | 152                     | 1015 |
| 301                    | 633                       | 718, 745, 789, 1170     | 55              | 22                      | 153                   | 126                     |      |
| 303                    | 54                        | 37, 145, 203, 1010      | 57              | 117, 667, 678           | 154                   | 314                     |      |
| 305                    | 10                        | 649, 840                | 60              | 994                     | 155                   | 118, 121                |      |
| 307                    | 1093                      | 234                     | 61              | 434, 1096, 1264         | 156                   | 311                     |      |
| 309                    | 197, 1205                 | 519                     | 579             | 65 (1)                  | 157                   | 1089                    |      |
| 322                    | 432                       | 520                     | 370             | 65 (2)                  | 159                   | 565                     |      |
| 324                    | 83                        | 521                     | 194             | 67                      | 160                   | 117                     |      |
| 325                    | 1178                      | 525                     | 315             | 68 (1)                  | 161                   | 128                     |      |
| 327                    | 617                       | 527                     | 472             | 68 (2)                  | 163                   | 2                       |      |
| 331                    | 284                       | 528                     | 486             | 69                      | 171                   | 121                     |      |
| 338                    | 797                       | 529                     | 878             | 71                      | 174                   | 1065                    |      |
| 340                    | 1185, 1279                | 530                     | 290             | 74 (1)                  | 180                   | 120                     |      |
| 342                    | 462, 1028                 | 532                     | 502             | 74 (2)                  | 185                   | 819, 866                |      |
| 344                    | 985                       | 536                     | 591             | 75 (1)                  | 187                   | 394                     |      |
| 346                    | 828                       | 537                     | 1058            | 76 (1)                  | 188                   | 552                     |      |
| 348 (1)                | 543                       | 539                     | 614             | 76 (2)                  | 189                   | 116                     |      |
| 348 (2)                | 1232                      | 540                     | 479             | 77                      | 193                   | 228, 1181               |      |
| 353                    | 97                        | 542                     | 561             | 79 (2)                  | 195                   | 312                     |      |
| 354                    | 276                       | 545                     | 186             | 80                      | 196                   | 214, 668                |      |
| 355                    | 705                       | 546                     | 449             | 81                      | 197                   | 1039                    |      |
| 358                    | 498                       | 547                     | 513             | 82 (1)                  | 199                   | 218, 241                |      |
| 361                    | 1047                      | 550                     | 495, 531        | 82 (2)                  | 202                   | 769, 770, 1210          |      |
| 363                    | 493                       | 558                     | 487, 656        | 84                      | 205                   | 1240                    |      |
| 364                    | 488                       | 562                     | 819             | 86                      | 206                   | 121, 204                |      |
| 366                    | 494                       | 564                     | 193, 1222, 1249 | 87                      | 208                   | 364                     |      |
| 368                    | 551                       | 572                     | 97              | 88                      | 209                   | 500                     |      |
| 369                    | 490                       | 575                     | 263             | 92                      | 212                   | 1045                    |      |
| 371                    | 245, 939                  | 576                     | 977             | 97                      | 214                   | 128                     |      |
| 375                    | 142, 346, 353             | 581                     | 1236, 1278      | 98 (1)                  | 215                   | 1183                    |      |
| 380                    | 459                       | 585                     | 666             | 98 (2)                  | 216                   | 576                     |      |
| 381                    | 96                        | 588                     | 485             | 100                     | 218                   | 116, 1126               |      |
| 384                    | 944                       | 589                     | 426             | 102 (1)                 | 222                   | 1032                    |      |
| 385                    | 342                       | 592                     | 1000            | 102 (2)                 | 223                   | 633                     |      |
| 386                    | 275, 617                  | 597                     | 368             | 103                     | 226                   | 396, 874                |      |
| 391                    | 61                        | 600                     | 253             | 107                     | 227                   | 442, 570                |      |
| 397                    | 72, 84                    | A. I. R. (1928) Rangoon |                 | 108                     | 230                   | 1255                    |      |
| 401                    | 127                       | 1                       | 435             | 110                     | 231                   | 1056                    |      |
| 402                    | 80                        | 1133                    | 114             | 672, 702, 813           | 232                   | 1261                    |      |
| 404                    | 1221                      | 9                       | 504             | 832                     | 236                   | 120                     |      |
| 406                    | 615                       | 12                      | 1182, 1280      | 117                     | 237                   | 309                     |      |
| 407                    | 703                       | 13                      | 525, 844        | 119 (1)                 | 238                   | 1234                    |      |
| 410                    | 102, 505, 558             | 15 (1)                  | 679             | 119 (2)                 | 239                   | 152                     |      |
| 411                    | 257                       | 15 (2)                  | 1092, 1185      | 120                     | 242                   | 1187                    |      |
| 417                    | 333                       | 16                      | 945             | 122                     | 244                   | 339                     |      |
| 418                    | 319                       | 17                      | 906             | 124                     | 245                   | 462, 1088               |      |
| 420                    | 200                       | 18                      | 1143            | 125                     | 246                   | 457                     |      |
| 424                    | 40, 724, 725, 728         | 21                      | 175             | 127 (1)                 | 247                   | 1065                    |      |
| 433                    | 269                       | 22                      | 52              | 127 (2)                 | 248                   | 568                     |      |
| 435                    | 321                       | 23 (1)                  | 644             | 198                     | 250                   | 197                     |      |
| 436                    | 671                       | 23 (2)                  | 3, 423          | 529                     | 251                   | 1069                    |      |
| 437                    | 484                       | 24                      | 424             | 130                     | 252                   | 292                     |      |
| 438                    | 471                       | 26                      | 131             | 131                     | 253                   | 1057                    |      |
| 441                    | 59, 60                    | 27                      | 219             | 132                     | 254                   | 1185, 1196, 1259        |      |
| 443                    | 738                       | 29                      | 501             | 133                     | 256                   | 248                     |      |
| 445                    | 314                       | 31                      | 1055            | 134                     | 257                   | 160                     |      |
| 446                    | 307, 381                  | 37                      | 92              | 135 (1)                 | 258                   | 328                     |      |
| 450                    | 480                       | 40                      | 128             | 135 (2)                 | 261                   | 924                     |      |
| 451                    | 320, 761                  | 41 (1)                  | 1242            | 136                     | 265                   | 608                     |      |
| 453                    | 69, 743                   | 41 (2)                  | 910             | 139                     | 268                   | 1036                    |      |
| 464                    | 420, 654, 906, 1126, 1128 | 44 (1)                  | 54              | 140                     | 271                   | 119                     |      |
|                        |                           | 44 (2)                  | 54              | 141                     | [A. I. R.] 1928 Sind. |                         |      |
| 470                    | 43                        | 45 (1)                  | 563             | 143                     | 1                     | 105, 107                |      |
| 474                    | 535                       | 45 (2)                  | 1025            | 144                     | 5                     | 413, 693, 808,          |      |
| 475                    | 259, 914, 976, 1223       | 46                      | 1182            | 145                     | 1051                  | 988, 1105, 1222         |      |
| 481                    | 965                       | 47                      | 433             | 146                     | 14                    | 354                     |      |
| 483                    | 615                       | 49                      | 1183            | 148                     |                       |                         |      |

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| 15                      | 820                  | 66                   | 893            | 64                | 998                  | 113            | 342                  |
| 17                      | 273, 1223            | 68                   | 524            | 67                | 992                  | 118            | 1297                 |
| 20                      | 1141, 1222           | 70                   | 215            | 69                | 745                  | 121            | 902, 904             |
| 25                      | 51, 218, 413         | 73                   | 136            | 72                | 1150                 | 125            | 40                   |
| 33                      | 1289                 | 78                   | 705, 1194      | 79                | 635                  | 128            | 965                  |
| 35                      | 199                  | 81                   | 745            | 81                | 734                  | 133            | 709, 922, 1017, 1018 |
| 38                      | 217                  | 85                   | 137            | 99                | 746                  | 191            | 917                  |
| 42                      | 683, 1307            | 91                   | 423            | 104               | 731                  | 194            | 231, 281             |
| 50                      | 414, 423, 1186, 1223 | 93                   | 1001           | 110               | 141, 812             | 196            | 452                  |
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| 1                       | 1003                 | 111                  | 720            | 119               | 244, 384             | 201            | 54, 417, 733         |
| 3                       | 833, 1004            | 119                  | 559, 1081      | 122               | 138                  | 204            | 1134                 |
| 8                       | 1004                 | 121                  | 888            | 124               | 354                  | 206            | 874, 933             |
| 10                      | 1003                 | 130                  | 68             | 126               | 1146                 | 209            | 1262                 |
| 11                      | 1201                 | 144                  | 537, 659       | 128               | 1143                 | 216            | 226                  |
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| 21                      | 1215                 | 157                  | 306            | 135               | 886                  | 223            | 884, 1016            |
| 25                      | 1312                 | 161                  | 138, 961       | 139               | 1178                 | 228            | 726                  |
| 30                      | 1289                 | 166                  | 969            | 144               | 1136, 1137           | 231            | 8, 891               |
| 34                      | 422, 1004            | 170                  | 828            | 147               | 773, 774             | 239            | 451                  |
| 38                      | 362                  | 177                  | 566            | 150               | 14                   | 242            | 476                  |
| 42                      | 1234                 | 179                  | 1106           | 151               | 300                  | 244            | 872                  |
| 43                      | 358                  | 181                  | 350            | 154               | 469                  | 245            | 756, 1017, 1248      |
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| 58                      | 148                  | 213                  | 1136, 1139     | 170               | 265, 903             | 286            | 764                  |
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| 14                      | 887                  | 24                   | 138            | 53                |                      | 746            | 1060                 |
| 21                      | 682                  | 26                   | 139            | 56                |                      | 190            | 445                  |
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| 39                      | 731                  | 36                   | 268            | 66                | 920                  | 618            | 848, 915, 1023       |
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| 24                   | 250                | 593               | 165, 845, 1103 | 296                     | 345                 | 937                      | 937                     |
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| 159                  | 686                | 696               | 856, 1033      | 488                     | 412, 740            | 53                       | 698                     |
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| 185                  | 765                | 715               | 731, 793       | 538                     | 142, 346, 353       | 65                       | 75, 93, 94              |
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| 347                  | 1079               | 134               | 793            | 422, 702                | 177                 | 176                      | 71                      |
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| 234                 | 263                | 180                 | 177, 438            | 76                  | 78         | 68                  | 90, 91            |
| 235                 | 879                | 190                 | 848                 | 77                  | 585, 666   | 71                  | 455               |
| 237                 | 578, 579           | 196                 | 67                  | 88 (Rev.)           | 839        | 76                  | 581               |
| 239                 | 510                | 201                 | 40, 724, 725, 728   | 92                  | 78         | 81                  | 640               |
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| 263                 | 760                | 267                 | 1304                | 111                 | 79         | 99                  | 299, 701          |
| 266                 | 660                | 269                 | 705                 | 115                 | 987        | 102                 | 617, 764          |
| 269                 | 845                | 270                 | 235                 | 117                 | 591        | 107                 | 543               |
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| 18                  | 931                | 445                 | 430                 | 229                 | 1155       | 232                 | 698               |
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| 25                  | 455                | 458                 | 299, 942            | 242                 | 1047       | 239                 | 670, 1284, 1285   |
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| 498                 | 315                     | 15                  | 394                  | 472                     | 409, 1187     | 209           | 854                 |
| 502                 | 1048                    | 19                  | 844                  | 481                     | 311           | 212           | 54, 760, 814        |
| 503                 | 579                     | 22                  | 1197                 | 487                     | 119           | 232           | 1073                |
| 504                 | 253                     | 34                  | 121                  | 492                     | 9             | 234           | 848                 |
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|                     | 1128                    | 102                 | 116                  | 551                     | 117           | 269           | 523, 1092           |
| 538                 | 348                     | 121                 | 1185, 1196, 1259     | 557                     | 674, 1284     | 271           | 521                 |
| 544                 | 308                     | 129                 | 769, 770, 1210       | 562                     | 668           | 272 (1)       | 1057                |
| 546                 | 283                     | 135                 | 214, 668             | 565                     | 415           | 272 (2)       | 493                 |
| 548                 | 352, 460                | 138                 | 364                  | 580                     | 1301          | 273           | 178, 433, 771       |
| 552                 | 581                     | 142                 | 866, 1230            | 584                     | 871           | 274           | 900                 |
| 553                 | 1215                    | 146                 | 123                  | 600                     | 130           | 275           | 1158                |
| 562                 | 143                     | 153                 | 1124                 | 604                     | 520           | 277           | 940                 |
| 567                 | 329                     | 161                 | 120                  | 618                     | 327, 336      | 278           | 244                 |
| 571                 | 905                     | 176                 | 924                  | 629                     | 128           | 281           | 970                 |
| 575                 | 343                     | 186                 | 913                  | 632                     | 559           | 282           | 830, 832            |
| 577                 | 682, 1006               | 189                 | 328                  | 634                     | 1182          | 283           | 1154                |
| 579                 | 485                     | 196                 | 243                  | 637                     | 1242, 1250    | 284           | 123, 673            |
| 581                 | 87, 96, 647             | 199                 | 442, 570             | 651                     | 1285          | 286           | 792                 |
| 606                 | 136, 1150               | 209                 | 1070                 | 661                     | 867           | 289           | 676                 |
| 608                 | 1076                    | 211                 | 1045                 | 665                     | 1285          | 290           | 863                 |
| 609                 | 1131, 1244              | 218                 | 1056                 | 668                     | 1181          | 291           | 769                 |
| 613                 | 973, 977                | 220                 | 228, 1181            | 687                     | 1182          | 302           | 981                 |
| 622                 | 1155                    | 226                 | 819, 866             | 689                     | 541           | 304           | 197                 |
| 627                 | 209                     | 231                 | 174, 234             | 690                     | 1058          | 313           | 745                 |

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| 323                    | 1306           | 454                    | 466, 1067      | 573                    | 3, 603, 645, 786 | 707                    | 977, 1255, 1979     |
| 326                    | 1138           | 457                    | 1035           | 577                    | 456              | 713                    | 284                 |
| 330                    | 772, 1154      | 458                    | 1091           | 578                    | 1268             | 714                    | 395                 |
| 331                    | 39, 594, 606   | 459                    | 1069           | 579                    | 630              | 715                    | 1167                |
| 337                    | 251, 300       | 460                    | 1211           | 585                    | 176              | 717                    | 176                 |
| 354                    | 709            | 461                    | 550, 579       | 596                    | 720              | 718                    | 253, 295            |
| 356 (P C)              | 1131           | 462                    | 696            | 600                    | 828              | 719                    | 238                 |
| 358                    | 1185           | 464                    | 1034           | 602                    | 737, 748, 788    | 720                    | 192, 1286           |
| 359                    | 141, 1190      | 465                    | 701            | 608                    | 1193             | 721                    | 597                 |
| 361                    | 363            | 467                    | 270, 930       | 611                    | 858              | 722                    | 461                 |
| 363 (1)                | 125            | 469                    | 593            | 612                    | 776, 1190        | 723                    | 1228                |
| 363 (2)                | 125            | 470                    | 1220           | 615                    | 992              | 724                    | 869                 |
| 365                    | 267            | 473                    | 1255           | 616                    | 94               | 729                    | 762                 |
| 366                    | 354            | 474                    | 607            | 618                    | 370, 932         | 730                    | 403, 727, 808, 1016 |
| 367                    | 856            | 475                    | 592            | 619                    | 278, 967         |                        | 1097, 1246, 1308    |
| 368                    | 291            | 476                    | 761, 770       | 622                    | 1142             | 742                    | 253                 |
| 369                    | 481            | 485                    | 1135           | 624                    | 37               | 743                    | 349                 |
| 370                    | 544            | 486                    | 1122           | 625                    | 566              | 745                    | 323                 |
| 371                    | 514            | 491                    | 968            | 627                    | 467              | 746                    | 635                 |
| 374                    | 654            | 495                    | 330, 605, 1211 | 628                    | 519              | 448                    | 810, 933            |
| 376                    | 579            | 498                    | 1209           | 629                    | 470              | 750                    | 1173                |
| 377                    | 541, 664, 688  | 499                    | 207            | 630                    | 531              | 752                    | 1144                |
| 379                    | 556, 1088      | 500                    | 707            | 631 (2)                | 499              | 753                    | 966                 |
| 380 (1)                | 1047           | 501                    | 907, 1101      | 633                    | 554, 1048        | 754                    | 761                 |
| 380 (2)                | 591            | 502                    | 884, 902       | 634                    | 553              | 758                    | 779                 |
| 383                    | 540            | 504                    | 99, 851, 1093  | 635                    | 1015             | 759                    | 353                 |
| 384                    | 573            | 506                    | 251            | 636                    | 653              | 765                    | 734                 |
| 385                    | 225            | 507                    | 206            | 638                    | 512, 1306        | 767                    | 986                 |
| 389                    | 785, 922       | 509                    | 633            | 640                    | 586              | 769                    | 420                 |
| 392                    | 1158           | 511                    | 623, 996, 1277 | 641                    | 975              | 772                    | 175                 |
| 393                    | 362            | 513                    | 370            | 642                    | 192              | 777                    | 620                 |
| 395                    | 338            | 516                    | 1110           | 645 (1)                | 227              | 779                    | 966                 |
| 396                    | 440            | 517                    | 839, 841       | 645 (2)                | 1169             | 781                    | 211, 444            |
| 398                    | 11             | 520                    | 191            | 647                    | 680, 695         | 783                    | 163                 |
| 399                    | 1028           | 521 (1)                | 7              | 648                    | 1112             | 785                    | 1029                |
| 401                    | 344            | 521 (2)                | 596            | 649                    | 746              | 786                    | 911                 |
| 402                    | 256            | 522                    | 893            | 650                    | 457              | 788                    | 805                 |
| 403                    | 804, 933, 1139 | 523                    | 608            | 651                    | 1269             | 789                    | 425                 |
| 405                    | 794            | 525                    | 386            | 653                    | 356, 1277        | 795                    | 834                 |
| 406                    | 642            | 526                    | 449            | 655                    | 1033             | 796                    | 793                 |
| 407                    | 1249           | 527                    | 136            | 657                    | 411              | 799                    | 34                  |
| 409                    | 1112           | 528                    | 163, 638       | 658                    | 142, 229         | 800                    | 210, 716            |
| 413                    | 260            | 529                    | 326            | 660                    | 941              | 807                    | 208, 1227           |
| 414 (1)                | 991            | 530                    | 351            | 665                    | 291              | 808                    | 48, 537             |
| 414 (2)                | 76             | 535                    | 953            | 666                    | 893              | 811                    | 27                  |
| 415                    | 978            | 538                    | 601, 1157      | 667                    | 357, 412         | 812                    | 433                 |
| 417                    | 230, 239, 1158 | 541                    | 125, 657, 1010 | 668                    | 941              | 814                    | 53, 810             |
| 418                    | 1167           | 542                    | 236            | 669                    | 780              | 818                    | 278                 |
| 419                    | 273            | 543                    | 410            | 671                    | 451              | 819                    | 897                 |
| 421                    | 666, 778       | 545                    | 987, 1243      | 672                    | 136              | 820                    | 860                 |
| 422                    | 271            | 546                    | 980            | 673                    | 741              | 821                    | 820                 |
| 424                    | 171            | 547                    | 1287           | 677                    | 259, 352         | 823                    | 131                 |
| 425                    | 1157           | 549                    | 270, 280, 930  | 681 (1)                | 435              | 826                    | 179, 239            |
| 427                    | 925            | 552                    | 738            | 681 (2)                | 770              | 827                    | 620                 |
| 428                    | 454, 825, 862  | 554 (1)                | 276            | 683                    | 2                | 828                    | 373                 |
| 431                    | 694, 1154      | 554 (2)                | 600            | 684                    | 610              | 831 (1)                | 1131                |
| 433                    | 858            | 556                    | 1157           | 685                    | 366              | 834                    | 845                 |
| 437                    | 1044           | 557 (1)                | 325            | 686                    | 446              | 835                    | 685                 |
| 438                    | 544            | 557 (2)                | 440            | 688                    | 604              | 836                    | 977                 |
| 439                    | 1063           | 558                    | 865            | 693                    | 853, 956         | 837                    | 278, 279, 282, 964  |
| 440                    | 562            | 559 (1)                | 643            | 695                    | 993              | 840                    | 1223                |
| 442                    | 854            | 559 (2)                | 12             | 697                    | 945              | 841                    | 10, 86, 97          |
| 444                    | 1073           | 560                    | 147            | 698                    | 67               | 845                    | 757                 |
| 445                    | 1050           | 563                    | 306            | 700                    | 1246             | 846                    | 763                 |
| 447                    | 519            | 565                    | 71, 837        | 701                    | 11               | 848                    | 793                 |
| 448                    | 505            | 568                    | 50             | 703                    | 841              | 849                    | 70, 714             |
| 449                    | 1062           | 569                    | 734            | 704                    | 841              | 853                    | 600                 |
| 451                    | 1090           | 560                    | 160, 206, 980  | 705                    | 994              | 858                    | 144                 |
| 452                    | 483            | 572                    | 1308           | 706                    |                  |                        |                     |

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| 863                    | 395           | 34                     | 141            | 203                    | 965           | 389                    | 658                 |
| 866                    | 88            | 36                     | 604            | 205                    | 608           | 391                    | 768                 |
| 867                    | 1231          | 38                     | 231, 1245      | 407                    | 81            | 392                    | 455                 |
| 870                    | 141           | 39                     | 608            | 209                    | 327           | 394                    | 706                 |
| 872                    | 314           | 43 (1)                 | 634            | 212                    | 996, 1246     | 396                    | 869, 883            |
| 876                    | 790, 1304     | 45                     | 908            | 224                    | 365, 1267     | 400                    | 955                 |
| 877                    | 1193          | 46                     | 796            | 226                    | 755           | 405                    | 429                 |
| 883                    | 924           | 47                     | 1240           | 227                    | 596           | 408                    | 388                 |
| 885                    | 332, 340      | 53                     | 334, 808, 1018 | 229                    | 257           | 410                    | 403                 |
| 886                    | 851, 1281     | 66                     | 621            | 232                    | 144, 163, 812 | 417                    | 213, 1096           |
| 888                    | 125, 410      | 68                     | 75             | 248 (2)                | 525           | 419                    | 781                 |
| 893                    | 190           | 70                     | 778            | 250                    | 1256          | 420                    | 883                 |
| 894                    | 423           | 71                     | 1012           | 253                    | 965, 1138     | 423                    | 1266                |
| 895                    | 872, 367      | 72                     | 451            | 263                    | 593, 636, 891 | 425                    | 387                 |
| 897                    | 351           | 74                     | 724            | 267                    | 1298          | 427                    | 1211                |
| 900                    | 442, 656, 929 | 75                     | 643            | 268                    | 730, 1132     | 432                    | 389                 |
| 908                    | 1136          | 79                     | 372            | 273                    | 81, 125, 715  | 437                    | 81, 98              |
| 910                    | 259, 927      | 80                     | 943            | 378                    | 278, 700      | 439                    | 893, 1282           |
| 912                    | 923           | 81                     | 849            | 281                    | 267           | 444                    | 611                 |
| 915                    | 860           | 82                     | 824            | 283                    | 219           | 446                    | 923                 |
| 918                    | 955           | 84                     | 960, 966       | 284                    | 173           | 448                    | 439                 |
| 921                    | 230, 461      | 85                     | 902, 904       | 285                    | 369           | 451                    | 705                 |
| 923                    | 955           | 87                     | 198, 877       | 286 (1)                | 453           | 452                    | 953                 |
| 927                    | 443           | 92                     | 860            | 286 (2)                | 1268, 1278    | 459                    | 396                 |
| 929                    | 385           | 96                     | 433            | 289                    | 900           | 463 (1)                | 1125                |
| 932                    | 942           | 97                     | 1137           | 290                    | 779           | 463 (2)                | 730, 1233           |
| 938                    | 149           | 98                     | 275            | 291                    | 1150          | 466                    | 717                 |
| 939                    | 416, 1024     | 99                     | 1215           | 292                    | 269           | 468                    | 1124                |
| 942                    | 995           | 101                    | 276, 455       | 293 (2)                | 701, 867      | 469                    | 715, 960            |
| 944                    | 701           | 103                    | 167            | 295                    | 991           | 474                    | 709                 |
| 947                    | 640           | 104                    | 1185           | 296                    | 940           | 479                    | 788, 793            |
| 954                    | 1231          | 107                    | 671            | 298                    | 675           | 481                    | 960                 |
| 957 (1)                | 622           | 109                    | 883            | 299                    | 208, 605, 882 | 483                    | 145, 459, 926       |
| 957 (2)                | 409, 1245     | 111                    | 1281           | 300                    | 42            | 484                    | 230, 336            |
| 959                    | 304           | 112                    | 1182           | 303                    | 182           | 486                    | 1224                |
| 961                    | 145, 259, 820 | 113                    | 971            | 306                    | 309           | 488 (1)                | 858                 |
| 963                    | 134           | 115                    | 296, 1152      | 307                    | 347           | 488 (2)                | 131                 |
| 966                    | 237           | 119                    | 69             | 308                    | 313           | 493                    | 965                 |
| 968                    | 1124          | 121                    | 908            | 310                    | 427           | 494 (1)                | 1276                |
| 971                    | 907           | 128                    | 288            | 311                    | 818           | 494 (2)                | 136                 |
| 976                    | 132           | 124                    | 417            | 312                    | 963           | 495                    | 18, 24              |
| 977                    | 254           | 126                    | 423            | 316                    | 1152          | 496                    | 1149                |
| 978                    | 1127          | 127                    | 97, 233        | 321                    | 790           | 498                    | 1245                |
| 981 (1)                | 384           | 129                    | 358            | 323                    | 1007          | 504                    | 794, 795            |
| 981 (2)                | 903           | 132                    | 1258           | 324                    | 942           | 510                    | 58, 690             |
| 988                    | 134           | 138                    | 437, 438       | 328                    | 1013          | 517                    | 910                 |
| 990                    | 203           | 144                    | 1183           | 329                    | 180           | 519                    | 1131                |
| 992                    | 851           | 145                    | 1117           | 332                    | 309, 462      | 529                    | 190, 354            |
| 994                    | 635           | 146                    | 764            | 333                    | 357, 942      | 530                    | 139, 307            |
| 995                    | 49            | 152                    | 352            | 335                    | 274           | 532                    | 673, 1260           |
| 1000                   | 604           | 153                    | 1150, 1153     | 337                    | 765           | 535                    | 77                  |
| 1101                   | 315           | 154                    | 64             | 344                    | 35, 407       | 537                    | 92                  |
| 1003                   | 242, 384      | 155                    | 1142           | 346                    | 407           | 539                    | 194                 |
| 1004                   | 929           | 156 (P. C.)            | 1212           | 353                    | 48            | 541                    | 194, 232            |
| 1005                   | 1014          | 158                    | 355, 1266      | 355                    | 441           | 542                    | 997, 1097           |
| 1008                   | 673           | 160                    | 765            | 356                    | 1015          | 547                    | 378                 |
|                        |               | 165                    | 957            | 357                    | 1142          | 548                    | 616, 669, 708, 769, |
|                        |               | 166                    | 72             | 358                    | 1308          |                        | 787                 |
|                        |               | 168                    | 311, 1100      | 360                    | 719           | 551                    | 134                 |
| 1                      | 1000          | 169                    | 909            | 362                    | 1270          | 555                    | 54, 194, 656, 686   |
| 5                      | 240           | 172                    | 220, 866       | 365                    | 704           | 562                    | 120                 |
| 6                      | 39, 160, 293  | 173                    | 6, 638         | 367                    | 6             | 564 (F.B.)             | 961                 |
| 18                     | 658           | 175                    | 1206           | 369                    | 925           | 569                    | 184, 648            |
| 20 (1)                 | 997           | 177                    | 84             | 370                    | 932           | 570                    | 1193                |
| 20 (2)                 | 195           | 178                    | 1232           | 371                    | 134           | 572                    | 1136                |
| 24                     | 743, 1257     | 187                    | 11, 262        | 378                    | 249           | 573                    | 825                 |
| 27                     | 835           | 190                    | 1223           | 379                    | 408, 424      | 576                    | 886                 |
| 30                     | 700, 799      | 194                    | 655, 657, 1248 | 385                    | 692           | 578                    | 32                  |
| 31                     | 434           | 202                    | 211, 1185      | 387                    | 163           | 579                    | 202                 |
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| 581                    | 1278                         | 790                    | 680           | 929                    | 112             | 54                     | 497                 |
| 582                    | 900                          | 791                    | 292           | 923                    | 1306            | 56                     | 532                 |
| 583                    | 1259                         | 793                    | 643           | 929                    | 326             | 58                     | 1081                |
| 586                    | 369                          | 794                    | 925, 1256     | 930                    | 641             | 61                     | 1311                |
| 589                    | 991                          | 802                    | 123, 1256     | 931                    | 434             | 62                     | 467, 711            |
| 590                    | 1008                         | 804                    | 859           | 932                    | 650, 993        | 63                     | 506                 |
| 591                    | 213                          | 805                    | 770           | 933                    | 227             | 65                     | 1090                |
| 593                    | 885                          | 810                    | 1275          | 937 (1)                | 387             | 72                     | 551                 |
| 596                    | 1009                         | 811                    | 454           | 937 (2) (P. C.)        | 1196            | 77                     | 1091                |
| 598                    | 1208                         | 813                    | 690, 787      | 939                    | 805             | 79                     | 475                 |
| 601                    | 415                          | 815                    | 265           | 941                    | 762             | 81                     | 699, 854, 856       |
| 602                    | 99, 921                      | 817                    | 20            | 942                    | 290             | 110                    | 1078                |
| 606                    | 324, 810, 913                | 820                    | 88, 829       | 949 (P. C.)            | 40, 793, 1308   | 122                    | 854                 |
| 611                    | 304                          | 822                    | 872           | 951                    | 1109            | 113                    | 1049                |
| 613                    | 881                          | 827                    | 838           | 953 (1)                | 453             | 115                    | 541, 515            |
| 615                    | 933                          | 828                    | 883           | 953 (2)                | 679             | 117                    | 688                 |
| 635                    | 156                          | 830                    | 331           | 955                    | 727             | 120                    | 591                 |
| 636                    | 1127                         | 832                    | 1030, 1032    | 958                    | 258, 815, 1266  | 124                    | 587                 |
| 637                    | 1265                         | 833                    | 1182, 1280    | 959                    | 788             | 126                    | 510                 |
| 638                    | 2                            | 834                    | 693           | 960                    | 648, 1221       | 128                    | 494                 |
| 642                    | 715                          | 836 (1)                | 973           | 964                    | 349             | 129                    | 139                 |
| 645                    | 205, 1287                    | 836 (2)                | 206, 213, 916 | 966 (1)                | 1020            | 130                    | 735, 748, 766, 1260 |
| 648                    | 308                          | 838                    | 1             | 966 (2)                | 8               | 140                    | 130, 666            |
| 653                    | 4, 367, 650, 690, 728, 821   | 839                    | 935           | 968                    | 34, 125         | 143                    | 76                  |
| 655                    | 373                          | 841 (1)                | 359           | 976                    | 142             | 145                    | 1097, 1116          |
| 657                    | 1283                         | 841 (2)                | 899           | 977                    | 409             | 150                    | 100                 |
| 659                    | 397                          | 843 (2)                | 1025          | 984                    | 898             | 153                    | 740, 772, 1259      |
| 663                    | 636, 637                     | 844                    | 681           | 985                    | 165, 396        | 160                    | 239                 |
| 668                    | 618                          | 846                    | 778           | 986                    | 993             | 161                    | 413, 693, 988, 1105 |
| 670                    | 1009                         | 849                    | 56            | 987                    | 958             | 171                    | 1222                |
| 672                    | 961                          | 850                    | 971           | 990                    | 722             | 173                    | 4                   |
| 673                    | 364                          | 852                    | 1222          | 994                    | 7, 164, 916     | 176                    | 229                 |
| 675                    | 321                          | 853                    | 211, 1095     | 999                    | 80, 830, 843    | 177                    | 327                 |
| 677                    | 715                          | 854                    | 1177          | 1002                   | 598             | 178                    | 777                 |
| 679                    | 874                          | 855                    | 120           | 1006                   | 780             | 200                    | 945                 |
| 682                    | 118                          | 857                    | 897           | 1008                   | 376             | 201                    | 603                 |
| 684                    | 234, 257                     | 859 (1)                | 1099          | 1026                   | 982             | 204                    | 374, 856            |
| 687                    | 773, 1027, 859 (2)           | 860                    | 186           | 711 C.                 | 207             | 205                    | 136                 |
| 689                    | 1233, 1241, 1244, 1308       | 862                    | 746           | 1                      | 56              | 209                    | 140                 |
| 713                    | 980                          | 864                    | 786           | 7                      | 344             | 212                    | 856, 1033           |
| 714                    | 70                           | 867                    | 361, 420      | 11                     | 360             | 213                    | 547, 530, 575       |
| 715                    | 731                          | 869                    | 328           | 15                     | 85              | 214                    | 492                 |
| 728                    | 629                          | 870                    | 68            | 20                     | 312, 1261       | 215                    | 518                 |
| 729                    | 677, 784, 952                | 872 (1)                | 424           | 25                     | 100             | 216                    | 770, 1090           |
| 732                    | 1113                         | 872 (2)                | 679           | 26                     | 1001            | 217                    | 1052                |
| 735                    | 352                          | 874                    | 719           | 28 (1)                 | 1252            | 219                    | 550                 |
| 736                    | 40, 406, 423, 429, 431, 1096 | 877                    | 646           | 28 (2)                 | 1160            | 222                    | 581                 |
| 741                    | 389                          | 881                    | 437, 440      | 31                     | 232, 455        | 225                    | 513                 |
| 743                    | 253, 868, 880, 931           | 884                    | 419           | 32                     | 1235            | 228                    | 483, 487, 710       |
| 747                    | 1171                         | 886                    | 896           | 33                     | 678             | 234                    | 494                 |
| 748                    | 766, 774                     | 888                    | 147           | 35                     | 247             | 237                    | 1063                |
| 754                    | 305, 324                     | 890                    | 233, 1119     | 37                     | 1140            | 238                    | 481                 |
| 755                    | 123, 918, 1184               | 901                    | 219           | 38                     | 174             | 239                    | 967                 |
| 759                    | 285                          | 902                    | 192           | 39                     | 101, 271        | 241                    | 570                 |
| 762                    | 31                           | 903                    | 564           | 40                     | 902, 1186, 1215 | 242                    | 506                 |
| 763                    | 367                          | 904                    | 358           | 42 (1)                 | 1228            | 243                    | 1041                |
| 767                    | 747                          | 906                    | 321           | 42 (2)                 | 914             | 244                    | 553                 |
| 768                    | 162                          | 907                    | 1166          | 43                     | 54, 775         | 246 (1)                | 512                 |
| 769                    | 49, 51                       | 910                    | 652           | 45 (1)                 | 312             | 246 (2)                | 558                 |
| 770                    | 242                          | 911                    | 198           | 45 (2)                 | 1               | 247                    | 557                 |
| 780                    | 386, 612                     | 912                    | 117           | 46                     | 246             | 248 (1)                | 1089                |
| 782                    | 368                          | 915                    | 886, 888      | 47                     | 448             | 248 (2)                | 514                 |
| 784 (1)                | 59, 820                      | 917                    | 253           | 48                     | 141             | 252                    | 513, 559            |
| 787                    | 908                          | 919 (1)                | 3             | 49 (1)                 | 464             | 256                    | 528                 |
|                        |                              |                        | 1278          | 49 (2)                 | 503             | 254                    | 574                 |
|                        |                              |                        | 891           | 51                     | 542             | 257                    | 495                 |
|                        |                              |                        | 450           | 52                     | 1066            | 259                    | 807                 |
|                        |                              |                        | 347           | 53                     | 566             | 265                    | 667, 904            |
|                        |                              |                        |               |                        |                 |                        | 6, 928              |

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| 266                    | 930                 | 409                    | 139, 300, 1250 | 558                    | 1185                 | 699                    | 484            |
| 268                    | 175                 | 411                    | 172            | 559                    | 448                  | 700                    | 1056           |
| 270                    | 271                 | 412                    | 1009           | 560                    | 614                  | 702                    | 569            |
| 273                    | 1265                | 413                    | 771            | 561                    | 596, 988             | 704                    | 560            |
| 274                    | 1189, 1198          | 416                    | 722            | 562                    | 1115                 | 705                    | 343, 618, 1264 |
| 276                    | 814                 | 417                    | 190            | 565                    | 897                  | 722                    | 446, 811       |
| 278                    | 1274, 1279          | 418                    | 1145           | 566                    | 745                  | 724                    | 400, 401       |
| 280                    | 200                 | 420                    | 197            | 568                    | 672                  | 727                    | 731            |
| 283                    | 282                 | 421                    | 1241           | 570                    | 922                  | 730                    | 321            |
| 284                    | 96, 376             | 424 (1)                | 1109           | 572                    | 722                  | 734                    | 341            |
| 287                    | 781                 | 424 (2)                | 384            | 573                    | 615                  | 736                    | 454, 871       |
| 288                    | 335                 | 426                    | 464            | 574                    | 793                  | 737                    | 453, 885       |
| 290                    | 204                 | 431                    | 173            | 577                    | 920                  | 739                    | 1186           |
| 291                    | 1301                | 432                    | 1152, 1294     | 581                    | 756, 1017, 1248      | 741                    | 299, 701       |
| 293                    | 1184                | 436                    | 268            | 587                    | 218                  | 743                    | 562            |
| 296                    | 964                 | 441                    | 645, 1249      | 589                    | 683, 1242            | 746                    | 1164           |
| 298                    | 721, 1298           | 443                    | 508, 720       | 593                    | 518, 884             | 748                    | 791            |
| 299                    | 449                 | 444                    | 378            | 595                    | 510                  | 749                    | 758, 1223      |
| 300                    | 76, 375             | 445                    | 1283           | 596                    | 861                  | 753 (P. C.)            | 979            |
| 303                    | 293                 | 447                    | 27             | 597                    | 544                  | 756                    | 795, 797       |
| 304                    | 87                  | 450                    | 203, 1171      | 599                    | 1159                 | 761                    | 406            |
| 305                    | 685                 | 452                    | 274, 1187      | 600                    | 554                  | 762                    | 208            |
| 307                    | 150                 | 453                    | 377            | 602                    | 559                  | 763                    | 407, 680       |
| 308                    | 31                  | 455                    | 449            | 603                    | 574                  | 767                    | 198            |
| 309                    | 639                 | 456                    | 285            | 605                    | 1041                 | 769                    | 730            |
| 312                    | 1106                | 457                    | 296            | 608                    | 546                  | 773                    | 30, 31         |
| 314                    | 1134                | 459                    | 1171           | 609                    | 1176                 | 775                    | 1162           |
| 318                    | 1114                | 460                    | 972            | 610                    | 1009                 | 777                    | 137            |
| 319                    | 87, 124             | 463                    | 1208           | 611                    | 135                  | 779                    | 830            |
| 321                    | 328, 331, 367       | 465                    | 734            | 614                    | 1179                 | 781                    | 1253           |
| 324                    | 257                 | 466                    | 905, 1186      | 617                    | 240                  | 783 (1)                | 123            |
| 325                    | 1013                | 470                    | 80             | 618                    | 4                    | 783 (2)                | 441            |
| 326                    | 392                 | 472                    | 232            | 619                    | 1194                 | 785                    | 481, 487       |
| 327                    | 1033                | 473                    | 97             | 620                    | 1228                 | 789                    | 580            |
| 330                    | 835                 | 474                    | 1150           | 621 (P. C.)            | 967, 974             | 792 (1)                | 1076           |
| 332                    | 316, 938            | 475 (1)                | 35             | 623                    | 765                  | 792 (2)                | 538            |
| 334                    | 220                 | 475 (2)                | 1221           | 628                    | 1301                 | 795 (1)                | 526            |
| 336                    | 665                 | 477                    | 682            | 629 (P. C.)            | 884                  | 795 (2)                | 578            |
| 339                    | 221                 | 478                    | 127            | 630                    | 919                  | 797                    | 601            |
| 341                    | 342                 | 480                    | 1204           | 631                    | 884                  | 798                    | 1075           |
| 343                    | 788                 | 481                    | 162            | 640                    | 8                    | 801                    | 624            |
| 345                    | 144                 | 484                    | 243, 279, 894  | 641                    | 846                  | 804                    | 1001           |
| 346                    | 211, 709, 1105      | 487                    | 229            | 643                    | 746                  | 806                    | 8, 675, 1198   |
| 350                    | 25                  | 488                    | 1298           | 645                    | 1153                 | 808                    | 1253           |
| 351                    | 737                 | 489                    | 758            | 646                    | 919, 978             | 811                    | 1168           |
| 353                    | 585, 606            | 491                    | 742            | 649                    | 449                  | 812                    | 834            |
| 359                    | 577                 | 495                    | 875            | 650                    | 365, 678, 1188, 1197 | 813                    | 371            |
| 360                    | 555, 660, 663, 1079 | 497                    | 663            | 653                    | 11                   | 814                    | 398            |
| 365                    | 486                 | 501                    | 523            | 654                    | 125, 672, 688        | 816                    | 1133           |
| 367                    | 550                 | 503 (1)                | 132            | 655                    | 1109                 | 817                    | 48, 187        |
| 368                    | 577                 | 503 (2)                | 1056           | 657                    | 576, 700             | 820                    | 963            |
| 369                    | 216, 624            | 504                    | 946            | 661                    | 1054                 | 822                    | 832, 895, 1170 |
| 370                    | 836                 | 505                    | 520            | 662                    | 538, 583             | 823                    | 1167           |
| 371                    | 224                 | 507                    | 481, 523       | 665                    | 1071                 | 825                    | 672, 862       |
| 374                    | 448                 | 509                    | 529            | 666                    | 288, 562             | 826                    | 841            |
| 376                    | 1233                | 511                    | 570            | 667                    | 557                  | 827                    | 1158           |
| 378                    | 156, 182, 701       | 512                    | 492            | 668                    | 477                  | 828                    | 801            |
| 381                    | 24, 216             | 514                    | 569            | 669                    | 524                  | 829                    | 599            |
| 382                    | 1293                | 516                    | 481            | 670                    | 521, 557             | 830                    | 970            |
| 383                    | 284                 | 519                    | 1125           | 673                    | 855                  | 831                    | 127, 637       |
| 391 (1)                | 768                 | 523                    | 506            | 681                    | 505                  | 833                    | 741, 779       |
| 391 (2)                | 673, 863            | 525                    | 575            | 685                    | 587, 591, 666        | 836                    | 1114           |
| 393                    | 1154                | 527                    | 483            | 691                    | 468                  | 837                    | 1282           |
| 395                    | 61                  | 529                    | 1302           | 692                    | 526                  | 840                    | 1234           |
| 400                    | 841                 | 530                    | 234, 340       | 693                    | 566                  | 841                    | 594            |
| 401                    | 216                 | 533                    | 744            | 694                    | 471                  | 843                    | 617, 764       |
| 402                    | 898                 | 543                    | 579            | 696                    | 515                  | 847                    | 929            |
| 405                    | 647                 | 556                    | 877            | 697                    | 591                  | 849                    | 214, 655, 687  |
| 408                    | 1113                | 557                    | 1226           | 698                    | 587                  | 855                    | 768            |

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| 860                    | 392                 | 1039                   | 235, 240, 958         | 135                    | 905                   | 315                    | 161            |
| 862                    | 291                 | 1054                   | 299                   | 136                    | 76, 81                | 316                    | 1165           |
| 863                    | 844                 |                        |                       | 137                    | 231                   | 318                    | 306            |
| 864                    | 605                 | 72 I. C.:—             |                       | 138                    | 83                    | 320                    | 1142           |
| 865                    | 475, 510            | 1                      | 58, 270               | 139                    | 1243                  | 321                    | 1221           |
| 871                    | 483                 | 2                      | 328                   | 140                    | 1111                  | 322                    | 760            |
| 877                    | 1078                | 4                      | 119                   | 141                    | 947                   | 324                    | 452            |
| 879                    | 469                 | 5                      | 909                   | 142                    | 765                   | 325                    | 318, 1100      |
| 881                    | 307, 381            | 6                      | 1032                  | 145                    | 593, 983              | 326                    | 214            |
| 885                    | 805                 | 8                      | 785                   | 148                    | 234                   | 327                    | 1143           |
| 887                    | 1205                | 13                     | 869                   | 149                    | 36                    | 328                    | 1204           |
| 896                    | 378, 1165           | 14                     | 166, 168              | 152                    | 968                   | 329                    | 918            |
| 897                    | 965                 | 22                     | 865                   | 154                    | 1120                  | 333                    | 1177           |
| 899                    | 401, 875, 898       | 25                     | 1174                  | 155                    | 150                   | 337                    | 511            |
| 902                    | 75, 93, 94          | 32                     | 492                   | 156                    | 261                   | 339                    | 572            |
| 911                    | 1, 233              | 33                     | 5, 1195               | 157                    | 845                   | 340                    | 504, 509       |
| 916                    | 901, 905, 1126      | 34                     | 1191                  | 158                    | 871                   | 345                    | 492            |
| 925                    | 98                  | 36                     | 989                   | 161                    | 1053                  | 348                    | 1080           |
| 929                    | 670, 714, 917, 1016 | 37                     | 78                    | 165                    | 1092                  | 349                    | 399            |
| 933                    | 764                 | 38                     | 615                   | 171                    | 482                   | 351                    | 573            |
| 937                    | 432                 | 40                     | 94                    | 172                    | 1081                  | 353                    | 853            |
| 940                    | 998, 1270           | 42                     | 1218                  | 173                    | 514                   | 355                    | 1047           |
| 942                    | 211                 | 45                     | 913                   | 175                    | 946                   | 356 (1)                | 1046           |
| 944                    | 650                 | 46                     | 883                   | 177                    | 901                   | 356 (2)                | 65             |
| 948                    | 349, 351            | 47                     | 987                   | 187                    | 265                   | 358                    | 947            |
| 957                    | 101, 811            | 48 (P. C.)             | 761                   | 189                    | 192, 1007             | 359                    | 557            |
| 959                    | 753                 | 55                     | 215, 813              | 193                    | 394                   | 360 (1)                | 1036, 1049     |
| 960                    | 1056                | 57                     | 984                   | 194                    | 246                   | 360 (2)                | 579            |
| 962                    | 617                 | 60                     | 1143                  | 200                    | 721                   | 361                    | 566            |
| 963                    | 938                 | 62                     | 630                   | 202                    | 730, 962              | 362                    | 567            |
| 965                    | 263                 | 63                     | 205, 253              | 205                    | 332                   | 364                    | 582            |
| 968                    | 274, 410, 1227      | 65                     | 532                   | 207                    | 168                   | 367                    | 471            |
| 971                    | 845                 | 67                     | 1056                  | 212                    | 1152                  | 368                    | 564            |
| 972                    | 262                 | 68                     | 469                   | 214                    | 668, 823              | 369                    | 556, 580       |
| 973                    | 1263                | 69 (1)                 | 500                   | 218                    | 828                   | 370                    | 584            |
| 974                    | 740                 | 69 (2)                 | 486                   | 220                    | 1149                  | 371                    | 527            |
| 975                    | 345                 | 70                     | 111                   | 221                    | 135                   | 372                    | 521, 522, 1083 |
| 976                    | 1282                | 71 (1)                 | 135, 541              | 224                    | 347                   | 375                    | 513            |
| 979 (1)                | 1141                | 72                     | 1071                  | 225                    | 960, 1142, 1146, 1147 | 381 (1)                | 1159           |
| 979 (2)                | 724, 1132           | 73                     | 403                   | 230                    | 40, 724, 725, 728     | 381 (2)                | 983            |
| 983                    | 1029                | 77                     | 481                   | 239                    | 381                   | 383                    | 508            |
| 984                    | 8, 69, 88, 668      | 78                     | 139                   | 242                    | 765                   | 385                    | 900            |
| 991 (1)                | 826, 1012           | 79 (1)                 | 508                   | 243                    | 408                   | 388                    | 868            |
| 991 (2)                | 236, 241            | 79 (2)                 | 469                   | 246                    | 1006                  | 389                    | 820            |
| 992                    | 34                  | 81                     | 747                   | 247                    | 1113                  | 390                    | 357            |
| 993                    | 1060                | 86 (1)                 | 1281                  | 249                    | 885                   | 391                    | 1268           |
| 995                    | 557                 | 86 (2)                 | 264, 908              | 250                    | 222                   | 392                    | 173            |
| 996                    | 1072                | 88                     | 1309                  | 256                    | 185, 228              | 394                    | 230, 241, 279  |
| 997                    | 508                 | 91                     | 165                   | 258                    | 612                   | 395                    | 225            |
| 998                    | 590                 | 92                     | 415                   | 260                    | 1125                  | 397 (1)                | 288            |
| 999                    | 142, 305, 485       | 95                     | 258                   | 263                    | 993, 1260             | 397 (2)                | 157            |
| 1006                   | 573                 | 96                     | 384                   | 266                    | 805, 1098             | 400                    | 1307           |
| 1009                   | 166                 | 98                     | 844, 1193, 1283, 1280 | 270                    | 430, 867              | 401 (1)                | 1100           |
| 1012                   | 312                 | 99                     | 977                   | 275                    | 939                   | 401 (2)                | 830            |
| 1013                   | 744                 | 103                    | 334, 1201             | 277                    | 1309                  | 403                    | 1158           |
| 1014                   | 60                  | 105                    | 1138                  | 278                    | 725                   | 404                    | 1001           |
| 1017                   | 34, 211             | 106                    | 400                   | 282                    | 790                   | 405 (1)                | 253            |
| 1018                   | 317                 | 107                    | 801                   | 284                    | 258                   | 405 (2)                | 1157           |
| 1022                   | 1185, 1279          | 108                    | 846                   | 286                    | 698, 1308             | 406                    | 802            |
| 1025                   | 1114                | 109                    | 1094                  | 290                    | 264, 903              | 408                    | 102            |
| 1026                   | 148                 | 118                    | 1199                  | 292                    | 1274                  | 409                    | 985            |
| 1027                   | 1228                | 121                    | 68                    | 297                    | 1219                  | 410                    | 218            |
| 1028                   | 986                 | 127                    | 220                   | 305                    | 594                   | 411                    | 985            |
| 1030                   | 9, 621, 680         | 128                    | 45                    | 307                    | 746                   | 422                    | 425            |
| 1032                   | 1291                | 130                    | 930                   | 308                    | 366                   | 424                    | 726, 989       |
| 1033                   | 924                 | 131                    | 214, 954              | 309                    | 727                   | 427                    | 998            |
| 1034                   | 1110                | 133                    | 1175                  | 311                    | 836                   | 428                    | 1176           |
| 1035                   | 1275                | 134 (1)                | 749                   | 312                    | 1208                  | 430                    | 168            |
| 1038                   | 831                 | 134 (2)                | 632                   | 314                    | 174                   | 431                    | 636            |

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| 433                    | 811, 1136            | 612                    | 1081               | 8, 5                   | 735                | 974                    | 565            |
| 436                    | 409                  | 613 (1)                | 551                | 820                    | 195                | 975                    | 504            |
| 438                    | 141, 812             | 613 (2)                | 950                | 8, 1                   | 1232               | 977                    | 624            |
| 440                    | 442, 897, 1173       | 615                    | 469                | 826                    | 948                | 978                    | 1252           |
| 445                    | 603                  | 616                    | 136                | 832                    | 692                | 979                    | 73, 714, 834   |
| 448                    | 598                  | 617                    | 49                 | 833                    | 980, 981           | 982                    | 863            |
| 449                    | 9, 7                 | 621                    | 489                | 8, 6                   | 290, 313           | 985                    | 212, 658, 699  |
| 452                    | 306, 1251            | 622                    | 518                | 838                    | 447, 942           | 987                    | 1257           |
| 454                    | 1192                 | 623                    | 527                | 839                    | 192                | 989                    | 9, 1010        |
| 456                    | 1191                 | 624                    | 658                | 842                    | 875                | 993                    | 177, 215, 1195 |
| 458                    | 1002                 | 625                    | 321                | 845                    | 592, 594, 606      | 996                    | 445, 1030      |
| 459                    | 699                  | 626                    | 782                | 855                    | 695                | 1000                   | 759            |
| 461                    | 705                  | 627                    | 714                | 857                    | 309                | 1003 (1)               | 268            |
| 464                    | 707                  | 629                    | 2, 6               | 860                    | 181                | 1003 (2)               | 122, 943       |
| 465                    | 173                  | 631                    | 72, 9              | 861                    | 301                | 1006                   | 776            |
| 467                    | 1144                 | 632                    | 610, 1170          | 862                    | 185, 188           | 1011                   | 444            |
| 470                    | 747                  | 634                    | 259                | 865                    | 302                | 1012                   | 836            |
| 472                    | 460                  | 635                    | 3                  | 868                    | 1213, 1220         | 1013                   | 89, 886        |
| 473                    | 153                  | 636                    | 107                | 873                    | 602                | 1016                   | 202            |
| 475                    | 345                  | 637                    | 343                | 874                    | 703                | 1019                   | 741            |
| 477                    | 189, 339             | 638                    | 1002               | 875                    | 865                | 1023                   | 1022           |
| 479                    | 331                  | 640                    | 74, 99             | 877                    | 54, 417, 733       | 1024                   | 15             |
| 480                    | 910, 1157, 1191      | 643                    | 621                | 879                    | 181, 244, 246, 706 | 1026                   | 1203           |
| 482                    | 280                  | 646                    | 938                | 881                    | 525                | 1031                   | 760            |
| 483                    | 255                  | 648                    | 644, 656           | 882                    | 573                | 1032                   | 412, 1191      |
| 484                    | 1111                 | 651                    | 275                | 883 (1)                | 1087               | 1034                   | 242            |
| 485                    | 406, 609             | 653                    | 417, 911           | 883 (2)                | 488                | 1035                   | 703            |
| 488                    | 1148                 | 655                    | 164                | 885                    | 525                | 1038                   | 644            |
| 491                    | 1303                 | 657                    | 633                | 887                    | 1023               | 1040                   | 910            |
| 492                    | 888                  | 659                    | 763                | 891                    | 538, 579           | 1041                   | 169            |
| 495                    | 353                  | 662                    | 72                 | 892                    | 557, 570           | 1044                   | 736            |
| 497                    | 665                  | 663                    | 81, 809            | 894                    | 66, 1070           | 1046                   | 783            |
| 507                    | 1125                 | 668                    | 251, 1098          | 897                    | 902, 918           | 1047                   | 851            |
| 508                    | 1092                 | 670 (1)                | 704                | 898                    | 716, 814, 1131     | 1049                   | 142, 346, 353  |
| 515                    | 1036                 | 670 (2)                | 1238               | 900 (1)                | 1149               | 1053                   | 755            |
| 513                    | 512                  | 671                    | 982                | 902                    | 237, 950           |                        |                |
| 517                    | 1079                 | 680                    | 655, 727, 772, 774 | 907                    | 319                | 73 I. C.               | 1158           |
| 519                    | 1048                 | 683                    | 954                | 909                    | 642                | 1                      | 835            |
| 520                    | 1042                 | 686                    | 1132, 1203         | 910                    | 269                | 2                      | 389            |
| 521                    | 856                  | 688                    | 234, 242           | 911                    | 1136               | 4                      | 90, 91         |
| 525                    | 527, 545             | 690                    | 715, 1207          | 912                    | 245, 939           | 5                      | 350            |
| 526                    | 1077                 | 692                    | 886                | 916 (1)                | 1153               | 8                      | 857            |
| 527                    | 586                  | 696                    | 683                | 916 (2)                | 462, 1028          | 10                     | 97             |
| 529                    | 699                  | 698                    | 55, 67, 70, 449    | 918                    | 223                | 12                     | 124            |
| 533                    | 1068, 1074           | 703                    | 949                | 919 (2)                | 434                | 13                     | 140, 844       |
| 536                    | 509                  | 705                    | 74, 1031           | 920                    | 171                | 15                     | 909            |
| 538                    | 1083                 | 709                    | 1204               | 924                    | 644                | 17                     | 828            |
| 541                    | 481                  | 714                    | 1179               | 925                    | 957                | 24                     | 750            |
| 544                    | 485                  | 719                    | 86                 | 927                    | 710                | 27                     | 1254           |
| 545                    | 706                  | 722                    | 99, 768            | 930                    | 977                | 30                     | 354            |
| 547                    | 243                  | 727                    | 1252               | 931                    | 693, 1264          | 32                     | 899, 1154      |
| 548                    | 692, 772             | 732                    | 873                | 938                    | 703, 942           | 33                     | 269            |
| 554                    | 692                  | 735                    | 416                | 941                    | 1265               | 34 (1)                 | 391            |
| 556                    | 613                  | 742                    | 776                | 945                    | 502                | 34 (2)                 | 1238           |
| 558                    | 311, 644, 1232, 1241 | 744                    | 961                | 948                    | 530                | 39 (1)                 | 47             |
| 563                    | 250                  | 745                    | 712                | 949                    | 1055               | 39 (2)                 | 236, 924       |
| 566 (P. C.)            | 390, 391             | 748                    | 651, 907, 1097     | 950                    | 514                | 41                     | 455            |
| 569                    | 360, 364             | 766                    | 262, 411           | 951                    | 494                | 43                     | 185            |
| 575                    | 69                   | 772                    | 439                | 953                    | 545                | 47                     | 1061           |
| 576                    | 635, 640             | 775                    | 600                | 954                    | 797                | 49                     | 138            |
| 582                    | 170, 325             | 777                    | 1009               | 955                    | 468                | 52                     | 477            |
| 586                    | 1217                 | 779                    | 1172               | 956                    | 478                | 53 (1)                 | 491            |
| 588                    | 218, 374             | 781                    | 88, 90, 918        | 957                    | 571                | 53 (2)                 | 531            |
| 591                    | 1165                 | 788                    | 324                | 958                    | 480                | 54                     | 501            |
| 592                    | 175                  | 789                    | 156, 715, 921      | 959                    | 560                | 55                     | 1036           |
| 593                    | 550, 566, 1051       | 794                    | 91                 | 961                    | 498, 581, 582, 661 | 61                     | 584, 663       |
| 599                    | 956                  | 795                    | 952                | 970                    | 590                | 62                     | 1229           |
| 609                    | 1130                 | 797                    | 874                | 971                    | 491, 495, 1098     | 65                     | 639, 642, 675  |
| 611                    | 589, 1041            | 798                    | 614                | 973                    | 549                | 66                     |                |



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| 71                     | 257        | 244 (1)                | 457            | 376                    | 332, 443, 981        | 521                    | 696, 1155        |
| 73                     | 281        | 244 (2)                | 726            | 379                    | 1074, 1139           | 523 (1)                | 723              |
| 74                     | 1142       | 246                    | 974            | 381                    | 1207                 | 523 (2)                | 479              |
| 77                     | 83         | 247                    | 238            | 387                    | 329, 933, 938        | 524                    | 1091             |
| 79                     | 597        | 251                    | 1106           | 391                    | 1099                 | 527                    | 1082             |
| 87                     | 1236       | 252                    | 767            | 402                    | 186, 707             | 528                    | 543              |
| 99                     | 1246, 1307 | 254                    | 109            | 405                    | 171                  | 529                    | 831              |
| 106                    | 700, 496   | 255                    | 719            | 407                    | 225                  | 531                    | 637              |
| 112                    | 480        | 257                    | 668            | 409                    | 344                  | 532                    | 804, 1125        |
| 113                    | 998, 1277  | 260                    | 498, 1073      | 412                    | 746                  | 536                    | 1108             |
| 120                    | 1243       | 261                    | 476            | 413                    | 1116                 | 537                    | 437              |
| 125 (1)                | 1221       | 262                    | 537, 654       | 416                    | 80, 622, 838         | 538                    | 238, 348         |
| 126                    | 139        | 265                    | 482            | 419                    | 186                  | 540                    | 669              |
| 127                    | 822, 868   | 266                    | 588            | 421                    | 408, 619             | 542                    | 625, 708, 778    |
| 129                    | 1140       | 268                    | 979            | 424                    | 204                  | 548                    | 1179             |
| 131                    | 12         | 269                    | 467, 560       | 425                    | 916                  | 558                    | 46               |
| 133                    | 240        | 271                    | 493            | 427                    | 1310                 | 559                    | 280              |
| 136                    | 372        | 273 (P. C)             | 1281           | 428                    | 351, 658, 660, 968   | 561                    | 495, 631         |
| 137                    | 208, 691   | 275                    | 982, 1201      | 436                    | 4                    | 569                    | 498              |
| 139                    | 882        | 279                    | 745            | 440                    | 610, 1179, 1180      | 576                    | 503              |
| 142                    | 138        | 281                    | 777            | 441                    | 607                  | 577                    | 605              |
| 143                    | 443, 004   | 284                    | 169            | 442 (1)                | 832, 1102            | 583                    | 598              |
| 147                    | 1037       | 291                    | 837            | 442 (2)                | 1164                 | 584 (1)                | 23, 32, 1244     |
| 153                    | 492, 1293  | 292                    | 1162           | 443                    | 180                  | 590                    | 970              |
| 155                    | 5          | 294                    | 360            | 444                    | 808, 1164            | 591                    | 283, 377         |
| 157                    | 129        | 295                    | 1113           | 446                    | 1739                 | 594                    | 852, 1105        |
| 158                    | 1047       | 296                    | 1194           | 447 (1)                | 878                  | 598                    | 304              |
| 161                    | 471        | 299                    | 890            | 447 (2)                | 1170                 | 600                    | 362              |
| 163                    | 543        | 304                    | 634            | 450                    | 694                  | 602                    | 244              |
| 173                    | 490        | 306                    | 390            | 451                    | 705                  | 604                    | 331              |
| 175                    | 129        | 307                    | 178            | 452                    | 601, 1211            | 606                    | 1174             |
| 177                    | 338, 385   | 308                    | 604            | 453                    | 388                  | 607                    | 740              |
| 178                    | 645        | 309                    | 420            | 454 (1)                | 316                  | 609                    | 40, 606          |
| 182                    | 1200       | 310                    | 188            | 454 (2)                | 1311                 | 613                    | 975              |
| 187                    | 935        | 311                    | 354            | 455                    | 1105                 | 616                    | 41               |
| 188                    | 1189       | 312                    | 810            | 456                    | 1184                 | 619                    | 197, 291, 332    |
| 193                    | 75         | 317                    | 314            | 457                    | 167                  | 629                    | 818, 951         |
| 196                    | 191        | 318                    | 1166           | 458                    | 415, 418             | 629                    | 209, 593, 1310   |
| 200                    | 1163       | 319                    | 820            | 459                    | 40, 51               | 642 (1)                | 1188             |
| 202                    | 392        | 321                    | 472            | 460                    | 34, 149              | 642 (2)                | 1172, 1175, 1180 |
| 204                    | 726, 728   | 322                    | 477            | 461                    | 941                  | 645                    | 198              |
| 205                    | 171, 410   | 323                    | 501            | 462                    | 22, 1187             | 646                    | 293, 1288        |
| 206                    | 1284       | 328 (1)                | 547            | 464                    | 229                  | 648 (1)                | 247              |
| 209                    | 1168       | 328 (2)                | 689            | 465 (1)                | 1227                 | 648 (2)                | 780              |
| 211 (1)                | 944        | 329                    | 854            | 465 (2)                | 1245                 | 650                    | 378              |
| 211 (2)                | 398        | 331                    | 1083           | 466                    | 752                  | 651                    | 1013             |
| 212                    | 23         | 334 (1)                | 563            | 468                    | 1212                 | 652                    | 419, 1227        |
| 213                    | 159        | 334 (2)                | 544            | 470                    | 40                   | 654                    | 672              |
| 214                    | 696        | 335                    | 335, 789, 1081 | 474                    | 368                  | 655                    | 373              |
| 216                    | 597, 605   | 336                    | 1229           | 477                    | 419                  | 656                    | 738              |
| 217 (1)                | 1152       | 337                    | 474, 554       | 479                    | 194                  | 658                    | 601              |
| 217 (2)                | 221        | 338                    | 1057           | 482                    | 66, 73, 84, 85, 1237 | 660                    | 286              |
| 219                    | 171        | 339                    | 491, 698       | 483                    | 1304                 | 661                    | 993, 995         |
| 220                    | 598        | 341                    | 508            | 491                    | 983, 1208, 1287      | 665                    | 5                |
| 221                    | 222        | 343                    | 1039           | 494                    | 253                  | 666                    | 1190             |
| 222                    | 177        | 352                    | 475            | 495 (1)                | 33                   | 668                    | 417              |
| 223                    | 691        | 353                    | 441            | 495 (2)                | 176                  | 670                    | 987              |
| 227                    | 358        | 354                    | 241            | 497                    | 497                  | 671                    | 189, 932         |
| 228                    | 446        | 357                    | 599, 928, 1161 | 503                    | 479                  | 673                    | 1169             |
| 230                    | 280, 385   | 359                    | 158, 402, 830  | 504                    | 478, 523             | 675                    | 607              |
| 231                    | 1218       | 364                    | 889            | 506                    | 497, 697             | 679                    | 249, 255, 1107   |
| 232                    | 208        | 366                    | 1133           | 508                    | 1086                 | 682                    | 421              |
| 233                    | 937        | 367                    | 323            | 510                    | 555, 568, 1073, 1074 | 687                    | 1029             |
| 235                    | 769, 891   | 369                    | 773            | 513                    | 654, 1074            | 688                    | 1021             |
| 238                    | 1021       | 370                    | 1168           | 515                    | 475                  | 689                    | 1125             |
| 239                    | 733        | 372                    | 650, 1118      | 517                    | 1047                 | 690                    | 562              |
| 240                    | 196        | 373                    | 231, 384       | 518                    | 1156                 | 691                    | 1055             |
| 241                    | 303        | 374                    | 1135           | 519                    | 486                  | 693                    | 540              |
| 242                    | 1305       | 375                    | 1176           | 520                    | 521                  | 694                    | 1097             |

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| 702                    | 572                     | 881                    | 003                  | 1012                   | 27               | 73                     | 1041          |
| 705                    | 156, 804                | 882                    | 1276                 | 1013                   | 429, 1106, 1104, | 74                     | 500           |
| 706                    | 1105                    | 885                    | 443                  | 1016                   | 1217             | 75                     | 1054          |
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| 716                    | 503                     | 892                    | 267                  | 1020                   | 704              | 79                     | 490           |
| 718                    | 1230                    | 893                    | 002                  | 1023                   | 1151             | 81                     | 773, 774      |
| 719                    | 1200                    | 894                    | 771                  | 1024                   | 728              | 82                     | 1197          |
| 721                    | 292, 559                | 895                    | 970                  | 1024                   | 748, 750         | 86                     | 286, 366      |
| 725                    | 1101, 1102              | 896                    | 970, 974             | 1027                   | 274              | 87                     | 308           |
| 727                    | 206, 002                | 897                    | 349                  | 1029                   | 972              | 88 (1)                 | 461           |
| 733                    | 955                     | 898                    | 592, 606             | 1030 (1)               | 943              | 88 (2)                 | 817, 829      |
| 738                    | 604                     | 900 (2)                | 285                  | 10 0 (2)               | 13               | 90                     | 718, 1290     |
| 741                    | 659                     | 902                    | 1200                 | 1032                   | 420              | 93                     | 457, 844      |
| 748                    | 4, 272, 1029            | 903 (1)                | 892                  | 1033                   | 1178             | 95                     | 1270          |
| 755                    | 241                     | 903 (2)                | 145, 817, 1015, 1029 | 1035                   | 846              | 100                    | 121, 204      |
| 756                    | 209                     | 909                    | 361                  | 1037                   | 1136, 1139       | 102                    | 239, 317, 998 |
| 758                    | 1110, 1164              | 910                    | 872                  | 1039                   | 1257             | 104                    | 121           |
| 759                    | 596                     | 911                    | 1166                 | 1040                   | 594              | 107                    | 408           |
| 760                    | 817, 1160               | 912                    | 162                  | 1041                   | 245              | 108                    | 700           |
| 764                    | 1278                    | 915                    | 375                  | 1042                   | 909              | 110                    | 252           |
| 766                    | 179, 358                | 916                    | 904                  | 1044                   | 118              | 112                    | 238           |
| 767                    | 455                     | 913                    | 340                  | 1050                   | 251              | 115                    | 201           |
| 768                    | 1028                    | 924                    | 1157                 | 1052                   | 767              | 120                    | 717, 875      |
| 769                    | 1068                    | 926                    | 954                  | 1053                   | 1275             | 122                    | 765           |
| 770                    | 517, 534                | 927                    | 1103                 | 1054                   | 864              | 124                    | 1107          |
| 773 (1)                | 571, 871                | 928                    | 191, 1160            | 1055                   | 1150             | 128                    | 608           |
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| 775                    | 549                     | 931                    | 548                  | 305, 1160              | 129              | 133                    | 47            |
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| 779                    | 506, 509                | 934                    | 649                  | 203, 336               | 394              | 139                    | 630           |
| 780                    | 1085                    | 935                    | 1058, 1057           | 282                    | 140              | 239                    | 239           |
| 782                    | 508                     | 936                    | 966, 107             | 821                    | 42               | 975                    | 975           |
| 784                    | 591                     | 937                    | 569                  | 116                    | 144              | 301, 357               | 301, 357      |
| 785                    | 1063                    | 938                    | 581                  | 713, 817               | 145              | 1055                   | 1055          |
| 786                    | 603, 604                | 939                    | 547                  | 780, 1181              | 146              | 326                    | 326           |
| 788                    | 37, 461, 873            | 940                    | 525                  | 385                    | 149              | 179, 702               | 179, 702      |
| 791                    | 845                     | 941                    | 526                  | 445                    | 150              | 671                    | 671           |
| 792                    | 178                     | 943                    | 526                  | 332, 385               | 151              | 350                    | 350           |
| 794                    | 189                     | 944                    | 564                  | 122                    | 153              | 928, 847               | 928, 847      |
| 795                    | 210                     | 945                    | 1207                 | 754                    | 154              | 682                    | 682           |
| 797                    | 1163                    | 946                    | 348                  | 820                    | 155              | 166                    | 166           |
| 799                    | 1226                    | 947                    | 29, 816              | 635                    | 161              | 7                      | 7             |
| 800                    | 205                     | 948                    | 719                  | 461                    | 162              | 934                    | 934           |
| 801                    | 482, 558, 1053          | 950                    | 352                  | 794                    | 164              | 907                    | 907           |
| 802                    | 478                     | 952                    | 885                  | 1300                   | 166              | 1210                   | 1210          |
| 805 (1)                | 1087                    | 953                    | 34                   | 11, 638                | 174              | 299, 942               | 299, 942      |
| 805 (2)                | 542, 1095               | 954                    | 724                  | 170, 98                | 177              | 450, 1230              | 450, 1230     |
| 807                    | 588                     | 956 (1)                | 1154                 | 130                    | 178              | 671, 123, 673          | 671, 123, 673 |
| 808                    | 565                     | 956 (2)                | 178, 217, 235        | 199, 676, 717          | 182              | 2                      | 2             |
| 812                    | 549                     | 958                    | 190                  | 871                    | 186              | 179                    | 179           |
| 813                    | 1104                    | 959                    | 138, 961             | 936                    | 187              | 397                    | 397           |
| 814                    | 483                     | 963                    | 657, 497, 696        | 1238                   | 193              | 9, 447                 | 9, 447        |
| 815                    | 1080                    | 972                    | 130                  | 999                    | 194              | 194                    | 194           |
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| 820                    | 218                     | 977                    | 964                  | 215                    | 197              | 26                     | 26            |
| 821                    | 282                     | 978                    | 900                  | 994                    | 198              | 457                    | 457           |
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| 855                    | 1106, 1164              | 983                    | 686, 968             | 337                    | 206              | 1115                   | 1115          |
| 860                    | 175                     | 985 (1)                | 1267                 | 844                    | 209              | 800                    | 800           |
| 862                    | 264                     | 985 (2)                | 1120                 | 778                    | 214              | 223, 391               | 223, 391      |
| 863                    | 1025                    | 986                    | 1174, 1177           | 1018                   | 218              | 670                    | 670           |
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| 250                    | 635                 | 391                    | 710                    | 577                    | 165, 216, 334   | 765                    | 761           |
| 251                    | 12                  | 392                    | 380                    | 582                    | 1095, 1189      | 769                    | 98            |
| 253                    | 572, 1021           | 396                    | 430                    | 583                    | 160             | 770                    | 1196          |
| 256                    | 461                 | 401                    | 394, 395               | 584 (P C)              | 955, 1131       | 777                    | 888           |
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| 259                    | 505                 | 411                    | 152, 250, 807          | 596                    | 226             | 784                    | 1110          |
| 260                    | 1056                | 416                    | 390, 428, 901, 911     | 597                    | 1136            | 785                    | 877           |
| 261                    | 135                 | 420                    | 1297                   | 600                    | 400             | 792                    | 269           |
| 262                    | 544                 | 421                    | 1174                   | 601                    | 1155            | 793                    | 1103, 1202    |
| 264                    | 662                 | 423                    | 1162                   | 603                    | 991             | 802                    | 1146, 1147    |
| 267                    | 534, 1038, 1044     | 434                    | 585                    | 608                    | 944             | 804                    | 295, 777      |
| 270                    | 553                 | 444                    | 543, 547               | 609                    | 339             | 811                    | 212           |
| 271                    | 1082                | 445                    | 237, 340, 677          | 612                    | 784             | 813                    | 136           |
| 273                    | 115                 | 447                    | 483                    | 614                    | 1076            | 814                    | 1178          |
| 277                    | 996                 | 448                    | 468, 545               | 616                    | 41, 819         | 815                    | 793           |
| 278                    | 617                 | 449                    | 607, 1303              | 619                    | 459             | 816                    | 940           |
| 279                    | 881, 939            | 451                    | 598, 870               | 621                    | 1030            | 817                    | 41            |
| 281                    | 895                 | 454                    | 72, 84                 | 626                    | 194             | 818                    | 741           |
| 282                    | 11, 895             | 455                    | 932                    | 630                    | 877, 1132, 1232 | 820                    | 352, 460      |
| 283                    | 1215                | 459                    | 1295                   | 633                    | 600             | 821                    | 342           |
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| 287                    | 1212                | 466                    | 270, 413               | 644                    | 596             | 825                    | 154, 616      |
| 292                    | 110                 | 469                    | 79, 647                | 647                    | 16              | 827                    | 383           |
| 294                    | 621                 | 474                    | 62, 238                | 649                    | 43              | 828                    | 1286          |
| 295                    | 624                 | 476                    | 8, 891                 | 653                    | 607, 622        | 830                    | 926           |
| 297                    | 1303                | 477                    | 924                    | 656                    | 155, 685        | 831                    | 905           |
| 298                    | 790                 | 479                    | 1224                   | 660 (P C)              | 122, 991, 933   | 834                    | 395           |
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| 300                    | 1180                | 481                    | 638                    | 676 (2)                | 97              | 836                    | 217           |
| 302                    | 888                 | 482                    | 209                    | 679                    | 941             | 838                    | 303, 313, 318 |
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| 309                    | 341, 989, 992, 1224 | 486                    | 366, 878               | 684                    | 1269            | 842                    | 255           |
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| 3 6                    | 409                 | 490                    | 1298                   | 687                    | 300             | 845                    | 285, 1101     |
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| 320                    | 1260                | 495                    | 774                    | 689                    | 684             | 849                    | 480           |
| 321                    | 1292                | 497                    | 377                    | 692                    | 1007            | 855                    | 515, 562      |
| 322                    | 1109                | 498                    | 759                    | 693                    | 290             | 856                    | 1088          |
| 324                    | 445                 | 499                    | 1131, 124              | 695                    | 412, 740        | 857                    | 472           |
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| 330                    | 365                 | 502                    | 23                     | 703 (2)                | 642, 829        | 860                    | 667           |
| 331                    | 1093                | 503                    | 1110                   | 705                    | 584             | 861                    | 476           |
| 335                    | 237                 | 513                    | 157                    | 708                    | 570             | 862                    | 1087          |
| 339                    | 619, 1107           | 517                    | 412, 975, 1102         | 710                    | 561             | 863                    | 528           |
| 340                    | 915, 1023           | 528                    | 388                    | 712                    | 1060            | 865                    | 786           |
| 343                    | 966                 | 529                    | 661                    | 713                    | 102, 505, 558   | 867                    | 422, 702      |
| 344                    | 236, 347            | 533                    | 1039                   | 715 (1)                | 872             | 869                    | 6, 766, 787   |
| 345                    | 990                 | 534                    | 1088                   | 715 (2)                | 515             | 873                    | 184           |
| 346                    | 411, 756            | 536                    | 474, 502               | 716                    | 585             | 877                    | 61            |
| 349                    | 34                  | 539                    | 477                    | 717                    | 1071            | 879                    | 923           |
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| 353 (2)                | 750, 751, 1113      | 546                    | 309                    | 745                    | 294             | 896                    | 723, 742      |
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| 919                    | 1124             | 684                  | 78      |                    | 510, 863            | 203                | 557           |
| 922                    | 642, 1102        | 685                  | 80      |                    | 494                 | 204                | 477           |
| 923                    | 440              | 687                  | 81      |                    | 856, 1033           | 205                | 524           |
| 924                    | 1011             | 688 (I)              | 84      |                    | 530, 547, 575       | 206                | 521, 557      |
| 925                    | 91               | 689                  | 85      |                    | 492                 | 209                | 855           |
| 927                    | 188              | 691                  | 86      |                    | 518                 | 217                | 505           |
| 929                    | 335              | 694                  | 87      |                    | 770, 1090           | 220                | 1191          |
| 931                    | 755              | 697                  | 88      |                    | 1052                | 221                | 587, 591, 666 |
| 933                    | 120              | 699                  | 89      |                    | 551                 | 225                | 684           |
| 938                    | 136, 1150        | 700                  | 91      |                    | 581                 | 227                | 468           |
| 939 (1)                | 679              | 703                  | 94      |                    | 510                 | 228                | 526           |
| 939 (2)                | 841              | 705                  | 97      |                    | 483 487, 713        | 229                | 566           |
| 943                    | 351              | 709                  | 100     |                    | 490                 | 230                | 471           |
| 944                    | 948              | 710                  | 104     |                    | 1074                | 232                | 515           |
| 945                    | 540              | 711                  | 106     |                    | 1064                | 233                | 591           |
| 947                    | 591              | 712                  | 108     |                    | 483                 | 234                | 587           |
| 949                    | 464, 1091        | 714                  | 110     |                    | 961                 | 235                | 484           |
| 950                    | 532, 533         | 716                  | 111     |                    | 577                 | 236                | 1056          |
| 951                    | 422              | 717                  | 113     |                    | 500                 | 238                | 569           |
| 952                    | 984              | 719                  | 114     |                    | 1040                | 239                | 856           |
| 954                    | 1045             | 720                  | 115     |                    | 553                 | 240                | 560           |
| 957                    | 514              | 721                  | 116     |                    | 465, 512            | 241                | 481, 487      |
| 958                    | 1015             | 723                  | 118 (1) |                    | 558                 | 245                | 580           |
| 959                    | 545              | 724                  | 118 (2) |                    | 557                 | 248 (1)            | 1076          |
| 961                    | 84, 160          | 726                  | 119     |                    | 1080                | 248 (2)            | 538           |
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# THE "THE YEARLY DIGEST" OF I—INDIAN DECISIONS.

## ABADI.

### ABADI—*House in—If can be sold when leaving.*

The owners of houses constructed in *abadi* cannot on leaving the village sell their houses and the right of residence therein preparatory to their leaving. The rights of such person in Oudh is the same as in U P, as set out in 20 All 248. (*Kendall, A. J. C.*) PARAG DIN *v.* SHEO MANGAL.

9 O, & A. L. R. 309

### ABATEMENT—*See* C. P. CODE, O 22; Rr. 4 and 6.

**ACCOMPLICE** — Evidence of—Corroboration—Difference between one to whom pardon tendered and one against whom prosecution withdrawn—Dacoity case *See* CR. P. C, S 494.

73 I. C. 808.

### ACCOUNTS—*Re opening of—When allowed.*

Where accounts are impeached on the ground of fraud, two or three instances of particular items, which can be taken as false and fraudulent, must be brought to the notice of the Court before it can be called upon to order the accounts to be re-opened from the first. But before the defendant could ask the Court to re-open the account, he is bound to allege fraud, (*Macleod, C. J. and Coyajee, J.*) SANKAL CHAND *v.* CHIMANLAL.

70 I. C. 839 : 1923 Bom. 16 (1).

### ———*Settled—Re-opening of—Mistake.*

A person is always entitled to prove, if he can that there was a mistake in the accounts and that he signed them as correct by mistake. On such mistake being proved the account will be re-opened. (*Batten, J. C.*) BHOJRAJ *v.* SHANKER NATH.

71 I. C. 45 (2).

### ———*Suit for—Omission by plaintiff to produce accounts—Effect of.*

In a suit by a manager or agent against his employer for settlement of accounts, the plaintiff must produce all accounts and documents admitted or proved to be with him. On his refusal to do so, his suit is liable to be dismissed. (*Shadi Lal, C. J. and Wilberforce, J.*) MOHAN LAL *v.* NORTH WESTERN RAILWAY CO-OPERATIVE STORES ASSN., LTD.

5 Lah. L. J. 19.

### ———*Suit for—Procedure—Directions to produce accounts.*

## ADMIRALTY COURTS ACT.

In all cases where an account is claimed it is desirable that before ordering an account to be taken, the question of principle involving the measure of liability of the defendant, should always be decided and it is permissible to the Court, to vary or modify the directions already given if it is satisfied that some mistake has been made. (*Miller, C. J. and Foster, J.*) HARIHAR PRASAD SINGH *v.* KESHO PRASAD SINGH.

71 I. C. 911.

### ACCRETION—*See* ALLUVION AND DILUVIAN.

### ACQUIESCENCE—*See* EVIDENCE ACT, S. 115.

**ADMINISTRATION**—Account—Suit against administrator as heir. *See* (1922) DIG. COL. 3. JAMASJI *v.* JAMSETJI.

70 I. C. 754.

### ———*Decree on mortgage—When realisable.*

The mortgagee from one of the heirs of the deceased obtained a decree on his mortgage against his mortgagor's share in the estate after the debts had been paid off. *Held*, he cannot apply in execution of his decree till the administration is over and the debts have been paid off. (*Miller, C. J. and Kulkarni Sahay, JJ.*) FIRM OF SHYAM LAL GOKUL CHAND *v.* JAMIL AHMAD

74 I. C. 487

———*Jurisdiction—Release of a share. See* (1922) DIG. COL. 1071. MT. DULHIN SONA KOER *v.* SAYYID SHAH MAHOMED HAQUE.

I Pat. 667 : 4 Pat. L. T. 209 : 69 I. C. 684.

———*Suit for—Filing within 6 months from grant of probate—Maintainability. See* (1922) DIG. COL. 3. J. N. GHOSE *v.* B. B. DAS.

70 I. C. 638.

**ADMINISTRATOR GENERAL'S ACT, S. 52—**Administration commenced before Act of 1913—Distribution of assets after the Act—Right of Administrator General to commission. *See* (1922) DIG. COL. 3. THE ADMINISTRATOR GENERAL, MADRAS *v.* RAMIAH,

74 I. C. 182,

**ADMIRALTY COURTS ACT (1861), Ss. 5 and 35—**(Act of 1840), S 6—*Interpretation Act* 1889, S. 18 (2)—*Claim for necessities supplied to ship—Suit in rem and in personam—Jurisdiction.*

## ADMIRALTY JURISDICTION.

Claim for necessities can be enforced in a Colonial Court of Admiralty by a suit *in rem*, and such a suit can presumably be instituted in any Admiralty Court within whose jurisdiction the ship happens to be at the time when the suit is instituted. Before there can be an action *In rem* there must be a personal liability on the part of the owner. Though necessities supplied to a ship are *prima facie* presumed to have been supplied on the credit of the ship, this *prima facie* presumption may be rebutted by evidence of facts going to show that the person who has supplied or paid for the necessities looked for payment to the person at whose instance he furnished the supplies or advanced monies, and not to the owner of the ship. Under the English Admiralty Law (which is the law applicable to such a case) a party who supplied necessities to a foreign ship acquires a lien on the ship for the amount disbursed. *The Magleff* (1921) P. 236; *Fong Tai v. Buch Heister*. (1908) A. C. 458, *The Heinrich Bjorn* 11 A. C. 276 Ref. (*Heist and Play Oung, JJ*) *HEIWA MARU v. BIRD AND CO* 1 R. 78 : 1923 Rang. 163.

ADMIRALTY JURISDICTION — *Bombay High Court—Service on ship—Writ of summons—Warrant of arrest*

It is not essential under the Admiralty Rules to issue a writ of summons, in addition to issuing a warrant for arrest. Not that a writ can never be issued in an Admiralty suit, but it is unnecessary if a warrant of arrest is issued' (*Maiten, J.*) *FREEMAN v. SS. CALANDA*. 1923 Bom. 51.

ADMISSION—Reliance on—Scope of. See (1922) DIG. COL. 4. *MAUNG SHWE MYIN v. MA NAING* 70 I. C. 911 : 1923 Rang. 24.

## ADVERSE POSSESSION—Acquisition of title—Interruption of adverse possession—What constitutes.

Where a person has acquired title to certain property by adverse possession he is entitled to eject any person seeking to retain possession of it against his will. The mere fact that a person against whom prescription is running comes and stays as a guest now and then with the person in adverse possession will not constitute an interruption of the adverse possession (*Coutts Trotter and Ramsay, JJ.*) *AMMAKANNUAMMAL v. NARA YANASWAMI MUDALIAR*. 72 I. C. 635 : 17 L. W. 629 : 1923 Mad. 633

## —Acts necessary—Vacant site.

Where land consists of a vacant site desultory acts of possession such as storing cow dung cakes and tying cattle are insufficient to constitute adverse possession. (*William and Harrison, JJ.*) *WAZIRI MAL v. GANGA RAM*. 69 I. C. 573

## —Acts necessary to constitute — Tying cattle.

A place for the tying of cattle is one of the necessary adjuncts of an agricultural occupation and residence in the village. The user of land for tying cattle and maintaining cattle troughs is not a temporary user and gives the right to occupy the land, if continued for a sufficiently long time. 16 B. 338 dist. (*Kanhaya Lal, J.*) *KALAPAT DUBEY v. RAM RAJ*. L. R. 4 A. 378.

## ADVERSE POSSESSION

—*Animus possidendi*—Adopted son in possession—Invalid adoption—Effect of.

The statute of joint ownership with rights of survivorship cannot be acquired by prescription. (*Ayling and Odgers, JJ.*) *RAJAMBAL AMMAL v. SHANMUGA MUDALIAR* 70 I. C. 653 : 1923 Mad. 11.

## —Burden of proof. See LIM. ACT. ART. 142. 1923 All. 565.

## —Claim petition—Rejection of—Effect. See C. P. CODE, O. 21, RR. 101, 103. (1923) M. W. N. 633.

## —Co-heirs—Possession of one on behalf of all.

Where there are co-heirs possession of one heir is on behalf of all and not adverse to the others (*Fremantle, S. M.*) *MAHOMED ZAHID ALI v. MAHOMED HUSAIN*. L. R. 4 A. 211 (Rev.).

## —Common land—Shamilat—Occupation by one tenant.

An occupancy tenant who occupies a portion of the shamilat land with the consent or acquiescence of the proprietors for agricultural purposes cannot be disturbed in his possession so long as he remains a tenant in the village and uses the site for the purpose for which it was given, but if he diverts the site to other purposes as for instance to build upon, and disclaiming the title of the proprietors sets up an adverse title in himself, he forfeits his rights of user and is liable to ejectment at the instance of the proprietors. Where there is no overt act as for instance by the erection of a building, the possession of the occupant is not adverse to the proprietors. (*Harrison, J.*) *BHAG SINGH v. KUSHAL SINGH*. 71 I. C. 618.

## —Co-mortgagors — Redemption by one See. LIM. ACT. ARTS. 148 &amp; 144 1923 P. 98.

## —Co-owners—Nature of at inception—Receiver—Appointment of—Effect.

The possession of a co-owner is not ordinarily adverse to the other co-owners. But where a person originally entered not as a co-owner but asserting a hostile title and then became a co-owner and exercised his possession to the exclusion of the other co-owners, his possession continues to be adverse. The appointment of a receiver does not stop limitation running. (*Chatterjee and Pant, JJ.*) *PANKAJ MOHAN BAL v. BIPIN BEHARY CHAKLADAR*. 38 C. L. J. 220.

## —Co-owners—Ouster—Exclusive possession See 72 I. C. 680 : 1923 Cal. 18

—Co-owners—Sale by one of specific portion. See (1922) DIG. COL. 6 *ANWAR v. KISHEN SINGH*. 71 I. C. 171.

## —Co-sharers.

The possession of one co-sharer cannot become adverse to that of other co-sharers except where one party asserts an exclusive title as against others, (*Pisbon, C.*) *GHULAM HAIDAR KHAN v. ALI KHAN*. 73 I. C. 748.

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— Co-sharers—Adnamaliks and Alamaliks—Non-payment of dues—Effect of. *See* LANDLORD AND TENANT *LEKHU RAM v. MT. RAMZAN*.  
5 Lah. L. J. 198 : 19.3 Lah. 122.

— Co-sharers—Exclusive possession—Ouster. *See* (1922) DIG. COL. 7 CHAITANYA KRISHNA MANDAL *v.* SANDHYAMANI DAS.

27 C. W. N. 624.

— Co-sharers—Long silence and inaction—Effect of.

The mere silence and inaction of one of the co-sharers coupled with the uninterrupted enjoyment of the common property by the other co-sharers does not constitute an adverse possession on the part of the latter or an abandonment of possession by the former. (*Leslie Jones and Dundas, JJ.*) *MANGAL SINGH v. MAKHAN SINGH*.  
5 Lah. L. J. 17.

— Co-sharer—Possession by some of them—Mortgage—Redemption—Effect of.

The question of adverse possession is a mixed question of law and fact. As between co-sharers unless there was some act to the knowledge of the plaintiffs by which their title was denied or repudiated, the mere fact of the plaintiffs not being in actual possession would not amount to ouster such as would extinguish their right. Similarly the fact that some of the co-sharers mortgage the property and give possession thereof to the mortgagee would not make the possession of the mortgagee adverse to the other co-sharer. (*Mears, C. J. and Banerji, J.*) *HAFIZ ABDULLAH v. ALLI*.  
21 A. L. J. 204 :  
71 I. C. 640. L. R. 4 A. 139. 1923 A. 291 (1).

— Co-sharers—Shamilat land—Partition.

Where under a partition entered into by co-sharers, the shamilat land was divided and it was agreed that the lands should remain joint till Kharif 1905, the fact that some took possession of parts even before will not make it adverse. (*Le Rossignol and Harrison, JJ.*) *HADAYAT KHAN v. SHAHAMAND*.  
73 I. C. 665.

— Co-sharers—Stranger in possession on behalf of co-sharer—Effect of.

Where two sisters succeeded as co-heirs to certain properties of their deceased father and the husband of one sister was in possession and management of the land for over 40 years after which the other sister (plaintiff) sued for a declaration of her title to  $\frac{1}{2}$  of the properties: *Held* that the fact that the husband of one of the sisters was looking after the land would not make his possession adverse unless it was found that he was in possession of the land asserting his own right and not as a manager of his wife's property. If he was in possession openly asserting his own right and not that of his wife for a period of 12 years in such a manner as to amount to what is called notorious exclusion, then the plaintiffs' case would fail. But if he merely possessed the land without any such assertion of title in himself and the facts were such that the plaintiff could not be expected to know that he was not in possession on behalf of the plaintiff's sister then the plaintiff's suit would not be barred. (*Newbould, J.*) *JOYTUN BIBI v. SOLIMUDDIN CHOWKIDAR*.  
72 I. C. 33.

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— Co-sharers—Withholding of share of collections—Effect of.

If there is joint collection of rents at the time when any failure to deliver to the plaintiffs their share of the rent can hardly be held to amount to assertion of adverse title or to dispossession until it is shown that the plaintiff's title was definitely denied (*Coutts and Das, JJ.*) *KULDIP SINGH v. RAM SEWAK SINGH*.  
1923 P. 183.

— Easement—Permanent tenancy—Prescription by one tenant against another.

In India, unlike in England a tenant with permanent rights can acquire an easement by prescription against another tenant having the same rights. The incidents of a permanent tenancy in his country are different from the incidents of a tenant for years as they obtain in England. 19 C. W. N. 1211 followed. (*C. C. Ghose and B. B. Ghose, JJ.*) *KALIPADA BOSE v. FANI BHUSAN ROY*.  
70 I. C. 173.

— Easement right—User. *See* (1921) DIG. COL. 6 KANNIAH SIVANANJIAH *v.* SITHAY GOUNDAR.  
70 I. C. 367.

— Essentials of waste land.

Where the plot in suit was waste land which was of no immediate use to its owner the mere fact that the tenants have been enclosing it and tying their cattle upon it would not constitute adverse possession so as to deprive the owner of his ownership. Such temporary user which might be unnoticed or permitted would not amount to adverse possession. (*Gokul Prasad, J.*) *LAKHU v. LAL SINGH*.  
71 I. C. 265. (1923) A. 399.

— Exclusion of period—Burden of proving. *See* BURDEN OF PROOF. L. R. 4 A. 185 (Rev.).

— Execution of decree—Formal delivery—Judgment debtor in actual possession—Limitation. *See* C. P. CODE, O. 21 RR. 35 AND 95.

71 I. C. 885.

— Formal possession with another—Effect.

The fact that formal possession was given by decree against a stranger does not affect the position of the adverse possessor. (*Abdul Raouf, J.*) *MAHOMMED RAMZAN v. THE MUNICIPAL COMMITTEE, ALIPUR DT.*  
1923 Lah. 534.

— Gramanatham—Rights in—User by villagers—Effect of.

Natham Putamboke in a village vests in the government and the latter can grant portions for building purposes. The fact that the villagers have been using portions as a threshing floor or for storing hay, paddy, manure, etc. does not create a right adverse to Government. The enjoyment is too fugitive and patently permissive to support a right by custom or prescription. (*Ayling and Odgers, JJ.*) *TALUK BOARD, DINDIGUL v. VENKATARAMA AIYAR*. 46 Mad. 866 : 45 M. L. J. 333 : 18 L. W. 366 : 33 M. L. T. 40 (H C.) : 75 I. C. 38.

— Hindu family—Partial partition—Effect. *See* HINDU LAW—PARTITION.

(1923) M. W. N. 636.

— Hindu joint family—Widow in possession—Effect.

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Where the widow of a member of a joint family is in possession of properties for more than 12 years, unless it is shown that when she took possession she claimed only a limited interest, she acquires full title by adverse possession. The onus is on the persons who claim against her title (*Lindsay and Sulaiman, JJ*) *UMA SHANKAR v. MT. AISHA KHATUN* 74 I C 869

—Hindu widow—Family arrangement—Possession under, if adverse to other members of the family.

Where a minor widow claims and retains possession under a family arrangement, her possession is not adverse to the other members of the family. 29 Cal 664, 34 All 8 All 644 Foll. *Stuart and Sulaiman, JJ*) *RADHA DULIYA v. RASHIK LAL AND ANOTHER* 75 I. C. 14. 45 A. 1 : 1923 A. 25

—Hindu widow—Reversioner if bound. See HINDU LAW. JOINT FAMILY.

1923 Oudh 31.

—Interruption of—Delivery of symbolical possession. See LIM. ACT ART. 144. 1923 Cal. 82

—Interruption—Declaratory judgment—No interruption of possession.

The judgement of a Court declaring that one of the parties has no legal title to the properties in suit cannot have the effect of causing his possession to cease to be adverse to the opposite party from the moment of its pronouncement so long as possession remains undisturbed. (*Spencer and Venkatasubba Row, JJ.*) *SINGARAVELU MUDLIAR v. CHOKKA MUDALIAR.*

146 Mad. 525. 70 I. C. 994 : 1923 Mad. 88 (2).

—Interruption—Symbolical delivery of possession.

Symbolical delivery of possession operates to interrupt adverse possession on the part of the judgment-debtor. 34 M. L. J. 97 followed. (*Pradeaux, A. J. C.*) *SAWATRAM v. GANESHILAL.*

69 I. C. 521 (1) : 1923 Nag. 30.

—Khoti Kashgi lands—Division among branches—Effect.

Members of branches of a family holding Khoti Kashgi lands in specific portions for the sake of convenience and before a general partition has taken place, do not hold adversely to one another. (*Macleod, C. J. and Crump, J.*) *MOHIDDIN v. IBRAHIM.*

74 I. C. 161.

—Khoti lands—Title defective—Effect of long possession.

The occupancy rights in some khoti lands were sold in execution of the decree obtained by a khoti sharer and the property sold in auction. Some time after the purchaser surrendered the lands to the decree holder-sharer, who remained in possession thereafter for 15 years and was then dispossessed by a person who claimed to be the occupancy tenant. Held even assuming the auction sale was in contravention of the Khoti Settlement Act S. 9 which made the tenure inalienable the decree holder had obtained title by adverse possession after the surrender to him. (*Fawcett*

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and Coyajee, JJ) *ATMARAM BHILA BHATKAR v. BALAJI RAGHUNATH JOSHI.* 25 Bom. L. R. 1032

—Landlord and tenant.

Where a tenant wants to plead adverse possession, there must be a clear, positive and continued disclaimer and disavowal of the landlord's title; the latter must have had actual notice of the claim or the acts of ownership must be open, hostile and notorious. Non-payment of rent will not do. (*Mookerjee and Walmsley, JJ*) *GIRIS CHANDRA GANGOPADHYAYA v. SRI KRISHNA DE NAG.*

38 C L J. 266 : 75 I. C. 325.

—Landlord and Tenant—Non-payment of rent—Non-performance of services See (1922) DIG. COL. 11 *JAGDEO NARAIN SINGH v. BALDEO SINGH*

2 Pat 38 : 45 M. L. J. 460 : 1923 M. W. N. 361 : 27 C W. N. 925 : 32 M. L. T. (P. C.) 1. 71 I. C. 984 (P. C.)

—Landlord and tenant—Occupancy right payment of rent.

Where a squatter has been in possession of a plot of land without the consent of the landlord his occupation for any number of 12 years would not vest him with the rights of an occupancy tenant, but that occupancy rights would commence to accrue only from the date the squatter commences to pay rent. The question as to when a presumption arises that the possession of the tenant is without the consent of the landlord, depends upon the particular facts of each case and it is not a question capable of a uniform answer. (*Gokul Prasad, J.*) *CHHAJU v. JHABBA.*

L R. 4 A. 221 (Rev) : 74 I. C. 681.

—Landlord and tenant—Onus on tenant to prove nature of title. See BURDEN OF PROOF. 69 I. C. 373.

—Landlord and tenant—Repudiation of tenancy.

The possession of a tenant does not become adverse to the landlord by the mere fact of his repudiating the tenancy unless the repudiation is accepted by the landlord. Where waste land as well as cultivated land form part of one tenancy adverse possession of the cultivated land also constitutes adverse possession of the waste land. (*Martineau, J.*) *MAHOMED HUSSAIN v. SOHARA*

71 I. C. 805.

—Lessor and lessee—Case of successive leases. See (1922) DIG. COL. 11. *UDAI KUMAR DAS, v. KATYAYANI DEBI.*

49 Cal. 948.

—Lessor and lessee—Permissive possession of lessee.

If a person, after taking a lease, allowed his brothers to occupy the leased house along with him, it could certainly not be said that their possession was adverse to the lessor (*Martineau, J.*) *CHAUHAR v. MANSHA SINGH.* 70 I. C. 966 (2) : 1923 Lah. 247.

—Limited interest—Assertion of higher interest—Lapse of time—No acquisition of title.

It is not correct as a general proposition of law that a person who is, in fact, in possession of land under a tenancy or occupancy title can, by a mere assertion in a judicial proceeding and the

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apse of 6 or 12 years without that assertion having been successfully challenged, obtain a title as an under-proprietor to the lands. Such a judgment might have very far-reaching results and would almost certainly lead to a flood of litigation. (*Lord Salvesen*.) MD MUMTAZ ALI KHAN v. MOHAN SINGH. 45 A. 419 : 45 M. L. J. 623.

21 A. L. J. 757. 26 O. C. 231.

33 M. L. T. 321 (P. C.). L. R. 4 P. C. 1.

9 O. & A. L. R. 901 : 10 O. L. J. 383 :

50 I. A. 202 : 74 I. C. 476.

1923 P. C. 118 (P. C.).

———*Limited interest—Tenant.*

A limited interest such as that of a tenant can be acquired by adverse possession, (*Walmsley and B. B. Ghose, JJ.*) BHAIKABENDRA NARAIN ROY v. RAJENDRA NARAIN ROY. 50 Cal. 487 :

74 I. C. 193 : 1924 Cal. 45.

———*Mistake in boundaries—Effect*

Where on account of a mutual mistake as to boundaries a neighbour is in possession of the others properties for more than 12 years, he perfects a title by adverse possession (*Heald, J.*) MA SHAN MA v. SOMASUNDARAM CHETTY.

1 R. 492.

———*Mortgagor and mortgagee.*

Adverse possession against the mortgagor would not operate to the prejudice of the mortgagee, if the mortgage is simple. A trespasser's adverse possession which commences after the date of the hypothecation is not a bar to the mortgagee's right to recover the land. 48 Cal. 425 (oil) (*Ayling and Venkatasubba Rao, JJ.*) TANJORE PALACE ESTATE BY ITS RECEIVER SUNDARAM IYER v. THIYAGARAJA PILLAI.

1923 Mad. 160 (2)

———*Mortgagee and mortgagee.*

The mortgagees cannot rely on the 12 years' rule of limitation in support of a plea of adverse possession unless he can prove a subsequent valid sale, of the equity of redemption. Sale of the whole property by only one co-mortgagor is not a valid sale as regards his co-mortgagors. (*Scott Smith, J.*) AMIR v. NADIR ALI

1923 Lah. 74 (1)

———Mortgagor and mortgagee. See T. P. Act S. 76 (a) and (h). (1923) Lah. 71 (2).

———*Mortgagor and mortgagee—Assertion of a proprietary title.*

A mortgagee who comes into possession as a mortgagee cannot force the mortgagor to come into court and to sue for redemption merely by asserting a proprietary title. The mortgagor is perfectly entitled to sleep upon his rights until the 60 years allowed for redemption have expired. 49 P. R. 1882 ; 65 P. R. 1908 ; 9 P. W. R. 1912 ; 1 L. 549 Rel. (*Pipon, J. C.*) GHULAM HAIDAR SHAH v. BAZID SHAH. 72 I. C. 989.

———*Mortgagor and mortgagee—Dispossession of mortgagee—Effect of.*

Where the mortgagee took possession under their mortgage and remained in possession, the dispossession of the mortgagee by the landlord, even assuming that it was done against their will

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cannot by itself operate as adverse possession as against the mortgagor during the continuance of the mortgage. Besides, the mortgagees by suffering dispossession and having taken a new title from the landlord cannot affect the right of the mortgagors in the property of which they were put in possession under the mortgage. (*Walmsley and Ghose, JJ.*) KAMALA KANTA v. ANANDA CHANDRA CHAKRABARTY. 71 I. C. 1030.

———Mortgagor and mortgagee—Mortgagee acquiring rights of one mortgagor—Effect. (1922) DIG. COL. 12. OMAYURUPAKAM MUTT v. SIVA SOORIA THEVAN. 70 I. C. 33.

———*Mortgagor and mortgagee—Possession adverse to mortgagor when adverse to mortgagee.*

There can be prescription against a mortgagor, but ordinarily there can be no prescription against him unless he is entitled to immediate possession. *Contra non valentem agere nulla currit prescriptio*. The fact that he would be entitled to bring a suit for declaration is of no consequence. A party is never bound to bring a suit for declaration. (*Dalal and Simpson, A. J. C.*) JAI GOBIND SINGH v. ABHAIRAJ SINGH.

26 O. C. 308 : 9 O. & A. L. R. 651 :

10 O. L. J. 216.

———Mortgagor and mortgagee—Simple mortgagee not entitled to possession. See (1922) DIG. COL. 13. SITAL CHANDRA MAJHI v. PARBATI CHARAN CHAKRAVARTI. 69 I. C. 841.

———*Mortgagor and mortgagee—Simple mortgage—Possession adverse to mortgagor—When adverse to mortgagee.*

When after a simple mortgage has been granted a third person commences to acquire title by adverse possession against the mortgagor, the period of adverse possession against the mortgagor cannot operate against the mortgagee while he is not entitled to possession. Adverse possession operates against a mortgagee only when the mortgagee is entitled to possession and time runs against him from the date when he is entitled to enter upon the land. In the case of the grant of a mortgage by a person previously dispossessed the adverse possession which had commenced to operate against the mortgagor would not by the grant of the mortgage be arrested but would operate equally against the mortgagee. (*Adami, J.*) KUNJ LAL v. KANHAI MAHTO, 1923 P. 305.

———*Mortgagor and mortgagee—Unregistered sale of the equity of redemption—Commencement of adverse possession.*

A mortgagee can set up adverse possession if his possession at the inception was that of a trespasser. Where therefore a mortgagee obtained an unregistered sale of the equity of redemption and thereafter held possession of the property as owner held that the unregistered sale, though inadmissible to prove the passing of title to the property as vendee, was admissible for the purposes of proving that the possession of the mortgagee thereafter was adverse to the mortgagor. 43 M. 244 : 44 M. 253, 63 I. C. 215 ; 63 I. C. 284



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referred to. (*Broadway and Moti Sagar, JJ.*)  
*QADAR BAKSH V. MANGHA MAL*  
 4 Lah. 249. 5 L. L. J. 175.  
 73 I. C. 889 : 1923 Lah. 495

———*Nature of—If affected by intervention of life estate.*

Where a person takes possession of property adversely to the owner, the fact that before he acquires title by adverse possession a limited owner comes into the legal estate will not affect the nature of the possession. The reversioner cannot say a fresh starting point for limitation arises thereby (*Abdul Qadir, J.*) *KHILU RAM V. BHIRANWAN RAI.*  
 69 I. C. 398

———*Nature of—Question of fact* See (1922) DIG. COL. 13 *KHULB LAL V. JUGDISH PRASAD SINGH.*  
 69 I. C. 185.

———*Permanent tenancy—Vatandars.*

Persons who, and their predecessors in title, always claimed to be and were tenants of service Vatan lands can never acquire any title to a permanent tenancy in the lands by adverse possession as against the Vatan-dar from whom they held the lands. History of vatan legislation on reviewed (*Sir John Edge*) *MADHAV RAO VAMAN V. RAGHUNATH VENKATESH*  
 47 Bom. 798 : 25 Bom. L. R. 1005 :  
 33 M. L. T. 359 (P. C.) : 50 I. A. 255  
 74 I. C. 362 : 1923 M. W. N. 659.  
 1923 P. C. 205 (P. C.)

———*Permissive possession—Knowledge*

Sole possession by one of two or more joint owners is not adverse to others until the joint owner has done some act to the knowledge of the others which amounts to a denial of the latter's right. The mere execution of a registered deed affecting the property by one of the co-sharers is not notice of adverse possession to the other sharers. 48 C. 1 : 46 Bom. 213, 57 A. 203 referred to. (*Daniels, J.*) *SHAKUR V. HUSSAIN BIBI*  
 71 I. C. 633 : 1923 A. 447.

———*Plea of—If can be raised for first time in second appeal.* See APPEAL. 28 C. W. N. 46.

———*Pond—Not capable of physical possession*  
 —Intermittent user—Effect of. See (1922) DIG. COL. 14 *BHURU V. DATTU RAM.* 74 I. C. 282

———*Right of the public—Long user.*

The public as such cannot acquire by prescription the ownership of land or a right of easement over it. But the user by the public may be evidence of a dedication or grant in favour of the public. (*Oldfield and Ramesam, JJ.*) *USSAM KASIM SAIT V. SECY. OF STATE FOR INDIA.*  
 44 M. L. J. 638. 1923 M. W. N. 315 : 17 L. W. 610 :  
 74 I. C. 25 : 1923 Mad. 624.

———*Service tenure—Failure to perform services—Effect.* See (1922) DIG. COL. 15 *NAND LAL SAHU V. TIKAIT SRINIVASA HUKUM SING DEO.*  
 69 I. C. 703

———*Symbolical delivery of possession—Effect of—Decree-holder entitled to actual possession.*

Though the judgment debtor is actually in possession and decree holder is consequently entitled to take not merely formal possession but actual

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possession, yet the delivery of formal possession to the decree holders is in the sight of law sufficient possession as against the judgment debtor. 34 M. L. J. 97 : 6 C. L. J. 472 : 11 C. 93 : 24 C. 715 followed (*Mukerjee and Chotzner, JJ.*) *KULADA PRASAD CHATTERJEE V. KUDIRAM MISRA.*  
 27 C. W. N. 673 : 37 C. L. J. 545 :  
 70 I. C. 187.

———*Usufructuary mortgage—Record of name in village records—Effect.* See T. P. Act, S. 63.  
 1923 All. 11 (2).

———*Vacant site—Starting point.*

Where it was found that the title in one-third of the land was with the plaintiffs that the plot had been for many years lying unoccupied and that the Municipal Board had been using it for the deposit of refuse. Held, that this use of the land by the Municipal Board did not amount to adverse possession or to the dispossession of the plaintiffs. (*Daniels, J.*) *HAJI MOQBUL HUSSAIN V. HAFIZ AHMED HUSAIN*  
 74 I. C. 251 :  
 1923 A. 557.

———*Waste land—Intermittent and temporary user.* See LIM. ACT ART 144.  
 1923 Lah. 25.

———*Widow—Suit by reversioners after widow's death—Compromise decree with the widow when binding on reversioners*

Adverse possession cannot run against Hindu reversioners until after the death of the widow. In order to make the principle laid down in *Shivaganga case* (9 M. I. A. 543 P. C.) applicable, the possession of the defendant must be by force of the decree which is binding against the widow and not in spite of the decree. (*Lindsay, J.*) *JAGANNATH SINGH V. SARDAR SINGH.*  
 75 I. C. 614 : 1923 A. 448.

AGENCY RULES—*Decree passed by Court outside Agency tracts for sale of property within such area—Execution—Legality of decree—Objection to.*

Civil Procedure Code not being applicable to Agency Courts the ordinary rule that an executing Court will not canvass the legality of the decree is not applicable. An Agency Court may refuse to sell property within its jurisdiction under a decree not passed by an Agency Court and therefore not by a Court having jurisdiction (*Krishnan and Venkata.ubba Row JJ.*, *KRUTHIVENTI PEKRAZU V. SRI RAJAH NALLA-PAKAZU MESRIJA SEETHARAMA CHANDRARAZU GARU.*  
 69 I. C. 559 (2) = 1923 Mad. 114 (1),

———(*Vizagapatam*) R. 14—Agency Commissioner—Power of High Court to transfer case from the file of the Commissioner. See Government of India Act, S. 107 17 L. W. 517.

———*R. 20—Agency tracts—Claim procedure—Remedy by suit—Erroneous provision of law—Citation of—Effect.* See (1922) DIG. COL. 17 *RANI OF TUNI V. KORRA LATCHUNDHRA.*  
 46 Mad. 35.

———*Rr. 24 and 25—Assistant Commissioner—Order in execution—Appeal if maintainable—Remedy of aggrieved party.*

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The order of an Assistant Commissioner in execution proceedings is not a decree and there is no provision in the Agency rules for appeals against orders passed in execution or miscellaneous proceedings. The remedy lies by way of petition under R 24 against the order in execution of the Agency Commissioner: 26 M. 260, 41 M 325, 10 L. W. 8 referred to. Where a person aggrieved by an order of an Assistant Commissioner in execution proceedings preferred an appeal against it to the Agency Commissioner who rejected it on the ground that there was no appeal and the person aggrieved preferred a revision petition to the High Court: *held* that the order of the Commissioner was correct inasmuch as there was no appeal to the Commissioner from the order of the Assistant Commissioner and that even assuming the High Court might interfere in exceptional cases in the exercise of its powers of interference under S 107 of the Government of India Act, there was no ground for such interference in the particular case. (*Spencer and Venkatasubba Rao, J.*) VENKATANAGABUSHANAM V. KARELLA RAMASWAMI. 17 L. W. 370  
45 M. L. J. 78: 73 I. C. 131. 1923 Mad. 500.

AGRA TENANCY ACT (II of 1901).—*Appeal—District Court—Question of proprietary title.*

Where in a suit in ejectment under the Agra Tenancy Act a question of proprietary title is raised, an appeal lies to the District Court. (*Gokul Prasad, J.*) SHEIKH SAJJAD HUSSAIN V. SHAIKH WALI MOHAMMAD. 73 I. C. 1030 (2). 1923 All. 401.

—*Ejectment suit—Appeal lies to whom.*

An appeal from the decision of an Assistant Collector First Class in an ejectment suit lies to the District Judge; (1914) 22 I. C. 904 Foll (*Stuart, J.*) RAM DIN V. HAR DAYAL. 1923 A. 368.

—*Hindu widow—Inheritance of proprietary right—Nature of estate—Portion of lesser.*

A Hindu widow inheriting proprietary estates has an absolute estate, though it is subject to certain restrictions. When she grants a lease, the question whether the lease is a suitable one, is a matter for the civil courts to decide. The lease does not automatically come to an end on her death. (*Fremantle, S. M. and Burn, J. M.*) HAZARI LAL V. NAURANGI LAL. L. R. 4 All. 384. (Rev.)

—*Inherent power of court—S. 151, C. P. Code of appls. See C. P. CODE, S. 151.*

L. R. 4 All. 411 (Rev.)

—*Inheritance—Daughter's sons and collaterals.*

Under the Agra Tenancy Act, a daughter's son or a collateral can only inherit if he shared in the cultivation of the holding at the time of the tenant's death. (*Gokul Prasad, J.*) SHAIKH SAJJAD HUSSAIN V. SHAIKH WALI MUHAMMAD. 73 I. C. 1030 (2): 1923 All. 451.

—*Landlord and Tenant—Perpetual rent free tenant of a grove building thereon a house. Whether Landlord entitled to eject him.*

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Where the special provisions of the Agra Tenancy Act permitting landlords to resume rent free grants have no application the tenant cannot be ejected so long as the land has not lost the characteristic of a grove. (*Stuart, J.*) MOLVI AHMAD HUSAIN V. SIRAJUDDIN. 70 I. C. 616: 1923 A. 372.

—*Landlord and Tenant—Tenant grove holder dying without heirs but indebted—When their landlord responsible for the debts of the land holder.*

The right of a tenant to reside in a house in the inhabited site of an agricultural village and the right of a tenant grove holder in certain villages are both limited estates. When the last holder of such a house dies without heirs, the house reverts to the landlord and in the case of certain villages, the trees and land also. The landlord however does not succeed as heir and hence he cannot be held responsible for the debts of the last holder. (*Stuart, J.*) MT. RAMMAN BIBI V. MATHRA PRASAD. 75 I. C. 621: 1923 A. 374.

—*Lease for 7 years—Validity.*

Provisions against subletting and for re entry in case of non-payment of rent do not affect the validity of a 7 years lease. (*Burn, J. M.*) NEK RAM V. CHATTAR SINGH. L. R. 4 All. 447 (Rev.)

—*Mango trees planted presumably with landlord's consent—Whether transferable.*

Where it is found that trees were planted presumably with the consent of the Zamindar on the occupancy holding by the tenant, the tenant acquires no transferable right. 13 A. L. J. Foll. 34 All. 545 Dist. (*Sulaiman, J.*) ABDUL RAUF V. RAJU MUHAMMAD SHAH. 75 I. C. 655: 1923 A. 340.

—*Occupancy rights—Acquisition of—Khudkash cultivation—Period if can be counted.*

In calculating the period of cultivation for the purpose of acquiring occupancy rights, the time for which land was cultivated as *Khudkash* tenant cannot be added to the period of cultivation as ordinary tenant. (*Fremantle, S. M. and Burn, J. M.*) HAZARI V. RAJA RAM. L. R. 4 All. 428 (Rev.)

—*Occupancy rights—Acquisition of Period of joint cultivation.*

Where a holding is cultivated by a person jointly with another for a certain period and thereafter singly, the former period cannot be counted for the acquisition of occupancy rights (*Fremantle S. M.*) GAURI DAYAL V. GOPAL. L. R. 4 A. 347 (Rev.)

—*Occupancy right—Acquisition—Period of mortgage if counts.*

When a tenant becomes mortgagee of the share in which his land is situated the rights of tenancy are merged in the proprietary rights and he cannot count for continuous occupation the time during which he was mortgagee. (*Fremantle, S. M. and Burn J. M.*) GANGA PRASAD V. JAGESHAR RAM. L. R. 4 All. 429 (Rev.)

—*Occupancy rights—Lessee under mortgage—Period of occupation under lease.*

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Where a lessee was holding under a mortgagee and after the period of the mortgage continued to remain in possession he can count only the latter period for the acquisition of occupancy rights (*Fremantle, S. M. and Burn, J. M.*) *BOHRA JAGRAM v. MT KORILA* L. R. 4 A. 366 (Rev.)

—Occupancy rights—Payment of rent—Effect.

The mere casual payment of a sum purporting to be rent in one year to one co-sharer does not justify the conclusion that occupancy rights were acquired. (*Pearson, J. M.*) *GULAL v. GHASITA* 90 & A. L. R. 409.

—Relinquishment of expropriatory tenancy—Validity—Delivery of possession necessary.

Mere execution of a deed of relinquishment by an expropriatory tenant cannot amount to constructive fraud on behalf of the landlord. In order that the registered deed of relinquishment should operate as a valid surrender it is necessary that actual possession should be made over by the expropriatory tenant to the landlord. [7 All. 847 (F. B.), 20 All. 219 (F. B.) 27 I. C. 586; 31 I. C. 794 followed.]

Where according to the plaintiff's case itself as put forward in the plaint, the defendants were actually in possession but as sub-tenants and where the fact that they were in actual possession when the deed of relinquishment was executed, was now denied, held there is no necessity for delivery of possession because the landlords were already in actual physical possession.

Where the Revenue Court passed a decree for ejectment in favour of the plaintiff after failure of defendants to file a suit for declaration of right as proprietors and the plaintiff was put in possession: Held, the decision of the question of sub-tenancy against the defendants by the Revenue Court bars the defendant from contending that they have been in possession as landlords. The mere fact of the removal of the plaintiff's name from the revenue papers as an expropriatory tenant does not affect the question. The delivery of possession whether actual or formal to the plaintiff amounted to the plaintiff's getting possession as expropriatory tenant (the title which he had claimed) and a suit for actual possession within six months from that date, is not barred. (*Gokul Prasad, J.*) *BHAGWAN v. MARE.* 72 I. C. 1024: 1923 All. 113.

—Resumption—Rent free grant—Occupancy rights.

The right of a tenant who has held for 12 years under a rent free grantee cannot be disturbed by any subsequent order in a resumption suit. (*Fremantle, S. M.*) *GAJADAR PRASAD v. DWARKA PRASAD.* L. R. 4 All. 355 (Rev.)

—Revision—Period for

Generally 4 months is considered to be the term beyond which applications in revision are not accepted—But in special cases the period may be extended. (*Fremantle S. M.*) *BASHIR KHAN v. MT. ZAIB-UN-NISSA.* L. R. 4 All. 393 (Rev.)

—S. 3—Applicability of—Mortgages and leases.

## AGRA TENANCY ACT (1901), S. 9.

S. 3 of the Agra Tenancy Act was meant to protect tenants against their landlords and it does not affect mortgages or *Zaripeshgi* leases executed between April 1901 and January 1902. (*Burn, S. M.*) *BHAWANI v. ZAHRIA.* L. R. 4 A. 34 (Rev.)

—S. 4—Grove—Transferability

A plot of land which is neither let nor held for agricultural purposes but for planting a grove is not a holding within the meaning of the Act and there is no bar to transferring the rights thereunder (*Sulaiman, J.*) *GULAB v. BHAGWAN DAS.* 21 A. L. J. 907.

—S. 6—Construction.

Owing to the too rigid classification of tenants in section 6 all lessees including *Thekadars* have to be included in the class of non-occupancy tenants. No adequate provision has been made for lessees holding under a sub-contract and in such cases the intention of the parties is liable to be frustrated. (*Daniels, J.*) *INDER DEO RAI v. RAM CHARITTER RAI* 74 I. C. 971: 1923 A. 560.

—S. 8—Fixed rate tenancy—

A fixed rate tenancy cannot be created by contract, because a fixed rate tenant is defined in S. 8 of the Act and no person can be classed as a fixed rate tenant who does not come within the definition. (28 All. 747 Ret.) *Daniels, J.*) *INDER DEO RAI v. RAM CHARITTER RAI.* 74 I. C. 971: 1923 A. 560.

—S. 9—Fixed—rate tenancy—Acquisition of

Where a holding was recorded as occupancy in the last revision of records which took place before 1901 and there was no judicial decision declaring it to be a fixed rate tenancy between the date and the passing of the Agra Tenancy Act, S. 9 bars the acquisition of the status of a fixed-rate tenant. (*Fremantle, S. M.*) *MT. AMDANI BIBI v. RAM CHANDRA NAIK KALIA* L. R. 4 All. 306 (Rev.)

—Ss. 9 and 20—Scope of—Landlord and tenant—Disputes between—Jurisdiction—Fixed rate tenancy.

S. 9 of the Agra. Ten. Act is very limited in scope and applies only where the dispute is between a landlord and his tenant and relates to the nature of the tenancy. A dispute may arise in proceedings to which the landlord is not at all a party. Under S. 20(1) of the Tenancy Act the interest of a permanent tenure-holder or of a fixed-rate tenant is heritable according to his personal law. Whereas other tenancies devolve according to the rule laid down in section 22. A dispute may very well arise between the rival heirs of a deceased tenant and the question of the true nature of the tenancy may have to be decided in a litigation to which the landlord is not a party. It is not open to either set of these heirs to go behind the entry at the last revision of records and adduce evidence to the contrary. The presumption under S. 9 is conclusive.

There are many ways in which fixed rate tenancies may come to an end, e. g., by surrender, ejectment, express agreement with the landlord, or as in this case, by merger. I cannot therefore

## AGRA TENANCY ACT (1901), S. 10.

see how one can shut out evidence directed to show that a new position has arisen since the settlements (*Lindsay and Sulaiman, JJ.*) SHEO NANDAN v. BALGOBIND MISRA 21 A. L. J. 697. L. R. 4 A. 333 (Rev.) 74 I. C. 647.

S. 10—Proprietor—Right to *Khudkasht*—Possession.

*Khudkasht* can only be held by a proprietor who is in possession. When a proprietor makes a transfer, he loses his *sir* and *khudkasht* rights under S. 10 of the Tenancy Act even in the land which he has been cultivating for 12 years and becomes an exproprietary tenant. He obviously cannot claim *khudkasht* rights in land which he only begins to cultivate at the time when he loses his possession. (*Ryves and Daniels, JJ.*) GULAB SINGH v. SHIB LAL. 21 A. L. J. 331: L. R. 4 A. 206 (Rev.) 74 I. C. 286.

1923 A. 34.

## S. 11—Acquisition of occupancy rights—Joint tenants—Relinquishment by one—Grant of 7 years' lease to the other—Effect.

When a father and son cultivated jointly, but before acquiring occupancy rights, the father relinquished the holding and the son took under 7 years' lease, the terms of the tenancy are altered and the period cannot be counted for acquisition of occupancy rights. (*Fremantle, S. M. and Burn, J. M.*) SOTI HARNAM KUAR v. DILLA. L. R. 4 All. 445 (Rev.)

## S. 11—Acquisition of occupancy rights—Partition of holding—Breach of continuous possession.

A holding held jointly by two persons was partitioned by them and each entered into separate possession of his portion. Held that the question whether any of them was entitled to count the period before partition towards the acquisition of occupancy rights depended upon whether the partition had been recognised by the zamindar. If it had not been recognised then the tenants would remain jointly liable for the arrears of rent and the continuity of possession would not be broken by the partition. In the other case the zamindar would be debarred from suing jointly for arrears of rent and the tenant before partition would be deemed to be different from the tenant after partition and the period before partition would not be counted towards the acquisition of occupancy rights. (*Fremantle, S. M.*) ANUP RAI v. BISHAN MOHAN. L. R. 4 A. 263 (Rev.)

## S. 11—Nominal ejectment—Effect.

A merely nominal ejectment does not cause a break in the tenancy. (*Fremantle, S. M.*) MAULVI ASAD ULLAH v. BALDEO PATAKWAR

L. R. 4 All. 406 (Rev.)

## S. 11—Occupancy Rights—Continuous possession—Entry in records—Burden of proof

Where a tenant has been in possession of a holding for 12 years but the revenue papers show that for one year of this period some other person was in possession, the entry is not sufficient proof of relinquishment. The party who sets up relinquishment must prove it by evidence. (*Fremantle, S. M. and Burn, J. M.*) DWARAKA PRASAD v. JWALA PRASAD. L. R. 4 All. 356 (Rev.)

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## AGRA TENANCY ACT (1901), S. 14.

S. 11—Occupancy right—Creation of—Assertion of title. See (1922) Dig. COL. 21 PRAG NARAIN v. ANGAD 70 I. C. 495.

S. 11—Occupancy rights—Fallow land. Where it is found that before the defendant took it up for cultivation the land was fallow for many years if not for ever. Held, that occupancy rights cannot accrue in such land. (*Fremantle, S. M.*) MITTHO PANDEY v. CHATURJI PANDEY. L. R. 4 A. 251 (Rev.)

## S. 11. PROVISIO (a)—Ejectment—Tenant continuing in possession—Delay in execution—Lease for 7 years.

If occupancy rights have accrued, a subsequent execution of a lease does not destroy them. Where possession, in spite of formal ejectments, was continuous it is for the plaintiff, to show that the re-admission was in consequence of an agreement to hold under a registered lease for 7 years. (*Fremantle, S. M. and Burn, J. M.*) RAOTI v. RAJA SURAJ PAL SINGH. L. R. 4 A. 116 (Rev.)

## S. 11 (a)—Entry of tenant as holding under a lease—Occupancy rights—Bar of.

The mere entry of a tenant as holding under a lease in the revenue papers is not sufficient evidence to prove the lease as a bar to the accrual of occupancy rights. (*Fremantle, S. M. and Burn, J. M.*) SH. JAN MAHOMED v. RAJA INDERJIT PARTAB. L. R. 4 All. 408 (Rev.)

## Ss. 13 and 95—Decree for ejectment—Formal delivery of possession—Effect of—Subsequent suit for declaration of occupancy rights.

Where in execution of a decree for ejectment formal possession of the property is delivered, it is sufficient to destroy the judgment debtor's possession as a tenant. The tenant cannot after delivery of such possession maintain a suit under S. 95 of the Tenancy Act for a declaration of his occupancy right. (*Burn, J. M.*) FATEH SINGH v. PRAN SINGH. L. R. 4 A. 59 (Rev.)

## Ss. 14, 10—Applicability—Grant of fresh holding—Burden of proof.

S. 14 of the Agra Tenancy Act applies only to cases in which occupancy rights have not already been acquired. It does not apply to cases under S. 17 where the tenant has already acquired occupancy rights.

If a landlord moves a tenant who has already acquired occupancy rights, the onus lies on him to show which part of the new holding is given in exchange and which part constitutes fresh tenancy. (*Fremantle, S. M.*) BHAYIA DURGA PD. SINGH v. JUMMAN MUSALMAN.

L. R. 4 All. 301 (Rev.)

## S. 14—Exchange—Determination of minimum area.

The land which a tenant has cultivated jointly with others cannot be taken into account for the purpose of determining the minimum area received by him in exchange. (*Fremantle, S. M. and Burn, J. M.*) NAINOON v. MP. HAFIZUNNISA. L. R. 4 A. 290 (Rev.)

## S. 14—Exchange—Meaning of.

Where an adoption is proved and the father and son are cultivating together, that would

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seem a good cause for holding that a genuine exchange had taken place. (*Burn, S. M. and Pearson J. M.*) BHARTOO v. JAMBOO PRASAD.

L. R. 4 A. 15 (Rev.)

—Ss 14 and 17—Exchange of occupancy holding—Applicability of the section—Burden of proof.

Per *Pearson J. M.* S. 14 of the Agra Tenancy Act lays down generally the principles on which land may be considered to have been received in exchange for other land, where a tenant has lost possession on agreement to take other land and has actually received such other land within the year. It applies to all tenants generally and not only to those dealt with under S. 11. S. 14 applies to exchange generally both before and after the acquisition of occupancy rights.

Per *Burn J. M.* If a landlord removes a tenant from a holding in which he has acquired occupancy rights and gives him a new holding in its place the onus lies on the landlord to show which part of the holding is given in exchange and which part constitutes a fresh tenancy. (*Burn, J. M. and Pearson J. M.*) HARDON SINGH v. TODAR.

L. R. 4 A. 92 (Rev.)

—S. 14—Exchange—Period of occupation

A tenant who was already in possession of certain plots was given certain other plots by the Zamindar.

Held, that it was immaterial whether the tenant had surrendered the old plots or continued in possession of them, the question to be decided being whether he would be considered to have received the new plots in exchange. (*Fremantle, S. M. and Burn, J. M.*) BHAGELU v. PARSHOTAM DAS.

L. R. 4 A. 300 (Rev.)

—S. 14—Occupancy rights—Acquisition of change in the name of tenant

If there is only a nominal ejectment, followed by a change of name, the tenant remaining the same, the tenancy as a whole is not altered and the periods of continuous cultivation can be taken into consideration for the acquisition of occupancy rights. (*Fremantle S. M. and Burn, J. M.*) TULLA v. HANWANT SINGH.

L. R. 4 All. 383 (Rev.)

—S. 14—Occupancy rights—Acquisition of Exchange of plots.

Where a tenant held some holding or other from the same landlord continuously, the periods can be taken on for the purpose of acquiring occupancy rights. (*Fremantle, S. M.*) CHATTER PAL SINGH v. ISMAIL.

L. R. 4 All. 425 (Rev.)

—S. 14—Letting value—Calculation of.

Under S. 14 (3), Agra Tenancy Act, in determining the letting value, the increase of rent should be taken into consideration. In making the calculation of the letting value, all that is necessary is to calculate the valuation on the previous holding at settlement rates and to decree as occupancy a portion of the present holding carrying the same valuation at the same rates. (*Fremantle, S. M. and Burn, J. M.*) BHUPAL v. SUJAN SINGH.

L. R. 4 All. 395 (Rev.)

—S. 18—Ejectment—Claim as tenant—Extension of occupancy rights.

In a suit in ejectment the defendant proved he was recorded as sub-tenant for 7 years, and

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afterwards as *qabiz* and payment of rent all along. Held, his claim cannot succeed till he proves how the rights of the occupancy tenant have disappeared under S. 18. (*Fremantle, S. M. and Burn, J. M.*) NARAIN DHOBI v. KISHEN KUMAR RAM TEWARI.

L. R. 4 All. 403 (Rev.)

—S. 20—Occupancy holding—Mortgage—Estoppel

No mortgage of either occupancy or non-occupancy rights can be valid in view of S. 20 Agra Tenancy Act. Courts will not help such a mortgagee to recover his money but on the other hand they will not permit him to deny a transaction which he has entered into. (*Burn, S. M.*) CHAUDHURI KUNDAN LAL v. JAI SINGH.

L. R. 4 A. 342 (Rev.)

—S. 22—Cultivation by tenant—Death of tenant—Continuation of cultivation by widow—Occupancy rights—Acquisition.

A tenant died after holding certain land for 10 years. His widow afterwards continued to hold the land for two years more and then remarried. Held, that the widow had acquired occupancy rights, not in her own right, but as an heir to her deceased husband consequently she forfeited them on her re-marriage. (*Fremantle, S. M. and Burn J. M.*) MT. NAWAB SULTAN v. MT. KISHAN DEI.

L. R. 4 A. 259 (Rev.)

—S. 22—'Devolve', meaning of—Widow.

A widow who succeeds to an occupancy holding on the death of her husband may not have anything more than a life-interest therein; but she would be an occupancy tenant for the time being and the succession would open out on her death to the heirs of the last male holder and would go to the persons entitled under S. 22 of the Agra Tenancy Act and then in existence, provided that if those persons are the daughter's sons or collateral male relatives in the male line of descent, they must be co-sharers in the cultivation of the holding at the time when the last occupant died. Case-law discussed. (*Kanhaya Lal, J.*) BHAWANI BHIKH v. SIDH NARAIN.

70 I. C. 820 : 1923 A. 18.

—S. 22—Distant collateral sharing in cultivation—Right of succession

In the presence of a nearer collateral, a distant collateral even if he shared in the cultivation with the deceased cannot succeed. (*Fremantle, S. M. and Burn, J. M.*) MT. UMMULFAKIS BIBI v. ASHGAR.

L. R. 4 All. 409 (Rev.)

—S. 22—Joint holding—Mortgage of portion—Right to redeem.

Where two persons are in joint cultivation and a portion of the holding is mortgaged by one, the other is entitled to redeem. (*Kanhaya Lal, J.*) GANESH DIN v. LACHMAN SINGH.

74 I. C. 755.

—S. 22—Sir land—Succession chela—Rights of.

S. 22 of the Tenancy Act makes special provision for succession to tenancies. Before the Act was passed succession to tenancies was governed by Hindu Law and if there were no such provision as S. 22 it would be still governed by Hindu Law. There is certainly no ground for thinking that S. 22 can apply to succession to sir rights.

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This must still be governed by Hindu Law and chelas therefore succeed to sir rights as they do to Zemindari rights. (*Fremantle, S. M.*) DEBI N. ABDUL KHALIQ. L. R. 4 A. 210 (Rev).

## —S. 22—Succession—Collaterals.

Distant collaterals cannot succeed under S. 22 Agra Tenancy Act; nor can the nearer collaterals who did not share in the cultivation. (*Fremantle, S. M. and Burn, J. M.*) LALJI RAI v. BINDESHAR RAI. L. R. 4 A. 181 (Rev); 9 O. & A. L. R. 1009.

## —S. 22—Succession of collaterals—Co-sharing with widow.

Co-sharing with widow who has only a life tenure is not sufficient for purposes of S. 22 of the Tenancy Act. Joint living and cultivation with the last male owner must be proved before collaterals can claim the holding. (*Fremantle, S. M. and Burn, J. M.*) KOLHU BARAI v. SITAL CHAUBE. L. R. 4 A. 234 (Rev).

## —S. 22—Succession—Rights of illegitimate sons—Sudras—Kayasthas.

An illegitimate son of a Kayastha, who is a Sudra, can succeed under S. 22 of the Agra Ten. Act. (*Fremantle, S. M. and Burn, J. M.*) BAIJ NATH PRASAD v. GUR PRASAD. L. R. 4 A. 141 (Rev).

## —S. 22 (a)—Stepson—If inherits to step mother—Occupancy rights—Acquisition.

The step son cannot succeed to his step mother's holding under S. 22 Agra Tenancy Act. Nor can mere sharing in the cultivation along with his step mother give him occupancy rights until he is recognised by the Zamindar. (*Fremantle S. M.*) PASUPAT PARTAP SINGH v. LAL RUPENDRA NARAIN SINGH. L. R. 4 All. 407 (Rev).

## —S. 22 (e)—Managing cultivation of minor—Pooling of agricultural stock—If amounts to sharing.

A collateral cannot succeed by merely showing that he managed the cultivation of the deceased minor, as this does not amount to sharing in the cultivation. If however there is evidence to show that agricultural stock of both were pooled or profits divided it amounts to sharing in the cultivation. (*Fremantle, S. M. and Burn, J. M.*) SHEO SARUP TEWARI v. SAHEBZADA MAL. L. R. 4 All. 417 (Rev); 9 O. A. L. R. 965.

## —Ss. 23 to 30—Thekadars—Position of.

Thekadars are tenants for the purpose of applying the provisions of the Tenancy Act and the provisions of Ss. 23 to 30 regarding the right of sub-leasing are applicable to them. 6 A. L. J. 619 Ref. (*Daniels, J.*) INDER DEO RAI v. RAM CHARITTER RAI. 74 I. C. 971. 1923 A. 560.

## —S. 25—Sub-lease in contravention of—If can be enforced.

Where a sub-lease is made in contravention of S. 25 of the Agra Tenancy Act, by not being made under a registered instrument, the agreement is unenforceable and cannot be given effect to by a court of law. (*Lindsay, J.*) OHAJMAN v. SUKHL. 73 I. C. 98. 1923 A. 453.

## AGRA TENANCY ACT (1901), S. 34.

## —S. 25—Sub-lease for more than 5 years—Rights of parties.

The legality of the one letting of an occupancy holding for more than 5 years does not affect a suit between the occupancy tenant and his shikmi. It is a matter solely between the occupancy tenant and the zemindar. (*Fremantle, S. M. and Burn, J. M.*) RAGHUNANDAN v. SARJU PRASAD. L. R. 4 A. 340 (Rev).

## —S. 25—'Sub-let'—Meaning of—If may be oral See AGRA TENANCY ACT Ss. 31, 25 ETC. L. R. 4 A. 182 (Rev).

## —S. 28—Occupancy tenant granting perpetual lease—Surrender to landlord—Effect.

Where an occupancy tenant after granting a perpetual and heritable lease surrenders the holding to the Zemindar, the lessee and his heirs are entitled to hold as occupancy tenants or lessees so long as there are heirs of the original occupancy tenant alive on whom the estate would have devolved under S. 22 of the Agra Tenancy Act. (*Burn S. M. and Pearsall J. M.*) JAGDAMBIKA PRASAD v. NAUBAT RAI. 9 O. & A. L. R. 469.

## —Ss. 31 25 and 57 (d)—Applicability

S. 31 of the Agra Tenancy Act applies not only to written leases but even to sub-letting in contravention of the Act. The word 'sub-lease' is the correlative of 'sub-let' in S. 25 and a sub-letting may be oral or written. The entry in Sch. IV regarding suits under S. 31 (2) covers suits under S. 57 (d). (*Fremantle, S. M.*) KUAR JANG BAHADUR SINGH v. NOHAR KOELI. L. R. 4 A. 182 (Rev).

## —S. 31—Inaction of landlord in getting a sub-lease declared void—Effect.

A landholder might accept and recognize a transfer but if he wishes to repudiate it he must do so at an early date and bring his suit within one year of the transfer. Where the landlord was found to be the sub-tenant of a trustee under an invalid lease from the expropriatory tenant, he is liable to be ejected at the instance of the expropriatory tenant. (*Gokul Prasad, J.*) MARHAN LAL v. DEBI PRASAD. 1923 A. 401 (2).

## —S. 32—Applicability.

S. 32, Agra Tenancy Act does not apply to a suit to recover a fractional share in a holding against a person in lawful possession. (*Daniels, J.*) RAM KISHAN RAI v. SHEO SAGAR PANDEY. 73 I. C. 462.

## —S. 32—Suit for ejectment—Parties.

A genuine division of a holding, though it may not bind the Zemindar, it may confer on a co-sharer right to collect rents and a suit by him in ejectment cannot be dismissed merely because all the co-shares have not been joined. (*Fremantle S. M.*) SYED JAWAD HUSAIN KHAN v. RAGHUNATH SINGH. L. R. 4 A. 195 (Rev).

## —S. 34—Ejectment—Encroachment by tenant—Fixed rate holding

Are added by encroachment to lands under a fixed rate holding can only be regarded as land held without the consent of the Zemindar and the tenant is liable to ejectment therefrom.

## AGRA TENANCY ACT (1901), S. 34

(*Fremantle, S. M. and Burn, J. M.*) NAWAB MD. ABDUL MAJID v BHAGWATI SINGH.

L. R. 4 A 189 (Rev.)

—S. 34—*Person in possession for more than 12 years.*

Under S. 34 of the Tenancy Act a person who has cultivated land without the consent of the landholder becomes a tenant when the landholder chooses to acknowledge him to be so, either by suing for rent or by suing for ejectment. It is at the option of the landlord to treat such a person either as a trespasser and sue him in the civil courts or as a person liable to pay rent and sue him in the Revenue courts, but until the landlord has exercised this option such a person cannot be considered to be a tenant. (*Gokul Prasad, J.*) TARIF v. ASA RAM

73 I. C. 212 : 1923 A. 419.

—Ss. 34, 58—*Person recorded as sub-tenant—No payment of rent—Presumption of tenancy by sufferance when arises.*

In a suit in ejectment of a sub-tenant of an occupancy holding, the sub-tenant put in an extra. to show he was recorded as sub-tenant for the past 17 years without rent. There was no evidence to prove an ancestral claim. *Held*, he must be deemed to be a person holding on sufferance and as soon as the sufferance is withdrawn, he is liable in ejectment under Ss. 34 and 58 of the Tenancy Act. (*Fremantle, S. M. and Burn, J. M.*) JANKI v. RAM SAHAI L. R. 4 All. 398 (Rev.)

—Ss. 34, 177—*Proprietary title pleaded—Appeal.*

Where in a suit in ejectment, the defendant sets up a proprietary title within S. 177 (e) of the Agra Tenancy Act, an appeal lies to the District Court. (*Daniels, J.*) NAUJADIE RAI v. RAM JATAN RAI

73 I. C. 584 (1) : 1923 A. 558.

—S. 34—*Sub-tenant — Zemindar—Ejectment.*

The Zemindar could not be allowed to get rid of the sub-tenant by means of a nominal ejectment of the tenant in chief.

The proper remedy of the Zemindar was to proceed against the sub-tenant under S. 34 of the Tenancy Act. (*Fremantle, S. M.*) RAGHUBIR PRASAD v. RAMJIWAN. L. R. 4 A. 212 (Rev.)

—S. 34—*Suit for rent under—When tenable.*

A Thekadar of a village from the Zemindar sued the defendant for rent under S. 34 of the Agra Tenancy Act. Agreement for payment of rent had never been made between the parties; nor was ever any rent formally got assessed by any Court. *Held* that the suit was not tenable; 8 A. L. J. R. 1087. Ref. (*Ryves, J.*) MANNU LAL v. BABU RAM. 1923 A. 402

—S. 36—*Suit by grove-holder—Landlord and tenant—Wrongful appropriation—Suit in Revenue court.*

The plaintiff was a grove-holder and the defendant the Zemindar. The suit was brought on the allegation that the defendant being entitled to one-fourth of the fruits of the grove had wrongfully appropriated one half of the fruits. The suit was filed

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in the Small Cause Court claiming the value of the fruits wrongfully appropriated. The defence was that the suit was cognisable only by the Revenue Court being a suit contemplated by S. 36 of the Tenancy Act, and that, therefore, the jurisdiction of the Civil Court was ousted by S. 167 of the Same Act. *Held* that the intention of the framers of the Tenancy Act was to include such a case as the present within the jurisdiction of the Civil Court, and if S. 36, as framed, does not cover it, it is merely because the possibility that such a case was not thought of at that time when the section was drafted. (*Daniels, J.*) RAJA RABI PRATAB NARAIN SINGH v MAHANTH RAM PRASAD. 21 A. L. J. 646 : L. R. 4 A 331 (Rev.)

74 I. C. 502.

—Ss. 41 and 95—*Registered lease—Oral agreement for enhancement of rent. See (19-2) DIG. COL. 30 PRAG NARAIN v. ANGAD.*

70 I. C. 495.

—S. 43 cl. (1) (b)—*Enhancement of rent—Rise in prices—Competition rates.*

In cases of enhancement of rent it is advisable to check the general conclusion as to the effect of rise in prices by competition rates but the comparison must be limited to economic holdings only. (*Pearson, J. M.*) SAHU PARSHOTAM DAS v. RAGHUNANDAN BHAT. L. R. 4 A. 48 (Rev.)

—S. 47—*Agreement to pay higher rent—Right to eject.*

It is not illegal for a zemindar to realise more than the rent formerly payable if the tenant pays it willingly.

Where however there is an undertaking to let him remain in possession for 5 years and on the basis of that a higher rent was agreed to the zemindar is estopped from ejecting him till the expiry of such period. (*Fremantle, S. M.*) BISHAM CHAR SINGH v. SAHIB ALI. L. R. 4 All. 363 (Rev.)

—S. 47 A—*Record of Rights—Preparation of—Slips supplied to tenants—Value of—Enhancement of rent.*

The preparation of a Record of Rights is not equivalent to execution of an instrument within the meaning of S. 47-A of the Agra Tenancy Act. During the record operations, which are a preliminary part of settlement proceedings, slips containing extracts from the record, are supplied to tenants who are then called on to attest these. It is a stretch of language to describe such a slip as an instrument evidencing an agreement between a landholder and a tenant such as is contemplated by S. 47. The oral agreement proved by the settlement record is not sufficient to protect the tenant under S. 47. (*Burn, J. M.*) RAM SARUP v. AJODHIYA PRASAD. L. R. 4 A. 151 (Rev.)

—S. 56—*Status of sub-tenant—Ejectment—Civil or Revenue Court.*

Where an occupancy tenant under a compromise of a suit in a Civil Court sub-let a portion of his holding to another person for a fixed rent, the latter is a tenant within the meaning of S. 56 of the Agra Tenancy Act and she could be ejected only in accordance with that Act. (*Stuart, J.*) RAM GAJADHAR v. MT. SURTANI. 71 I. C. 381 : 1923 A. 343.

## AGRA TENANCY ACT (1901), S. 57.

## —Ss. 57, 63 (a)—Ejection—Suit under—Alienation by Hindu widow.

A Hindu widow's estate is not a life estate and it is not an estate held in trust for reversioners. She represents the estate and has power to make alienations subject to the rights of reversioners to have those alienations set aside if they are found to be either not for legal necessity or not for the benefit of the estate. They do not cease to be operative. A reversioner therefore cannot institute a suit for ejection in the Revenue Court without setting aside the alienation. (*Stuart, J.*) *KANDHYA v. RAJ KUNWAR*.  
75 I. C. 681 (2): 1923 A. 367 (2).

—S. 57 (a) (c)—Non-payment of rent—Ejection—Maintainability of suit. (*Mears, C. J. and Piggott, JJ.*) *MAHANT KUBER DAS v. RAM DIN KALWAR*.  
45 A. 5. 1923 A. 14 (2).

—S. 57 (b)—Fixed rate tenancy—Agricultural purposes—House construction. See (1922) Dig. Col. 32. *M. HARAJA PRABHU NARAIN SINGH BAHADUR v. PANDIT ACHUTA PRASAD DUBEY*.  
9 O. & A. L. R. 152.

## —S. 57 (d)—Grove—Tenant grove holder—Ejection.

A suit to eject tenant grove-holders stand on a different footing from a suit to eject a tenant of a grove. Neither S. 57 of the Agra Tenancy Act nor any other provision of law entitles the landlord to eject a tenant grove holder. (*Stuart, J.*) *SHEO PRASAD v. BABU RAM*.  
71 I. C. 350.

—S. 58—Entries in Settlement records—Correctors—Presumption—Rebuttal. See U. P. LAND REVENUE ACT, S. 57.

L. R. 4 All. 434 (Rev).

## —S. 58—Grove—Ejection from—When permissible.

It is necessary to distinguish between land which has been given to a person for the purpose of planting a grove and land in which there is already an established grove which is let to somebody. In the first case it is settled law that the landholder cannot eject the groveholder under S. 58 of the Tenancy Act unless there is some special custom or contract to that effect. Where however an established grove is let for rent, a suit for ejection will lie under S. 58 of the Tenancy Act. (*Fremantle, S. M. and Burn, J. M.*) *KASHI NATH v. DATA DIN*.  
L. R. 4 A. 71 (Rev).

## —S. 58—Grove holder—Suit against—If maintainable—Defences.

A tenant in possession of a grove is liable to a suit under S. 58 Agra Tenancy Act. He can resist such a suit on the ground he is not a tenant from year to year but a tenant holding under a special contract or one possessing the customary rights of a grove holder. He must prove that the trees were planted with the consent express or implied of the landholder. (*Fremantle, S. M. and Burn, J. M.*) *SHEO JATAN PRASAD NAIK v. JAGMOOP LONIA*.  
9 O. & A. L. R. 1059.

## —Ss. 58, 194—Sale of undivided Share—Effect—Ex-proprietary rights—Nature of.

When the undivided share of a co-sharer is a *malal* is sold, he becomes an ex-proprietary

## AGRA TENANCY ACT (1901), S. 73.

tenant of the whole proprietary body and not of his vendee only. This principle will apply even where the land being *khuakashi* of under 12 years ex-proprietary rights do not accrue and the vendee remains only a non-occupancy tenant. (*Fremantle, S. M. and Burn, J. M.*) *JANG BAHADUR NAIK v. HARBILAS NAIK*.  
L. R. 4 A. 430 (Rev).

## —S. 59—Applicability of—Ejection

An ejection under S. 59 of the Tenancy Act breaks the tenure even if the tenant continued to occupy the same land. (*Burn, J. M.*) *MALAI KHAN v. SHEODHAN SINGH*.  
L. R. 4 A. 217 (Rev).

## —Ss. 59 and 61—Proceedings for ejection—Uncertified payment or adjustment.

The provisions of O. 21, R. 2 of the Civil Procedure Code, which bar proof of payment of money or any other adjustment in satisfaction of a decree, which is not certified to the Court, apply to proceedings for ejection under S. 59 of the Tenancy Act. (*Fremantle, S. M. and Burn, J. M.*) *SUJAN v. MD. FATEH SHAH KHAN*.  
L. R. 4 A. 261 (Rev).

## —S. 63—Ejection—Right of one co-sharer to sue.

A co-sharer who is entitled to collect the entire rent of a particular tenant is also entitled to eject him, as he is a landholder for the purpose of the Act. (*Daniels, J.*) *MUNESHAH TEWARI v. MT. MAHESHA KUERI*.  
L. R. 4 A. 329 (Rev):  
74 I. C. 197.

## —S. 66—Ejection—Revision.

In an ejection suit the tenant raised the question that he should be allowed the benefit of S. 66 of the Agra Tenancy Act but the Commissioner did not decide the point. Held there was a ground for interference in revision. (*Burn, S. M. and Pearson, J. M.*) *PEAREY LAL v. PRAG NARAIN*.  
L. R. 4 A. 39 (Rev).

## —S. 67—Ejection—Suit for—Pleas in defence.

The pleas that the defendant had acquired occupancy rights and that his ejection was sued for because he had refused to agree to an enhancement of rent, can be raised as alternative defences to an ejection suit. (*Fremantle, S. M. and Burn, J. M.*) *RAM BHAROSEY v. KALKA PRASAD*.  
L. R. 4 A. 249 (Rev).

## —S. 73—Decree in ejection—When takes effect.

A decree in ejection takes effect from 1st July under S. 73, Agra Tenancy Act, even if actually possession is delivered later. (*Fremantle, S. M. and Burn, J. M.*) *HAFIZ AHSAN ULLA v. EDA*.  
L. R. 4 All. 324 (Rev).

## —S. 73—Ejection—Execution of decree—Date when it takes effect.

Though the formal giving of possession in execution of an ejection decree is postponed till shortly after the beginning of the next Fasli year the ejection takes effect from the beginning of that year. (*Fremantle, S. M. and Burn, J. M.*) *GAJADHAR PRASAD v. MUL CHAND*.  
L. R. 4 A. 68 (Rev).



## AGRA TENANCY ACT (1901), S. 75.

—S 75 (2)—*Execution—Crops on holding—Tenant allowed to remain in possession—Status of*

Under S. 75 (2) Agra. Ten. Act, when crops or standing on the holding at the time of delivery of formal possession, the parties may agree that the tenant remains in possession till the crops are cut paying a reasonable rent. The term during which he remains in such possession cannot be computed for acquiring occupancy rights. (*Fremantle, S. M.*) BISHNAIH v. MT. BHAWANI KUAR.

L. R. 4 A. 371 (Rev)

—S 79—*Dispossession by Zemindar—Suit for possession—Limitation.*

Where the Zemindar is responsible for the plaintiff's dispossession from his holding, a suit for recovery of possession thereof is governed by the six months rule under S. 73. (*Gokul Prasad, J.*) PARSOTAM v. GANPAT RAM.

73 I. C. 1012 : 1923 A. 517.

—S. 79—*Jurisdiction—Civil and Revenue Court—Relief granted by Revenue Court. See* (1922) DIG. COL. 35 PRAYAG AHIR v. MAHABIR AHIR.

69 I. C. 811.

—Ss 79 and 167—*Jurisdiction—Civil and Revenue Court—Suit for possession and damages—Declaration of title.*

Where the plaintiff brings a suit for possession as occupancy tenant and damages for crops forcibly cut and appropriated by the defendant claiming under a lease from the Zemindar held that the plea for possession was maintainable only in the Revenue Court and that the claim for damages must also fail. The suit was in effect an attempt to evade the provisions of the Agra Tenancy Act. The Civil Court cannot investigate, much less find on the allegations of the plaintiff that he is for one reason or other an occupancy tenant. Nor can it for the same reason decide whether the defendants are permanent lessees. A suit for declaration between two rival tenants may be brought in a Civil Court but a suit for possession as an occupancy tenant must be brought in a Revenue Court. (*Kyees, J.*) SITA RAM v. CHAIT RAM

71 I. C. 447 : L. R. 4 A. 291 (Rev.) : 1923 A. 257.

—S. 79—*Sir land—Mortgage of—Ex proprietary rights—Suit for possession.*

Persons having ex-proprietary rights in sir land can sue the purchaser of land under S. 79 of the Agra Tenancy Act for possession. It is immaterial that the latter was in possession as mortgagee on the date on which ex proprietary rights were acquired. (*Fremantle S. M. and Burn, J. M.*) RAM UDIT OJHA v. BALKARAN OJHA.

L. R. 4 A. 318 (Rev).

—S. 87—*Abandonment of holding—Proof.*

The law as to abandonment of a holding by a tenant in Oudh is not the same as it is in Agra and the facts that the tenant went away and that a relative left in charge of the holding paid rent direct to the landlord on his account does not constitute abandonment. Where there is proof that when the tenant went away he made no arrangements for the cultivation of the holding then

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there may be an abandonment. (*Fremantle, S. M. and Burn, J. M.*) AMIR HAIDAR KHAN v. RAM RATAN. L. R. 4 A. 286 (Rev.) : 9 O. & A. L. R. 804

—S. 87—*Abandonment of land by tenant—What constitutes—Action by Zemindar.*

Technical abandonment under S. 87 of the Act cannot be said to be proved where the tenant in chief did not leave the village. The mere entry in the patawari papers that the land has been abandoned does not make any difference. (*Fremantle, S. M.*) SHEO NATH KUAMI v. AUTAR KUMAL.

L. R. 4 A. 130 (Rev).

—S. 87—*Abandonment—Proof.*

Proceeding under S. 87 Agra Tenancy Act is not the only method of proving abandonment. (*Burn, J. M.*) NAINA v. CHAUDHURI BAWANT SINGH.

L. R. 4 A. 138 (Rev.) : 9 O. and A. L. R. 1058.

—S. 87—*Proof of abandonment.*

In order to prove abandonment it is necessary to prove not only that the tenant has left the village but also that he has done so without making arrangements for the cultivation. (*Fremantle, S. M. and Burn, J. M.*) SAKHAWAT ALI v. ASAD ALI.

L. R. 4 A. 173 (Rev).

—S. 87—*Object and scope of—Abandonment—Failure of landholder to proceed under the section.*

It has ever been held that there is absolutely no other way of establishing abandonment by an occupancy tenant except by proceeding under S. 87. Obviously this section is not meant to provide the only means for establishing this fact as it can only be brought into operation when the tenant has left the neighbourhood. When the tenant has done so it must, of course, be held that if the landholder fails to avail himself of this procedure. He will be considered to have neglected to take advantage of the means provided for him by law for establishing his claim definitely, and the burden must lie heavily on him; but cases do arise where it is positively to the advantage of the Zemindar to allow an absconding tenant's name to remain on the papers as a means of preventing the acquisition of occupancy rights by the sub-tenant. (*Pearson, J. M.*) MAHOMED ALI NASIR KHAN v. GUPTAR.

L. R. 4 A. 56 (Rev.),

—S. 87—*Occupancy holding—Zemindar—Receipt of rent from the cultivator—Abandonment.*

It is always a question of fact whether the Zemindar is to be considered as agent of the tenant-in-chief or the latter is to be held to have definitely abandoned. (*Pearson, J. M.*) NEUR AHIR v. KAULESHAR AHIR.

L. R. 4 A. 58 (Rev),

—S. 88—*Occupancy tenant—Improvement made by consent of 17 out of 18 Zemindars.*

Where 17 out of the 18 Zemindars consented to the making of an improvement held that the court will not compel the occupancy tenant making the improvement to destroy it at the instance of the 18th Zemindar as the benefit of that occupancy

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holding is the benefit of the whole village whether the plaintiff is interested in it or not. (Stuart, J.) *RESHNA BIBI v. BHAWANI SARAN.*

1923 All 281.

—S. 95—*Joint cultivation—Period of—If counts for acquisition of occupancy rights.*

Where the evidence shows that a person was cultivating jointly with another for some time and thereafter singly, the former period cannot be counted for the acquisition of occupancy rightst (Fremantle, S. M. and Burn, J. M.) *BOHRA SALIG RAM v. TULSI RAM*

L. R. 4 All. 350 (Rev).

—S. 95—*Jurisdiction—Civil Court—Suit for declaration that defendant is sub-tenant.*

A suit for a declaration that the defendant is a sub-tenant of the plaintiff falls under S. 95 Agra Tenancy Act and is not cognizable by the Civil Courts. (Daniels, J.) *GHISWA v. DEO NARAIN.*

73 I. C. 947. L. R. 4 A. 450 (Rev.).

1923 A. 568.

—S. 95—*Suit for declaration of ex-proprietary rights—Prior ex parte order based on Patwari's Report—If conclusive*

In a suit for declaration of ex-proprietary rights under S. 95 Agra Tenancy Act, a prior *ex parte* order based on the patwari's report and fixing rent cannot operate as *res judicata*. (Fremantle, S. M. and Burn, S. M.,—MT. REOTI v. TIKI RAM.

L. R. 4 A. 374 (Rev.).

—S. 95—*Suit for declaration of tenure—Prior ex parte order granting ex-proprietary rights—Order based on patwari's report—If binding. See C. P. CODE S. 11.*

L. R. 4 All 396 (Rev.).

—S. 95—*Suit for declaration of status same co sharers alone joining—Effect.*

Under S. 95 Agra Tenancy Act, a suit for declaration of status is not bad because the khata is joint and some of the sharers have not joined in the suit. (Fremantle, S. M.) *MT. AMDANI BIBI v. RAM CHANDRA NAIK KALIA*

L. R. 4 All. 306. (Rev).

—S. 96—*Applicability of.*

Even though a Thekadar is a non-occupancy tenant under S. 19 of the Agra Tenancy Act, nevertheless S. 96 can apply only to a non-occupancy tenant of an agricultural holding which a Thekadar is not; consequently he cannot sue under S. 96 in a Revenue Court. His proper remedy is to bring a suit for specific performance if there was a contract for permanent lease. (Ryves, J.) *GIRJA NAND v. HIS HIGHNESS THE MAHARAJA PARBHU NARAIN SINGH KASHI NARESH.*

75 I. C. 605 : 1923 A. 398 (2).

—S. 97—*Attestation by Revenue Officer—Sufficiency of.*

S. 97 declares that attestation may be affected by any Revenue Officer superior to the rank of Qanungo. Attestation by a Deputy Collector in an executive capacity is clearly adequate. (Fremantle, S. M. and Burn, J. M.) *JAGANNATH PRASAD v. RAJA INDRA BIKRAM SINGH.*

L. R. 4 A. 237 (Rev).

## AGRA TENANCY ACT (1901), S. 164.

—Ss. 102 and 167—*Landlord and tenant—Rent payable in kind—Refusal of tenant to cultivate land—Suit for damages.*

A suit for payment of rent in kind, where defendant is alleged to have purposely left land fallow is triable only by a Revenue Court. (Ryves, J.) *KAJA NARANDRA BAHADUR PAL v. BAFATI.*

45 A. 7. 1923 A. 50.

—S. 146—*Wrongful distraint—Suit for damages—Limitation See LIM ACT, S. 23.*

1923 All. 146.

—S. 150—*Order rejecting petition of appeal—Revision.*

In a suit under the Tenancy Act the Assistant Collector passed a decree and a petition of appeal was presented to the District Judge. The suit was under Sch. IV Group C. No. 39 of the said Act and under the provisions of Ss 150 and 154 of the said Act. The District judge refused to entertain the petition on the ground that he had no jurisdiction under S. 177 of the Tenancy Act. On revision to the High Court held that no revision lay. 14 A. L. J. 281 Ref. (Piggot, J.) *ADYA SARAN v. KALI CHARAN.*

45 A. 567 : 21 A. L. J. 524.

L. R. 4 A. 223 (Rev) : 75 I. C. 280 :

1923 A. 580.

—S. 158—*Suit for resumption—Plea by defendant—Proprietary title.*

A plea by the defendant in a resumption suit based on S. 158 of the Agra Tenancy Act raises a question of proprietary title within S. 177 (e) of the Ten. Act (Lindsay, J.) *LALTA PRASAD v. KHARGA,*

45 A. 336 : L. R. 4 A. 84 (Rev) :

71 I. C. 773 : 21 A. L. J. 189 :

1923 A. 313.

—S. 160—*Usufructuary mortgagee's name entered in revenue records—Suit for recovery of proportionate amount on account of that share which has been redeemed.*

Plaintiff was a usufructuary mortgagee under two mortgages, one was redeemed but his name continued to be recorded as a mortgagee. He sued for recovery of the proportionate amount of the money which he had to pay on account of that share which had already been redeemed. Held that where a person's name is entered as mortgagee lessee the revenue court was not competent to go behind the entry and to find that he was not in possession. Consequently such a suit does not lie. (Gokul Prasad, J.) *IRSHAD MAHOMED KHAN v. JWALA PRASAD.*

75 I. C. 663 :

1923 A. 344.

—S. 164—*Co-sharer—Lambardar—Collections—Suit and decree for a portion of the rental—Decree for share of rent—Interest.*

The amount of the actual Collections showed that the lambardar realised 76 per cent. With regard to to the rest he brought suits and obtained decrees against defaulting tenants. Held, the fact that some of the decrees cannot be realised is no fault of the lambardar nor can it be said to constitute negligence. No negligence of the lambardar in the Collection of rents has been proved and that the decree in favour of co-sharer for profits should proceed on the basis of actual Collections, with

## AGRA TENANCY ACT (1901), S. 164.

12 per cent interest which is the proper rate of interest in the case up to realization (*Rafiq and Lindsay, JJ*) *RAMCHANDRA SARUP v. KIRPA DEVI*. 1923 A. 216

—S. 164—*Suit by a co-sharer against Lambardar for recovery of share of profits—Onus when shifted*

When a co-sharer has given general evidence to show that the rents are greatly in arrears that the tenants are solvent and that there are no special circumstances why the rents should not have been collected, the onus is shifted on the Lambardar to show that for some reason not connected with his own negligence or misconduct, he was unable to collect the rent. Collection charges should be awarded to the Lambardar, even though he does the work of collection himself. 13 A. L. J. 851 Foll. (*Sulaiman, J.*) *MUSAMMAT HIRIA v. RAM ADHN SINGH*. 75 I. C. 553 : 1923 A. 330

—Ss. 164 and 165—*Suit by co-sharer for share of profits—Decree on actual collections—Previous arrears. See (1922) DIG. COL. 39.* *DURGA PRASAD v. GANGA SARAN*. 70 I. C. 763

—S. 164—*Suit by a mortgagee of a Lambardar for profits—Maintainability.*

An 8 annas sharer who was also a Lambardar mortgaged his 3 annas share. The mortgagee gave him a lease for 7 years. After that period the Lambardar continued making collections. The mortgagee sued him for recovery of profits. Held that such a suit did not lie. 14 I. C. 260 Affir. (*Gokul Prasad, J.*) *TIRBANI SAHU v. LACHMI PANDE*. 75 I. C. 666 : 1923 A. 346.

—S. 167—*Jurisdiction—Civil and Revenue Court—Suit relating to possession of trees. See LANDLORD TENANT, GROVE.* 45 A. 191 : 21 A. L. J. 33 : 90 & A. L. R. 277 : 1923 A. 134.

—S. 167—*Suit for declaration of occupancy rights—By whom cognisable.*

A suit for declaration of occupancy rights both against a zemindar and a co-tenant, is cognisable only by a Revenue Court. (*Ryres, J.*) *KHAIRED-DIN v. SAHU GULAB DAS*. 74 I. C. 220 (1)

—Ss. 175 and 179—*Ejectment—Death of decree-holder—Legal representative—Revival of proceedings—Abatement. See (1922) DIG. COL. 40.* *THE NATH CHANDRAWAT KOSH TRUST v. CHANDRA BALL*. L. R. 4 A. 10 (Rev).

—S. 177—*Applicability of Appeal—Forum.*

The words "in all suits" in S. 177 of the Agra, Ten. Act would comprise suits of any description in whatever group they may be and it cannot be said that because a particular kind of suit falls in Group C, the appeal does not lie to the District Judge. (*Lindsay, J.*) *LALTA PRASAD v. KHARGA*. 45 A. 336 : 21 A. L. J. 189 : L. R. 4 A. 84 (Rev) : 71 I. C. 773 : 1923 A. 313

—Ss. 177 and 198—*Ejectment suit—Plea of jus tertii—Appeal*

The defendant in a suit for ejectment denied the landlord's title and set up that of a third

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person. Held that there was a question of proprietary title raised in the suit and where the question was decided by the Revenue Court an appeal lay to the District Judge. The remedy under S. 198 of the Tenancy Act is an additional remedy but does not prevent an appeal lying to the District Judge under S. 177 cl. (e) of the Agra Tenancy Act. (*Gokul Prasad, J.*) *TULSI PRASAD SAHAI v. RAM RAJ AHIR*. 71 I. C. 308 : 1923 A. 414 (2)

—S. 177 (e)—*Proprietary right—Mortgage right*

The question whether the defendants are mortgagees of proprietary right or have no right at all in the land in dispute amounts to a question of proprietary right within section 177 (e). 35 A.L. 157. Foll. (*Daniels, J.*) *DHIRJA v. MITHAN LAL*.

74 I. C. 914 : 1923 A. 562.

—S. 177 (e)—*Proprietary title—Suit under S. 34, Agra Tenancy Act.*

The plaintiff brought the suit under S. 34 alleging that the defendant was occupying the land without his permission. The defendant pleaded that he was a mortgagee of the proprietary right. Held that a question of proprietary right was involved within S. 177 (e) of the Agra Tenancy Act. (*Daniels, J.*) *NAUJADIK RAI v. RAM JATAN RAI*. 73 I. C. 584 (1) : 1923 A. 558.

—S. 177 (f)—"Question of jurisdiction has been decided"—Meaning of. See (1922) DIG. COL. 17. *POHAR SINGH v. MOHAN SINGH*.

70 I. C. 578

—S. 185—*Grounds for revision*

Failure to consider the evidence on record judicially is a ground for revision under S. 185 Agra Tenancy Act. (*Fremantle, S.M. and Burn, J.M.*) *RAM CHARAN LAL v. RATI*. L. R. 4 A. 193 Rev.

—S. 185—*Omission to consider questions raised.*

Where the Court omits to consider questions which were definitely raised before it is a sufficient ground to interfere in revision. (*Fremantle, S.M. and Burn, J.M.*) *SOHAN v. AHMAD ALI*. L. R. 4 A. 197 (Rev).

—S. 185—*Power of Collector to review—Limitation.*

A Collector could not review the decision of another court except on the ground of some clerical error appearing on the face of the record and he could not interfere after the 30 days allowed by the Statute Law (*Fremantle, S.M.*) *CHINKOO CHAMAR v. ABDUL GHAFOOR*. L. R. 4 A. 146 (Rev).

—S. 194—*Co-sharer—Right to sue in ejectment.*

S. 194 Agra Tenancy Act should be strictly construed and unless there is clear proof that one of the co-sharers has the sole right to collect the whole rent from a tenant, all the co-sharers

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should join in a suit in ejectment. (*Fremantle, S. M.*) *RAM SAGAR PANDEY v. LAL KISHUN PANEDY*.  
9 O. & A. L. R. 1080.

—S. 194—*Declaration of tenure—Maintainability of suit—Claim common—Defendants refusing to press.*

In a suit for declaration of tenure under S. 95 Agra Tenancy Act, where it is found the basis of the claim is common to plaintiffs and the other defendants who refused to press it, the suit should be dismissed under S. 194. (*Fremantle, S. M. and Burn, J. M.*) *MT. REOTI v. TIKA RAM*  
L. R. 4 All. 396 (Rev.)

—S. 194—*Lambardars—Ejectment suit by some—Maintainability.*

In a suit to eject by some only of the lambardars, the others who never took any interest in the resumption proceedings or the claiming of rent cannot intervene to protect the tenants from being ejected (*Fremantle, S. M. and Burn J. M.*) *BADRI SINGH v. BHUP.* L. R. 4 All. 321 (Rev.)

—S. 194—*Lambardar—Powers of.*

A lambardar can give possession to a tenant to erect a kucha house on land belonging to the joint party as he is an implied agent of the co-sharers. (*Daniels, J.*) *ABDUR RAOF v. BACH-CHOO.* 73 I. C. 495 (1) : 1923 A. 532 (1)

—S. 194—*Lambardar—Power to collect rent of holdings.* See (1922) DIG. COL. 42 *HANUMAN SINGH v. SYED AHMED ALI KHAN.*  
9 O. & A. L. R. 243.

—S. 194—*Purchase of Zemindari interest before appeal—Effect.*

Pending the appeal in an ejectment suit the tenant purchased the Zemindari interest: Held, the mere ground that it was probable that if the suit had been then instituted, it would be dismissed under S. 194 Agra Tenancy Act was not justification for allowing the appeal (*Fremantle, S. M. and Burn, J. M.*) *DEBI MANGAL PATHAK v. JAGESARE* L. R. 4 A. 202 (Rev.)

—S. 194—*Right of—One co-sharer to sue—Civ. Pro Code, O. 1, R. 8.*

When there are many co-sharers in the village an informal partition between the co-sharers is the only means by which the rent can be realised and the Revenue paid and when such a partition or *phatbandi* is in existence in the village and is formally recorded in the *wajib ul-arz*; and it has been in force for over forty years, the co-sharer in whose share particular plots fall is perfectly entitled to collect the rents and eject the tenants of those plots, and the land is not removed from his share merely because particular tenant happens to die without heirs. (*Daniels, J.*) *JOKHU RAI v. BHABHUTI RAI.* 1923 A. 559

—S. 194.—*Thekadars—Authority to collect rent.*

There is nothing in S. 194 of the Agra Tenancy Act to require that the authorization to collect rent by one of several *thekadars* should be in writing (*Fremantle, S. M. and Burn, J. M.*) *HAFIZ AHSAN ULLAH v. EDA.*

L. R. 4 All. 324 (Rev.)

## AGRA TENANCY ACT (1901), S. 202.

—Ss. 196 and 197—*Ejectment suit—Revenue Court's decision whether binding.* See (1922) DIG. COL. 16 *JANKI v. DEBI SHANKAR.* 69 I. C. 799.

—S. 198—*Suit by landlord for arrears of rent—Tenant pleading payment in good faith to third person—Decision against landlord—Right of suit in Civil Court.*

A landlord brought a suit for arrears of rent and the defence set up by the tenant was payment in good faith to a third person who was impleaded as a party to the suit. The title of the third person was negatived whereupon he brought a suit in a Civil Court for the declaration of his title as landlord. Held that the suit was not barred by S. 11 C. P. C. and that it was maintainable in a Civil Court (*Ryves and Gokul Prasad, JJ.*) *HABIB KHAN v. FIDA HUSAIN KHAN.*  
L. R. 4 A. 138 (Rev.) 71 I. C. 1017.

—S. 199—*Grove land—Title to—Ownership of trees apart from the land—How determined.*

It is competent to a person in a suit under S. 199 of the Tenancy Act to have the question of title determined and to prove that he is the owner not of the land but of the trees on the plot. (*Lindsay and Daniels, JJ.*) *LALTA PRASAD v. RAM BAHADUR.* 21 A. L. J. 434 : 74 I. C. 349 : 1923 A. 540.

—S. 199 (1)—*Decision on a question of title—Effect of.*

The decision on a question of title under S. 199 of the Agra Tenancy Act has the force of a decision of a Civil Court and where such a decision has been arrived at by an Assistant Collector Second Class in the United Provinces, it will be *res judicata* when the same is attempted to be raised before an Assistant Collector, First Class. (*Daniels, J.*) *AMIN-UD-DIN v. ABDUL SHAKOOR.* 73 I. C. 460 : 1923 A. 556.

—S. 201—*Record of rights—Entry in—Presumption.*

Where notwithstanding the order of a competent authority the entries in the record of of rights have not been corrected for over two years there is no presumption that the entries are correct, 33 A 799 distinguished. (*Gokul Prasad, J.*) *TIKA RAM v. DUBO SHIB LAL.* 71 I. C. 992 : 1923 A. 401 (1).

—S. 201 (3)—*Suit for profits.* See (1922) DIG. COL. 1072 *SHEO NARAIN v. RALA RAO.*  
9 O. & A. L. R. 150 : 69 I. C. 208.

—S. 202—*Agricultural lease—Suit to set aside—Ejectment—Jurisdiction—Civil and Revenue Court.* See (1922) DIG. COL. 46. *AMINA BIBI v. SAIVID ALI ZAFAR.* 44 A. 748 : 70 I. C. 968.

—S. 202—*Lambardar—Perpetual lease—Rights of lessee—Plea of tenancy—Procedure.*

The lambardar of a village granted a perpetual lease to the defendant of 20 bighas of land. The plaintiff, a co-sharer, brought a suit in the Civil Court for the cancellation of this lease on the ground that it was beyond the powers of the lambardar to execute. The defendant pleaded that the lease was a good and valid lease. His

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contention was that not only was it within the powers of the lambardar but that it was executed with the consent of all the co-sharers. *Held* that this was in substance a plea that the defendant was the tenant of the whole proprietary body including the plaintiff and that under these circumstances the Trial Court should have under S. 202 of the Agra Tenancy Act directed the defendant to file a suit in the Revenue Court within 3 months to establish the tenancy which he set up. (*Lindsay and Daniels, JJ.*) **KALI DIX v RAMAPAT.**

L. R. 4 A 167 (Rev :  
73 I C 953 : 1923 A: 534

**S. 202—Suit in ejectment—Plea of tenancy—Power of Civil Court.**

Where a suit for ejectment from a certain plot of agricultural land on the ground that the defendant is a trespasser is brought in the Civil Court and the defendant pleads a tenancy it is incumbent on the Civil Court to refer the plaintiff to a Revenue Court under S. 202 of the Agra Tenancy Act. There is nothing in the section itself to require the Civil Court to decide that the claim to a tenancy is *bona fide* before applying S. 202. (*Daniels, J.*) **JASRAM v AMAR NATH.**

71 I C 475 (1) 1923 A 439

**CHAPTER X—Co-sharer—Agreement to hold less than his share in consideration of payment of Revenue by other sharers**

Where a co-sharer took less than his proportionate share of common property in consideration of the other co-sharers paying the revenue on the entire estate, chapter X of the Tenancy Act does not apply to the case and proceedings for assessment of rent or revenue are not maintainable. (*Pearson, J. M.*) **JAIKARAN SINGH v DIP NARAIN.**

L R 4 A 46 (Rev) ·  
90 & A. L R 213

**CH. X—Resumption—Grove land.**

It is only a grove and not the land given for planting a grove which can be resumed under Chapter X of the Tenancy Act. (*Fremantle S. M.*) **SURAJ BALI v. BRIJ NATH SHARGHA.**

L. R. 4 A. 276 (Rev).

**ALIEN ENEMY—Test of—Domicile—Commercial domicile.**

When considering questions arising with an alien enemy it is not the nationality of a person but his place of business during the war that is important. In considering the validity of commercial contracts, regard is had to the place of business, whether it is in an enemy country. The validity of the contract does not depend on the nationality of the party nor even on what is his real domicile but on the place or places in which he carries on his business or businesses (1916) 1 K B. 284; (1915) 1 K. B. 857; (1902) A. C. 484 *Ref.* (*Hallifax, A. J. C.*) **MOHANLAL v. BISHESHWARDAS DAGA.**

70 I. C. 344 : 1923 Nag. 121 (2).

**ALLUVION AND DILUVION—Acceptance of remission—If amounts to abandonment—Intention.**

Where division takes place the mere fact of non-payment of rent or claiming or accepting remission is not proof of abandonment and until abandonment is proved, the right to the lands

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remains intact. The question is one of intention to be determined by the circumstances of each case (*Jwala Prasad and Ross, JJ.*) **RAMNANDAN SAHEY v. JAIGOBIND PANDAY.**

2 Pat. 839.

**—Riparian owners—Rights of—Accretion.**

The bed of a public navigable river is the property of the Government though the banks may be the subject of private ownership. If there be slow accretion to the land on either side, due for instance to the gradual accumulation of silt, this forms part of the estate of the riparian owner to whose bank the accretion has been made. Regulation II of 1825). If private property be submerged and subsequently again left bare by the water, it belongs to the original owner. (*Lord Phillimore*) **NARESH NARAYAN ROY v. SECRETARY OF STATE FOR INDIA.**

50 Cal 446: 45 M. L. J. 444 :  
1923 M. W. N. 511 : 50 I. A 121 :  
32 M. L. T. (P. C.) 162 : 1923 P. C. 1 (P. C.).

**APPEAL—Agreement by parties to be bound by the decisions of a Court on local inspection—Whether excludes right of appeal—Right of appeal not taken away, unless parties agree expressly or by necessary implication.**

Where the parties to a suit agreed to the matter being decided by the Court according to the opinion which it may entertain upon a local inspection without going into any further evidence in the suit such an agreement does not preclude any party from appealing against any decree that the Court may pass after such local inspection, excepting on the points of fact decided by the Court on its local inspection.

It is only in cases where an agreement between the parties results in the Court assuming jurisdiction which otherwise it would not have or involves the Court in going so far outside its ordinary course of procedure that it is impossible for the appellate Court properly to review its decision, that parties are not entitled to appeal against the decision of that court.

The right of appeal is a very important right and the Court will not imply a term to give up that right unless it is driven to that conclusion.

The right of appeal will not be taken away when the parties agreed to mere deviations from the ordinary procedure of Courts. L. R. 5. P. C. 516; (1896) A. C. 136 followed. 26 Mad. 76; 37 M. L. J. 100 dissented from (*Schwabe, C.J. and Wallace, J.*) **SANKARANARAYANA PILLAI v RAMASWAMI PILLAI.**

44 M. L. J. 258 : 17 L. W. 303 :  
(1923) M. W. N. 154 : 72 I. C. 149 :  
1923 Mad 444.

**—Amendment of plaint—Power of court—Bona fide mistake—Objection taken in trial court—Effect, See C. P. CODE O. 6 R. 17.**

2 Pat. 919.

**—Batch of suits—Evidence in each not considered separately—Effect.**

In a batch of suits for enhancement of rent, the trial court went into the facts of each suit or group of suits separately and gave its judgment. But the appellate court reversed the judgment without considering the evidence in each sepa-

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rately. *Held*, the judgment cannot be accepted as proper. (*Das and Kulwant Sahay, JJ.*) **NAND LAL CHAUBE v. KESHO PRASAD SINGH.**

1923 Pat 339

—Criminal trial—Evidence against each of several accused to be gone into separately.

In a criminal appeal where several accused are concerned, the evidence against each should be gone into separately. (*Krishnan, J.*) **IN RE SAMACHARI.** 45 M. L. J. 728

33 M. L. T. 182 (H. C.) : 18 L. W. 743.

—Decree for joint possession—One of the plffs. not made respondent—Bringing him on record after the death of another. *See* (1922) DIG. COL. 1073 **TEJ NARAIN SAHU v. DAL RAM SAHU.**

1 Pat 699 . 4 Pat. L. T. 170 . (1923) Pat 207 : 69 I. C. 624

**APPEAL—Dismissal for default—Fresh one if Competent**

There is nothing in law to prevent the entertainment of a fresh appeal after the dismissal for default of a previously filed appeal, provided the latter appeal was otherwise in order and was filed within the period of limitation. (*Das and Kulwant Sahay, JJ.*) **SURAJDEO NARAIN SINGH v. PARTAP KAL.** 2 Pat. 739 . 4 Pat. L. T. 405 (1923) Pat. 213 : 75 I. C. 264 . 1923 P. 54 (A. I. R.)

—Disposal—Technical points.

It is always admissible in the interests of justice that an appeal should be heard upon its merits in preference to being rejected upon any technical point of law. (*Paton, J. C.*) **MURLI MAL v. VAISHNO DITTA.** 73 I. C. 788.

—Disposal of, without summoning respondent—Legality of.

Where an appeal is disposed of and allowed without notice to the respondent, the decision cannot stand. (*Fremantle, S. M. and Burn, J. M.*) **CHATTAR v. RAJA SURAJ PAL SINGH.** L. R. 4 A. 373 (Rev.) . L. R. 4 A. 442 (Rev.) .

—Evidence — Appreciation of — Conclusion of trial judge as regards credibility — When can be reversed in appeal. *See* EVIDENCE 1923 P. C. 156.

—Failure to consider evidence—Effect.

Failure to consider all the evidence on record is sufficient to justify interference in appeal. (*Fremantle, S. M. and Burn, J. M.*) **MT. KALAWATI v. SITA.** L. R. 4 A. 200 (Rev.)

—Judgment — Finding on all issues in appealable cases to be given.

In appealable cases an opinion should be expressed on all the important points, to avoid the necessity of a remand by the appellate Court. (*Batten, J. C. and Hallifax, A. J. C.*) **LACHMINARAYAN v. MOULVI ZAHIRUL SAID ALVI.** 1923 Nag. 322.

—Limitation—Plea of—If can be raised for the first time. *See* C. P. CODE, O. 8, R. 2. 69 I. C. 194.

—Limitation—Question if can be raised for the first time.

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Where a point of limitation though not set up as a defence appeared plainly on the face of the record and did not involve any enquiry into questions of fact before it could be disposed of, it may be raised for the first time in appeal. (*Chandrasekhara Aiyar, C. J. and Ramaswamy Iyengar, J.*) **JAVARE GOWDA v. MAKI GOWDA.** 1 Mys. L. J. 72.

—Maintainability—Transferee of tenancy. BENAMI TRANSACTION. 711 C. 1 : 1923 Cal. 90.

—New case — Power to allow—Adverse possession.

In the plaint the plaintiff set out that the property had been the subject of valid dedication for religious purposes and that it had only recently been trespassed upon by the defendants. *Held* that on appeal the plaintiff cannot be allowed to set up a new case that as soon as the property ceased to be the subject of dedication for religious purposes it became *shamilia* or common property of the whole village and that, the possession of the defendants could not therefore be adverse. (*Broadway, J.*) **DEORAM v. DULI CHAND.** 5 Lah. L. J. 97 : 73 I. C. 817 (2) : 1923 Lah. 259 (1).

—New plea—If can be allowed.

An appellant should not be allowed to put forward for the first time in appeal a plea not taken in the trial court, and which therefore the respondent had no opportunity to controvert. (*Mookerjee and Chotzner, JJ.*) **BHUBANMOHINI DAS v. KUMUDALA DAS.** 28 C. W. N. 131.

—New plea of jurisdiction—Facts not in dispute.

A question of jurisdiction which depends on no disputed facts can be allowed to be raised for the first time in appeal. (*Mookerjee and Kunz, JJ.*) **RAJENDRA NARAIN CHOWDHURY v. SATISH CHANDRA CHOWDHURY.** 50 Cal. 948.

—Offer by a party to be bound by the decision of the trial court—Offer not accepted by the opposite party—Competency of the party to prefer an appeal.

Even though the defendants in a suit offered to be bound by the decision of the trial court arrived at on inspection of the locality, their right of appeal is not affected when there is nothing to show that the plaintiff agreed to it. In such a case they are not estopped from questioning the correctness of the trial court. The case is different where there is an agreement of the parties agreeing to be bound by the decision of the trial court. 43, All. 266 referred to. (*Gokul Prasad, J.*) **GHULAM HUSAIN v. GANESH LAL.** 75 I. C. 619 : 1923 A. 373.

—Plea of adverse possession if can be raised for the first time.

Where a plea of adverse possession though referred to in the pleadings is not brought out in the Courts below, it cannot be raised for the first time in second appeal. (*Chatterjee and Cumming, JJ.*) **ANIL KUMAR BISWAS v. RASH MOHAN SAHA.** 28 C. W. N. 46.

—Point not raised in the memorandum—If to be allowed to be argued.

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A point not raised in the memorandum of appeal should not be allowed to be raised in argument. (*Ryves and Daniels, JJ*) LALTA PRASAD v. DARSHAN SINGH. 74 I. C. 839.

—Question of fact—Witnesses—Opinion of trial judge as to.

In an appeal on a pure question of fact sufficient weight should be given to the opinion of the trial judge as regards the demeanour, intelligence, position and character of the witnesses who are brought before him. He is in a better position to form a judgment on the points than the appellate judge who has no advantage of seeing the witnesses. (*Lora Wrenbury*) BANBAL FRAMJI v. MANILAL JUGALDAS.

45 M. L. J. 243 : (1923) M. W. N. 360 : 18 L. W. 148 : L. R. 4 P. C. 147 : 1923 P. C. 62. (P. C.)

—Redemption decree—Preliminary and final.

An appeal from a preliminary decree in a redemption suit cannot be treated as one from the final decree also. (*Dalal and Daniels, A. J. C.*) RAJA BETH SWAMI DAYAL v. MUHAMMAD SHER KHAN. 9 O. & A. L. R. 200 : 74 I. C. 480.

—Right of—*Ex parte* decree—Illegality of order—Effect of erroneous proceedings under. O. 9 R. 13. See C. P. CODE, O. 41 R. 22. 45 M. L. J. 805.

—Right of—Order of Court to be taken as it stands.

The right of appeal does not depend on what the Court ought to have done but on what it actually did. Where what it actually did was to pass a decree on the merits though the appellant did not appear against such a decree the law allows an appeal. When the appeal comes up for decision the appellate Court has then to decide whether the order passed was the proper order and one which the Court below had jurisdiction to pass. If it decides this question in the negative, it will set the order aside. (*Ryves and Daniels, JJ.*) NASTI KHAN v. ITWARI. 21 A. L. J. 667 : 9 O. & A. L. R. 645 : 74 I. C. 905.

—Right of—Partly aggrieved.

Even where a decree is not passed against a person to a suit in terms, if he is affected by the same, he can appeal against it. (*Dalal, A. J. C.*) RAJA SURAJ BAKSH SINGH v. MUNNU LAL. 10 O. L. J. 229 : 9 O. & A. L. R. 577.

**APPELLATE COURT—Decree of—Effect of decree of original court—Extension of time.** See (1922) DIG. COL. 24. RAJA SASIKANTA ACHARYA v. SARAT CHANDRA RAI. 70 I. C. 6

—Evidence admitted without objection in trial court—Objections.

Evidence admitted by the Trial Court without any objection at the time when it was offered should not be excluded from consideration by the appellate Court. (*Abdul Raoof and Abdul Qadir, JJ.*) MT. CHANNI BIBI v. AHMAD KHAN. 69 I. C. 331.

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—Evidence of witness—Credibility. See (1922) DIG. COL. 49. PALCHUR SANKARDA REDDI v. MAHALAKSHAMMA.

17 L. W. 1 : 27 C. W. N. 414 : 70 I. C. 949 (P. C.).

—Finding of fact by trial Court—Appreciation of evidence—Credibility of witnesses. See PRACTICE APPEAL 70 I. C. 736 : 1923 Mad. 103.

—New plea—Questions of fact.

Any ground of appeal raising question of fact ought to be pleaded in the Court of trial and cannot be taken at any later stage of the case. (*Simpson, A. J. C.*) MOHKAM v. BANSIDHAR. 26 O. C. 125 : 1923 Oudh. 14.

—New point of law—When allowed to be raised.

In appeal, questions of law not raised at the trial were allowed to be argued as they required no further evidence and as they affected the status of a party to the suit. (*Muir, C. J. and Foster, J.*) RAJA MAKUND DEB v. SRI JAGANNATH, JENAMANI. 2 Pat. 469 : 4 Pat. L. T. 427 : (1923) Pat. 97 : 1 Pat. L. R. 201 : 72 I. C. 230 : 1923 P. 423.

**ARBITRATION—Agent—Powers of—Proof.**

A principal can authorise his agent to refer dispute to arbitration. The authorisation need not be in writing, but must be proved. (*Lipon, J. C.*) FARUJ MAHOMED KHAN v. MT. WAFA BEGUM. 73 I. C. 609.

—Agreement to abide by majority alone acting—Award of valid.

Where the parties to a reference to arbitration agreed to abide by the award of the majority of arbitrators, and though 5 arbitrators were appointed only 3 of them actually took part in it and passed a unanimous award, the term is not binding on the parties as the result of the arbitration might have been different if the other two also participated and guided the proceedings. (*Poffen, J.*) SHEIKH ABDULLA v. M. V. R. S. FIAM. 2 Bur. L. J. 229.

—Agreement to have value fixed court's power to fix.

Where an agreement between parties contained a clause that if they could not agree as to valuation, it should be arrived at by arbitration, no right of action in a Civil Court can accrue, until valuation is fixed by arbitration. It is not a case of ousting the Courts of their jurisdiction, but to postpone such jurisdiction till a certain event takes place. (*Viscount Haldane.*) ARTHUR HERBERT HALLEN v. FREDERICK BENJAMIN SPAETH. 33 M. L. T. 453 (P. C.).

—Agreement to refer—Contract—Claim for damages for short delivery of goods.

The contract in question was in writing and contained a clause providing that any claim or dispute of any sort whatever in connection therewith, unless an amicable settlement could be arrived at, must be referred to arbitration.

Upon a claim being made for non-delivery of a portion of the goods contracted for, the defendants referred the matter to arbitration, under

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provisions of this clause. The plaintiffs, however, refused to attend the arbitration, and alleged as their reason for such refusal that arbitrators are invariably a prejudiced tribunal and that such proceedings are always subject to much delay.

The arbitration, therefore, proceeded in the absence of the plaintiffs and ultimately an award was made dismissing the claim.

In a suit by the plaintiffs for damages. *Held* that in the event, which had happened the arbitration clause in question was clearly applicable.

The parties had, by agreement, selected the court of law and must be bound by its decision unless it can be impeached upon any of the well-known grounds upon which such a decision can be challenged. (*Scott Smith and Bhorac, JJ.*) *FIRM OF GHAMANDI LAL v. CHURANJI LAL.*

4 Lah. 168. 5 Lah. L. J. 146:  
73 I. C. 439. 1923 Lah. 493

——— *Agreement to refer—Suit on contract—Maintainability of.*

Plffs. brought a suit to recover a certain sum of money alleged to be due in respect of a contract which was entered into on 12-9-1915 on the delivery by 18-11-1918 of a bale of dhories at a certain rate. The date fixed for payment was 27-11-1918. The goods were delivered to the defendant on the date in question but the price therefor was not paid on the due date. After this latter date, inasmuch as there had been much speculation in this class of goods, a committee of the cloth merchants of Jhansi assembled and brought out a plan by which claims for breach of contract of delivery of these goods or for failure to pay the price due in respect of these goods were to be settled. The plaintiffs and the defendant submitted to what might be called the award of the arbitrators and agreed that the claim which the plaintiffs had against the defendant should be settled on this basis. The plaintiffs subsequently sued on the basis of the old contract for damages. *Held* that the suit was not maintainable. (*Lindsay and Daniels, JJ.*) *RAM NATH v. MANNU LAL.*

45 A. 472. 21 A. L. J. 380: L. R. 4 A. 216:  
73 I. C. 615: 1923 A. 518

——— *Award—Law governing—Dispute between parties to be referred to arbitration in London—Objections to award to be preferred—Irregularity if can be pleaded in defence.* (1922) DIG. COL. 52 *OPPHENHEIM AND CO v. HAJEE MAHOMED HANIF SAMIB.*

74 I. C. 616.

——— *Award—Application for filing—Correction of mistakes—Execution proceedings.*

The decision of the arbitrators is final. If there is on the face of the award, a patent inconsistency such as a flat contradiction in measurement, or a mistake of arithmetical calculation, it is open to the Court to which application is made for filing the award on a patent error of that sort being pointed out, to send the award back to the arbitrators to correct it before a decree is passed in accordance with it. But anything of this kind cannot be done in execution proceedings. (*Walsh and Kanhaiya Lal, JJ.*) *H. R. PRASAD v. RAGHUBAR DAYAL.*

21 A. L. J. 541: L. R. 4 A. 553:  
74 I. C. 817: 45 A. 628.

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——— *Award—Contract—Arbitration clause—Reference to arbitration before commencement of suit—Effect.*

Where an action has been commenced upon a contract which contains a provision for reference to arbitration then even if a reference to arbitration has taken place before the suit is instituted and if no application is made to stay the suit pending the arbitration, the award is of no effect.

The law will not enforce the specific performance of an agreement to refer to arbitration but if duly appealed to, it has the power, in its discretion, to refuse to a party the alternative of having the dispute settled by a Court of law and thus to leave him in the position of having no other remedy than to proceed by arbitration. If the Court has refused to stay an action or if the defendant has abstained from asking it to do so, the Court has seisin of the dispute and it is by its decision and by its decision alone, that the rights of the parties are settled. It follows that in the latter case, the private tribunal, if it has ever come into existence, is *functus officio* unless the parties agree *de novo* that the dispute shall be tried by arbitration, and that the action itself shall be referred. There cannot be two tribunals each with jurisdiction to insist on deciding the rights of the parties and to compel them to accept its decision. This is clearly involved in the proposition that the Courts will not allow their jurisdiction to be ousted. (*Mookerjee and Fletcher, JJ.*) *RAM PRASAD SURAJMULL v. MOHAN LAL LUCHMINARAIN.*

38 C. L. J. 67.

——— *Award—Decree based on award—Fresh suit within twelve years if lies—Proper remedy whether by execution of the decree on award or suit—Suit barred.* See (1922) DIG. COL. 52 *LALIT MOHAN MOITRA v. SASI SERHARESWAR ROY.*

70 I. C. 300.

——— *Award—Legality of—Ministerial act—Notice to parties—Necessity for—Statement of arbitrators as to what transpires before them—Conclusiveness of.*

In case the parties are at variance on the question as to what took place before the arbitrators, the proper course is to take the statement of the arbitrators as to the facts as *prima facie* representing the true state of affairs as to what took place at the time of the enquiry unless there is very strong reason for doubting the accuracy of the statement of the arbitrators as regards the facts which took place before them and within their competence. Where an act judicial in its character is to be performed, the arbitrators are bound by the same rules as bind the courts. The arbitrators are not entitled to decide or to give their award in the absence of one or more parties to the arbitration and without notice to them. But when an act done is not of a judicial nature but merely ministerial in character it is competent to one of the arbitrators or all the arbitrators to have the act performed in the absence of one or more parties. On an application to set aside an award on the ground of misconduct on the part of the arbitrators the facts found were that both the parties did not turn up together, the petitioner turned up and the



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arbitrators asked him to state his case and file his documents and he gave a written statement stating what his case was and filed such documents as he had in his possession. While he was doing this the counter-petitioner turned up and the arbitrators sent for him, asked the petitioner to remain outside, and took from the counter-petitioner a written statement setting out his case and received his exhibits. Then the arbitrators having gone through these statements and exhibits called in both the parties and began the enquiry. *Held* that the acts performed by the arbitrators before the enquiry were ministerial in character and that the absence of one of the parties at the time did not vitiate the award of the arbitrators. (*Kumaraswami Sastri, J.*) *In the matter of the ARBITRATION ACT.*

17 L. W. 648.

————— *Award—Legality of—Misconduct—Arbitrators not acting together.*

An agreement or reference to arbitration provided for the settlement of disputes by 4 arbitrators and an umpire acting together. There was no provision that in case of difference of opinion amongst the arbitrators the opinion of the majority was to prevail. All the 5 arbitrators entered into the reference but the award made was signed by only 4 of them. The 5th man did not sign because he did not concur in the award. *Held* that the award as filed, was invalid. On a reference to several arbitrators together when there is no clause provided for an award made by less than all being valid, each of them must act personally in performance of the duties of his office, as if he were the sole arbitrator; for as the office is joint, if one refuse or omit to act, the others can make no award. (*Kanhaya Lal, J. C.*) *NAND KISHORE v. KISHORI LAL.* 10 O. L. J. 29 : 9 O & A. L. R. 545 : 74 L. C. 299. 1923 Oudh 181.

————— *Award partly bad—Not valid.*

Where an arbitration is made without the intervention of a Court and an application is made to file the award, then if the award is good in part the Court cannot remit to the arbitrator for amendment or declare valid the part to which no exception is taken even if it is separable from the bad part. 19 C. W. N. 476 and 4 P. L. J. 394 Fol. (*Mullick and Bucknill, JJ.*) *JALDHARI RAI v. MAHOMED ABDUL KABIR.*

4 Pat. L. T. 669. 74 L. C. 649 : 1923 P. 470.

————— *Award—Validity of—Error of law apparent on the face of the record—Clause of reference—Interpretation of.*

The question whether the arbitrator acts within his jurisdiction or not depends solely upon the clause of reference and is to be decided by the court. An arbitrator is constituted the sole and final judge of all questions of law and fact referred to him and the only exceptions are cases where there is corruption, fraud, or an error of law apparent on the face of the award. In the latter case the award must have been based upon some erroneous legal proposition. *Hodkinson v. Fernie* 3 C. B. N. S. 189; *British Westinghouse Co. v. Underground Electric Railways & Co.* (1912) A. C. 673 foll. (*Lord Dunedin.*)

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*CHAMPSEY BHARA & Co. v. THE JIVRAJ BALLOO SPINNING & WEAVING CO. LTD.*

47 Bom. 578 : 44 M. L. J. 706 : 25 Bom. L. R. 588 : 38 C. L. J. 130 : 1923 M. W. N. 596 : 33 M. L. T. 419 (P. C.) : 73 L. C. 436 : 50 I. A. 324 : L. R. 4 P. C. 99 : 1923 P. C. 66. (P. C.)

————— *Award—Validity of—Ex parte procedure of arbitrators—Prejudice—Interest on amount found due*

Arbitrators should give notice of their intention to proceed *ex parte* if one of the parties should not appear. Where the arbitrators are alleged to have proceeded *ex parte* without giving special notice of their intention to do so and the award is attacked on that ground the true test is, has the complainant who has taken exception to the validity of the award been in fact, prejudiced by the omission of the arbitrators to serve the special notice on him? If it is established that notwithstanding such warning, he would not have appeared before the arbitrators, he has really no grievance and cannot invite the Court to set aside the award on the ground of the alleged defect in procedure.

Arbitrators do not exceed their authority when they allow interest after the date of the award. The arbitrators have authority to make a decree for such damages as might have been assessed by the Court. (*Mookerjee and Fletcher, JJ.*) *BHOWANIDAS RAMGOBIND v. HARSUK DAS BALKISHEN DAS.* 27 C. W. N. 933.

————— *Award—Validity of—Parties to reference—Subject-matter—Parties interested in—Award—Partly valid—Enforcement of.*

Where there were a number of matters in difference between the Plaintiffs and the various defendants to the suit it can hardly be suggested that the submission to arbitration is bad on the ground that it does not refer to arbitration all the matters that may be in dispute between the parties. Sch. II para. 1, C. P. Code in terms provides that where all the parties interested agree that any matter in difference between them shall be referred to arbitration, they may apply to the Court for a reference, and sub-cl (2) provides that the application shall state the matter sought to be referred. It may well be that some of the parties are interested in certain of the matters in dispute only, whilst others are interested in other matters and there is no reason why all the parties interested in one or other of the matters in difference between them should not agree to refer their disputes, if there are other matters still to be determined in the suit.

Where the arbitrators, however, made an award not only in respect to the matters properly referred but in respect to the matters in dispute between the plaintiffs and the two minors which were not validly referred at all, it cannot be said then that the whole award is bad merely because the arbitrators have dealt with matters outside the terms of the reference; the award is valid in so far as the reference was legal and binding.

The rules in the schedule clearly contemplate a case where the arbitrators in making their award have gone outside the legitimate subject-matter of the reference. If that part of the award which

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deals with matters outside the reference can be separated from the other part, without affecting the decision on the matters referred, the Court may in such a case modify or correct the award. (*Miller, C. J. and Kulwant Sahay, J.*) RAGHUNATH SIKUL v. RAM KUP RAUT. 2 Pat 777; (1923) Pat. 225.

———Award—Validity of—Pendency of probate proceedings—Disputes regarding division of testator's property.

Disputes as regards the division of a testator's property were referred to arbitration without the intervention of the Court when proceedings for obtaining a probate of the will were pending. The arbitrators made an award giving each of the parties certain portions of the estate and on that award being filed in court a decree was passed thereon. On a question arising as to the validity of the award *Held* that the arbitrators did not in any way oust the jurisdiction of the Court in which the probate proceedings were pending and that the award and decree thereon were perfectly valid. There was nothing whatever to prevent the parties going to arbitration with regard to the division of the estate, leaving the Court to decide whether or not probate should be granted of the will. That was a question entirely outside the functions of the arbitrators, while the actual questions regarding the division of properties in dispute between the parties could be properly referred to them. The test would be to consider what would have happened if the parties had waited until probate had been issued to refer to arbitration the question how the properties of the deceased should be divided. It could not possibly be said then that the submission to arbitration would be illegal. The mere fact that it was entered upon before the probate proceedings had come to an end cannot possibly affect the question of its legality. (*MacLeod, C. J. and Crump, J.*) SHANKAR RAMCHANDRA v. RAMCHANDRA ANNALI. 25 Bom. L. R. 437; 73 I. C. 415; 1923 Bom. 365.

———Award—Validity of—Proceedings not taken to enforce award—Effect of.

As between the parties and their privies an award is entitled to that respect which is due to the decision of a Court of last resort. The award is in fact a final adjudication by the Court of the party's own choice, and until impeached upon sufficient grounds in an appropriate proceeding, an award which is, on the face of it regular is binding. If an award is valid, it is operative, even though neither party has sought to enforce it by a regular suit or by the summary procedure. (*Mukherjee and Choizner, JJ.*) BAIDYANATH CHOTTOPADYA v. PANCHANANI DASSEE. 28 C. W. N. 140; 37 C. L. J. 542; 72 I. C. 128.

———Court's power to limit time for objections—Waiver and estoppel.

A court has no power to cut short the period of limitation provided by statute for filing objections against an award. Even if the agreed to the award it does not amount to a waiver of the right to file objections nor does it amount to an estoppel.

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(*Wazir Hasan, A. J. C.*) KAMTA PRASAD v. UMAN PRASAD. 9 O. & A. L. R. 703

———Decision beyond terms—Objections disallowed by Court—Revision.

Plaintiff filed a suit against the defendant for recovery of land in the Court of a Munsiff who referred the matter to an arbitrator. The arbitrator decreed the claim in favour of the plaintiff in his capacity as a trustee of the temple. The plaintiff objected on the ground that the arbitrator had travelled beyond the terms of the reference. The Munsiff overruled the objection.

*Held*, as the Munsiff had jurisdiction to decide the objections, the High Court has no power to interfere, even if the Munsiff has come to a wrong conclusion on a question of law or fact if he cannot be said to have acted illegally or with material irregularity. (*Abdul Raoof, J.*) SHEO NATH v. BEG RAJ. 73 I. C. 558; 1923 Lah. 194 (1).

———Delegation of powers—Deciding matters not referred—Failure to decide matters referred.

Acts of a ministerial nature can be delegated to arbitrators e.g. valuing properties.

There is a presumption in favour of the validity of an award. Where matters not referred to arbitration are also decided, but they are easily severable, the award is not invalid. So also failure to decide some matters referred, if it is not a serious omission. (*Chandrasekhara Aiyar, C. J. and Subbanna, J.*) MUNIAPPA v. SANJEEVAPPA. 1 Mys. L. J. 50.

———Evidence improperly admitted—Effect.

Where arbitrators improperly admit evidence which ought not to have been admitted, but the same has not any material bearing, the award is not vitiated. (*Viscount Birkenhead*) GRAND TRUNK RAILWAY COMPANY OF CANADA v. THE KING. 33 M. L. T. 246 (P. C.)

———Guardian and ward—Agreement by guardian to refer disputes to an arbitrator to decide on his own information or other information or by examining witnesses or otherwise—Whether agreement binding on the minor—Award by an arbitrator on information in the absence of parties—Award invalid—Legal misconduct—Gross negligence of guardian—Parties sui juris can bind themselves by such reference.

An agreement by the guardian of a minor to refer disputes to be settled by an arbitrator and to be bound by and act according to the decision the arbitrator might give either on his own information or other information known in the village or by examining the witnesses of both parties, should he think it necessary, is an unreasonable and improvident act on the part of the guardian and therefore not binding upon the minor.

A guardian is not entitled to waive his ward's right to object to irregular procedure. Such conduct on the part of the guardian is gross negligence and such gross negligence of a next friend or guardian would entitle the minor to impeach an award or a judgment passed against him.

17 Bom. 299; 22 Q. B. D. 577; 34 M. L. J. 71; 42 M. L. J. 429 followed.

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An award passed on such reference by a guardian, when the arbitrator acted upon information received in the absence of parties or on his own knowledge of facts is vitiated by legal misconduct and would therefore be invalid.

Ordinarily an award based on information received in the absence of the parties or on the arbitrator's own knowledge of the facts in regard to the matters in issue between the parties would be invalid. But it is open to parties who are *sui juris* to agree to a reference that the arbitrator shall decide the dispute on his own knowledge or that there is no need for him to take any evidence; and they will be bound by such a reference and no legal misconduct can be imputed to the arbitrator, if he based his award on such materials. 42 A. 185 followed. (*Spencer and Venkatasubba Rao, JJ.*) CHINTALAPUDI SANYASIRAO v. CHINTALAPUDI VENKATRAO. 44 M. L. J. 263 32 M. L. T. (H.C.) 32 : (1923) M. W. N. 7 : 17 L. W. 71 : 73 I. C. 470 : 1923 Mad. 301.

Minor—Misapprehension of rights—Effect.

The principles under which the validity of an arbitration should be judged are more rigid than those which apply to a case of family agreement. Where the parties to it were under a misapprehension as to their legal position and right the award is bad. (*Bucknill and Ross, JJ.*) RAM BAHADUR SEN v. GANESHI BHAGAT. 73 I. C. 542 : 2 Pat. 554.

Minor—Setting aside—Duty of Courts.

A suit by some minors was referred to arbitration which ended in an award in their favour. Before the objections of the defendant were taken up for consideration, on an oral request of the parties the court set aside the award and referred the matter to the counsel of the parties for fresh arbitration. *Held*, the award was valid and binding unless set aside for one of the reasons mentioned in the C. P. Code. The Court ought to have addressed itself to the question whether the next friend of the minors could so compromise the disputes as to the validity of the award as to give the court no option but to accept the compromise and therefore to preclude the court from considering if it was to the benefit of the minors.

Jurisdiction of equity courts over the interests of minors adverted to. (*Piggott and Walsh, JJ.*) JHINKU SINGH v. SITAL SINGH. 45 A. 263 : 21 A. L. J. 81 : L. R. 4 A. 329 : 74 I. C. 133 : 1923 A. 267 (2).

Powers of arbitrator—Partition—Provision for maintenance.

If the arbitrators have authority to make a partition they have authority to determine everything incidental or consequential with reference to the mode in which the partition is to be effected and the rights of the female members of the family cannot be disregarded. Where in an award provision for the maintenance of the female ladies of the family was made with the consent of the parties it is not open to them to rescind from the arrangement to which they had agreed when the award was made. (*Kanhaiyalal, J. C.*) MURLI DHAR v. MOOLCHAND. 10 O. L. J. 296 : 9 O. & A. L. R. 875 : 73 I. C. 39 (2).

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Provision for decision of other matter.

An agreement to refer to arbitration is not bad merely for the reason that it included disputes other than that before the Court, if there was a distinct clause to the effect that the arbitrators would only report to the court their decision on the subject-matter of the suit (*Broadway, J.*) MANSA RAM v. KARLA RAM. 1923 Lah. 411.

Reference—Not signed by party but by son and pleader—Effect—Ratification.

A reference to arbitration was signed not by the party himself but by his son and pleader. He subsequently appeared in the arbitration proceedings. *Held* he had ratified the act of his pleader and the award was valid and binding. (*Walsh and Kannaiah Lal, JJ.*) PARBHU LAL v. FIRM SHEO DIAL MAL RAM SARAN DAS. L. R. 4 A. 472.

Reference to—Suit under S. 92 C. P. Code—See C. P. CODE S. 92. 6 N. L. J. 7.

Time for filing award—Extension by arbitrators themselves—Legality of—Impire—Ex parte procedure—Misconduct—Remission of award—Discretion—Arbitration Act S. 12.

An award is bad if arbitrators extend, having no power to do so the time for passing of the award when once the time for the award has expired, because under S. 12 of the Arbitration Act, the Court alone has got the power for extending the time even though the award has been completed. LOUIS DREYFUS CO. v. RAJAGOPALAN AIYAR. 70 I. C. 333 : 1923 Mad. 222.

ARBITRATION ACT (18-9).—Applicability. See (1922) DIG. COL. 55. AMAR CHAND CHAMARIA v. BANWARI LALL RAKSHIT. 69 I. C. 808.

Provisions of—If subject to C. P. Code as to appeal.

The Arbitration Act is complete in itself and is not affected by rules as to appeal as laid down in the C. P. Code with reference to proceedings taken under Sch. II of the same. (*Duckworth and Po Han, JJ.*) SAYA PYE v. U. KUNDINNYA. 2 Bur. L. J. 193.

Ss. 4 and 8 (2)—Compromise—Reference to arbitration—Order under S. 1 (2) of the Act—Appeal.

The definition of submission in S. 4 of the Arbitration Act covers a contract to refer as well as the reference, the reference amounting to delegation of authority to the arbitrator. 35 I. C. 536 Ref.

*Held*, on the facts of the case that the petition of compromise in a suit for accounts amounted to a submission to arbitration within the meaning of S. 4 of the Arbitration Act. (*Broadway and Abdul Qadir, JJ.*) HAJI BAKSH ILAHI v. HAJI ABDUL RAHMAN. 71 I. C. 817.

Ss. 7 and 11 to 15—Scope.

There is no express provision in the English law as to what is to happen to an award, when it is made, with the single exception of the section which enables the party to enforce it as though it were a judgment. The reason for that

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is that the machinery is so familiar and habitual that no provision on the subject is necessary. Either party, on receiving notice from the arbitrator that the award has been made, can take it up from him. Once the arbitrator has parted with it, he is *functus officio* and he cannot exercise the power given to him by S. 7 of Act IX of 1899, none the less the Court is able to remit to him if satisfied that an honest mistake has been made. There are express provisions to be found in S. 11 of the Act as to what is to be done by an arbitrator, if he has made his award. When the question when an arbitrator in India becomes *functus officio* comes to be decided, the line will have to be drawn somewhere in the procedure which is laid down in S. 11 for getting the award into Court. It is difficult to hold that an arbitrator is *functus officio*, while there are still express statutory duties laid upon him by the Act. The procedure laid down by the Act seems to be that the various stages to be found in Ss. 11 to 15 are to be followed in the same chronological order as the numerical order of the sections and that an application to set aside is not as a rule within the jurisdiction of the Court, until some application or attempt has been made to file the award or some other similar step is taken to enforce it. (*Walsh and Ryves, JJ.*) *FIRM OF RAM KISHAN DASS BRIJ MOHAN v. FIRM OF SUSHIL CHANDRA DASS*, 1923 A. 31.

—S 9 (b)—Different intention—What is. See (1922) DIG. COL. 55. *SASSOON AND COMPANY v. RAMDUTT RAMKISSEN DAS*.

32 M. L. T. (P.C.) 19 : 50 Cal. 1 :  
37 C. L. J. 336 : 44 M. L. J. 758 :  
27 C. W. N. 660 : 18 L. W. 537 :  
70 I. C. 777 : 1923 M. W. N. 372.

—Ss. 10 and 12—Private arbitration—Power of court to order examination of witnesses on commission. See (1922) DIG. COL. 56. *JAMES MACKINTOSH & Co v. THE INDIAN STEAM NAVIGATION Co., LTD.* 47 Bom. 250 : 75 I. C. 221.

—S. 10—Submission to arbitration—Award—Error or mistake—When a ground for remitting the award. See (1922) DIG. COL. 56. *U. M. CHOWDHURY v. JIBAN KRISHNA GHOSE & SON*, 69 I. C. 995.

—S 10.—Umpire—Statement of case to the High Court—Not obligatory—Interest after date of award.

It is in the discretion of an umpire to state a special case for the opinion of the Court and if he refuses to do so and decides the point of law himself, his refusal does not amount to misconduct. An umpire is not entitled to award interest on the damages awarded by him and if he does so the award should be remitted to him for re-consideration (*Greaves, J.*) *SEWDUTRAI NARSARIA v. TATA SONS LTD.* 27 C. W. N. 494.

—S. 11—Fees of arbitrators—Taking fees before entering upon their duties—Effect of.

Where the arbitrators take a reasonable fee for their services before entering upon their duties with a view to avoid the necessity of suing the parties in Court their conduct in so doing is not

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proper and does vitiate the award. There is nothing in S. 11 of the Arbitration Act which precludes the arbitrators from either fixing the fee or receiving the fee beforehand. All that the section requires is that in case the award is given the arbitrators shall state in the award what amount is payable to them for their fee. (*Kumaraswami Sastri, J.*) IN THE MATTER OF THE ARBITRATION ACT 17 L. W. 648.

—S. 11—Scope.

Where a third arbitrator resigned because there was a majority against his view and did not sign the award; held that did not affect the validity of the award (*Broadway, J.*) *MANSA RAM v. KARLA RAM*. 1923 Lah. 411.

—S 13—Remitting an award.

Ordinarily an appellate Court will not interfere with the discretion of the first Court in declining to remit an award, but the discretion being a judicial one, the appellate Court will interfere where no grounds have been shown why the award should be not be remitted to the arbitrators. In the absence of anything to show that the umpire was either prejudiced or was otherwise unfitted to hear and determine the case, the Court out to remit the award to the arbitrators. (*Schwabe, C. J. and Wallace, J.*) *MESSRS LOUIS DREYFUS AND Co. v. R. K. RAJAGOPALA AIYAR AND BROS.* 1923 Mad. 222.

—S. 13 (1)—Remand order for making fresh award—If Appealable

Where a court directs the arbitrators to make a fresh award, it amounts to an order refusing to file an award and is not appealable either under the C. P. Code or the Arbitration Act (*Duckworth and Ho Han, JJ.*) *SAYA PYE v. U. KUNDINNYA*. 2 Bur. L. J. 193.

—S 14—Award—Illegality.

Award is vitiated by the legal misconduct of the umpire, if he proceeds with the reference without giving any notice to the parties of the enquiry by him. (*Schwabe, C. J. and Wallace, J.*) *MESSRS. LOUIS DREYFUS AND Co v. R. K. RAJAGOPALA AIYAR AND BROS.* 1923 Mad. 222.

—S. 14—Award—Setting aside—Practice.

Where an award is challenged on the ground that there was no submission to arbitration by the parties, the remedy lies in a regular suit and not in an application under S. 14 of the Arbitration Act. (*Mecklerjee and Fletcher, JJ.*) *MATULAL DALMIA v. RAM KISSEN DAS*. 47 Cal. 806 : 69 I. C. 568.

—S. 15.—Provisions of C. P. Code, if apply.

When the legislature provided under S. 15 of the Arbitration Act that an award on being filed was enforceable as if it were a decree of court, it intended that all the provisions of the C. P. Code applicable to the execution of decrees should apply to an award so filed. (*Greaves, J.*) *GLADSTONE WYLLIE & Co. v. JOOSUB PIER MAHOMED & Co.* 27 C. W. N. 686.

## ARBITRATION ACT (1899), S. 15.

—S. 15—Scope of—Execution of award—If bars suit *See* (1922) DIG. COL. 57 SASSOON AND COMPANY v. RAMDUTT RAMKISSEN DAS.

44 M. L. J. 758 : 50 Cal. 1 : 37 C. L. J. 336.  
32 M. L. T. (P. C.) 19 : 27 C. W. N. 660 :  
(1923) M. W. N. 372 : 18 L. W. 537 :  
70 I. C. 777.

—S. 19—Agreement to refer to arbitration—Omission to plead in bar of trial—Effect of.

The defendant having submitted to the jurisdiction of the trial Court and not having pleaded the agreement to submit to arbitration at the earliest possible moment as required by law, was precluded from relying upon this objection at a later stage. (*Piggott & Walsh JJ*) KHARIDAR KAPRA. Co. v. RUKMANAND RAMDEO. L. R. 4 A. 22. 1923 A. 139.

—S. 19—Application for stay—Suit not on contract.

Where an agreement contained a clause to refer disputes to arbitration and one of the parties raised the objection that he misread the contents and also there was misrepresentation *Held by per Kincaid, J. C.*—Such a dispute is one that arises out of the contract, and an arbitrator has power to decide what are the terms of the contract. Where pending the settlement of disputes, a suit is filed by one, the other is entitled to a stay under S. 19 Arbitration Act.

*per Madgavkar, A. J. C.* An application for stay of suit must be clearly distinguished from an application for stay of arbitration proceedings. A case of misrepresentation set up to avoid a contract is not a dispute arising out of the contract and a stay cannot be obtained under S. 19, (*Kincaid J. C. and Madgavkar, A. J. C.*) (FIRM OF A) SODAWATERWALA v. VOLKART BROTHERS. 1923 Sind 25.

—S. 19—Contract for sale of goods—Short delivery—Award—Subsequent suit—Bar.

Where there is an arbitration clause in a contract for the sale of goods providing that any claim or dispute of any sort whatever in connection therewith must be referred to arbitration the clause applies to a case of short delivery of goods as much as to a case of non-delivery (*Scott-Smith and Fforde, J. J.*) FIRM OF GHAMANDILAL v. FIRM OF CHIRANJI LAL 4 Lah. 168 : 5 L. L. J. 146 : 73 I. C. 459 : 1923 Lah. 453.

—S. 19—Order granting stay—If appealable. *See* C. P. CODE S. 104. 1923 Sind 25.

—S. 19—Stay pending arbitration—Omission to object to long threatened litigation—Effect.

Where legal proceedings were for a long time threatened against a person in respect of a contract which provided for all settlement of disputes by arbitration, and when instituted that person applied for a stay of suit pending arbitration, he is entitled to it as a matter of right. His failure to object to the litigation is no ground for refusing stay. (*Schwabe, C. J. and Krishnan, J.*) ANGLO PERSIAN OIL COY v. PANCHAPAKESA IYER. 45 M. L. J. 653 : 18 L. W. 753 : 33 M. L. T. 103 (H. C.) : (1923) M. W. N. 772.

## ARMS ACT (1878), S. 19.

ARMS ACT, (XI OF 1878) S. 4—Arms—Test of.

The true criterion is not whether any given *dah* is a "upyat" but what was the intention of the maker as regards its purpose. 5 L. B. 207 *ref.* (*Duckworth, J.*) PO ME v. EMPEROR. 1923 Rang. 23(1)

—S. 4—Empty case of cartridges—If ammunition.

An empty cartridge case comes within the definition of ammunition in S. 4 and possession thereof is an offence (*Sulaiman, J.*) EMPEROR v. ALADIN. 21 A. L. J. 879.

—S. 4—Parts of arms

Bolts and bars of rifles are arms within S. 4 (38 P. R. 1889 (*Cr.*) *Ref.*) In order to fall within S. 4 the weapon need not be in a servicable condition. (21 Mad. 350. F.B., *Rel.*) (*Moti Sagar, J.*) KARM DIN v. EMPEROR 1923 Lah. 617.

—Ss. 5 and 19 (a)—Manufacture of Kirpans—Sikh—Absence of license.

The accused who was a Sikh was convicted by a Magistrate under S. 19 (A) of the Arms Act for having manufactured and sold kirpans without a license. On a question arising as to whether having regard to the entry in the 2nd Sch. annexed to the rules framed under the Indian Arms Act, the conviction was correct, *held* that the exemption did not apply to the accused and that he was guilty. (*Scott Smith and Harrison, J. J.*) EMPEROR v. BASTA SINGH. 3 Lah. 437 : 1923 Lah. 267.

—Ss. 19 and 13—Licence—Breach of—Carrying a gun in procession.

The accused, who was not a licensee, borrowed a gun from his cousin who held a license, and fired some shots while proceeding in a marriage procession through streets. The license forbade the taking of a gun to a public assemblage. *Held*, that the accused in handling and firing the gun had committed the offence under S. 19, since the marriage procession became a public assemblage as soon as it emerged into a public road. (*Macleod, C. J. and Shah, J.*) EMPEROR v. KALYANCHAND GOPALCHAND GUJRATI 1923 Bom. 35.

—S. 19—Recovery not in presence of witnesses.

Where the head constable made a false report that a dacoity had been committed and that he had arrested some dacoits; and after a delay of 3 days, as he recovered the arms from the petitioner not in the presence of witnesses who signed the list but who distinctly record that the arms were produced before them by the constable, *held* the petitioner was not guilty. (*Moti Sagar, J.*) ALIF DIN v. EMPEROR. 1923 Lah. 466.

—S. 19 (6)—Joint possession of house.

Where a *Chhawi* was found in a house admittedly in the joint possession of two accused, it cannot be said with any degree of certainty that the one of them was in exclusive possession thereof and hence the petitioner must be given the benefit of the doubt. (*Abdul Raouf, J.*) ALIA v. EMPEROR. 1923 Lah. 513 (1).

**ARMS ACT (1878), S. 19.****—Ss. 19 (f) and 20—Sanction**

There must be an express sanction for prosecuting a man under S. 19 (f) of the Arms Act, but the same is not necessary under S. 20—If a person is charged under S. 20, the charge must specify whether it is one falling under the first or second part. (*May Chung, J.*) *NGA THA HLA v. EMPEROR.* 2 Bur. L. J. 203.

**—S. 20—Concealment of arm Test**

Each case of concealment of arms must be decided on its own facts.

*Held* on the facts proved in the case the gun appeared to have been placed in the corn bin in order to conceal it from the Police and therefore Section 20 was applicable. 8 P. R. 1915 Cr. 9. P. R. 1912 Cr. not followed. (*Abdul Qadir, J.*) *SHER ALI v. EMPEROR* 1923 Lah. 79.

**—Ss. 20 and 19—Intention to commit**

Where the weapon which was found to fit the dang the appellant was carrying, was originally concealed but the appellant voluntarily took it from its place of concealment in order to threaten a railway servant who caught him for traveling without a ticket, *Held* it indicates an indifference as to whether the weapon was seen or not. The intention requisite for an offence under S. 20 had not been established and conviction must be altered to one under S. 19 of the Act (*Brasher, J.*) *SURJAN SINGH v. EMPEROR.* 1923 Lah. 10.

**—S. 20—Possession of servant—Pistol found in accused's shops, See PENAL CODE S. 27.** 9 O. & A. L. R. 27 : 69 I. C. 457 : 23 Cr. L. J. 729 : 1923 A. 33 (2).

**—S. 20—Scope.**

Where the arms were discovered on the information given by the accused the concealment of the arms recovered from the possession of the accused was clearly with the intention referred to in S. 20 of the Indian Arms Act (*Moti Sagar, J.*) *ALI AHMED v. EMPEROR.* 1923 Lah. 434.

**ASSAM LAND AND REVENUE REGULATION (I OF 1886) S. 97—Partition of estate—Lands joint with those of other estates—Jurisdiction of Revenue Court—Imperfect partition—Modus operandi of partition. See (1922) DIG. COL. 60.** *YASIN ALI MIRDHA v. RADHAGOBINDA CHOWDHURY.* 69 I. C. 814

**—S. 154—Suit for partition—Defined portion of estate—If lies in civil court.**

S. 154 Assam Land and Revenue Regulation does not bar a civil court from trying a suit for partition of definite plot of land merely because it is comprised in a revenue paying estate. (*Mookerjee and Rankin, JJ.*) *RAJENDRA NARAIN CHOWDHURY v. SATISH CHANDRA CHOWDHURY.* 50 Cal. 948

**ASSIGNMENT—Promissory note—Rights of assignee—Mistake in calculation of interest—Effect of. See LIM. ACT, S. 10** 44 M. L. J. 685.

**ATTESTATION—Effect of—Knowledge of contents of document.**

The mere fact of a person's attestation of a document does not lead to the

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inference that he knew the contents of the deed. 49 Cal. 334 followed (*Kotwal, J. C.*) *ANAND RAO v. DADA.* 71 I. C. 43.

**AUTRE FOIS ACQUIT—See CR. P. CODE, S. 403.**

**BANKER AND CUSTOMER—Interest—If can be levied from servant.**

In the case of loss incurred in an ordinary banking transaction between a Bank and a customer, the charging of interest is justifiable, but where the suit claim is based on an agreement between the Bank and one of its servants as to security to be given by the servant, the matter is outside the ordinary banking business (*Miller C. J. and Adams, J.*) *RAGHUNATH PRASAD v. BANK OF BENGAL.* 69 I. C. 212.

**BENAMI—Evidence of—Source of purchase money—Old transaction—Evidence of possession.**

Benami transactions are familiar in India and even a slight quantity of evidence to show that a transaction is benami may suffice. But the person who impugns the apparent character of a transaction must not rely solely on probabilities, but must show something definite to establish that it was a sham transaction, on the principle that the burden of proof lies on the person who claims contrary to the tenor of a deed and alleges that the apparent is not the real state of things. The most important test in these cases is the source whence the consideration came. Where however from the lapse of time, direct evidence of a conclusive or reliable character is not forthcoming, as to the payment of consideration, the case must be dealt with on the reasonable probabilities and legal inferences arising from proved or admitted facts. *PROMODE KUMAR ROY v. KALI MOHAN SAHA.* 27 C. W. N. 305. 70 I. C. 555 : 1923 Cal. 228.

**—See also.**

1923 Cal. 13.

**—Pronote—Assignment.**

No assignment can be made in favour of a benamidar. (*Kanhaiya Lal, J. C.*) *RAM SINGH v. MT. RAGHU BANSAL.* 26 O. C. 201 : 9 O. & A. L. R. 29 : 72 I. C. 877 : 1923 Oudh. 3.

**—Proof of—Onus—Admissions—Value of.**

Where a deed is in the name of a defendant the burden is on the plaintiff to show that it is a benami transaction. Where a so-called admission is merely a suggestion made in the course of a negotiation and is not even unconditional it is no admission at all. (*Coutts and Das, JJ.*) *RAMPATI RAUT v. MAHANTH HANUMAN SARAN.* (1923) Pat. 142 : 1 Pat. L. R. 235.

1923 P. 303.

**—Proof of—Suspicious—Not sufficient See (1922) DIG. COL. 62** *RADHA KRISHNA v. BISHESHAR SAHAY.* 21 A. L. J. 23 :

27 C. W. N. 294 : 1 Pat. 733 :

44 M. L. J. 718 : 37 C. L. J. 430 :

25 Bom. L. R. 680 : 9 O. & A. L. R. 194 (P. C.)

**—Test of—Evidence—probabilities.**

Benami transactions being common in India slight evidence may show a transaction was of that nature. A conclusion however cannot be

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based on mere probabilities. The burden is on the person who claims contrary to the tenor of the deed and the source of the consideration is always an important test. If from lapse of time, direct evidence is not forthcoming, reasonable probabilities as are deducible from surrounding circumstances can be made the basis of decision. (*Mookerjee and Chotzner, JJ.*) BHUBANMOHINI DAS v. KUMUDBALA DAS. 28 C. W. N. 131.

— — — *Test of—Omnis of proof.*

A court's decision as to the benami character of a transaction must rest not upon suspicion but upon legal grounds established by legal testimony. The court must consider circumstances such as source of purchase money, possession of property, custody of title deeds, adequacy of consideration and like facts. The burden of proof in such cases lies on the person who claims against the tenor of the deed. (*Mookerjee and Rankin, JJ.*) ABDUL LATIF KAZI v. ABDUL HUG KAZI. 28 C. W. N. 62.

— — — *Tests of—Source of purchase money—Possession—Other evidence.*

In the case of benami transactions in India the court need not approach them with that scrupulous rigour which in other systems of jurisprudence, may demand the existence of the clearest positive evidence that the *ex facie* owner of property holds the same for the interest of another. 23 C. W. N. 321 Ref. In addition to considering the source from which the purchase money came and the person in possession, the court may also take into consideration the surrounding circumstances. 40 C. 600, 37 A. 557 Ref. (*Mookerjee and Chotzner, JJ.*) LALIT MOHAN SEN v. MANORANJAN GHOSH CHAUDHURI. 72 I. C. 698. 1923 Cal. 13.

— — — *Transfer—Right of transferor to recover Fraudulent intent—Evasion of rules for the conduct of Government servants.*

Where a person acquired property *benami* in the name of another with a view to evade the rules prescribed by Govt. regarding the acquisition of property by Govt. servants, his conduct does not amount to fraud. He is not thereafter precluded from recovering the property. (*Mookerjee and Chotzner JJ.*) DHIRENDA KUMAR BOSE v. CHANDRA KANTA ROY. 1923 Cal. 154.

**BENAMI TRANSACTION—Sue by fraudulent grantee for recovery of property—Fraudulent purpose carried out—Whether suit maintainable.**

One S executed a mortgage in favour of D. This transaction was ascertained to be fictitious and the mortgage was effected solely with a view to delay, if not to defeat the creditors of S. The fraudulent purpose was accomplished, D obtained a decree on the mortgage and became purchaser. The successors of D. commenced the present action for a declaration of their title by purchase at auction sale and for recovery of possession from the successors of S. *Held* the plaintiff must fail.

The rules that guide the Court in the matter of fraudulent conveyances are as follows.—

(1) When recovery of property is claimed by the fraudulent grantor from the grantee, the modern rule is that although where intended fraud has been carried into effect, the Court will

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not help the owner to recover the property which he has once cast off in order to defraud others, yet if he has not defrauded any one, the Court will not punish his intention by giving his estate away to another whose retention of it is an act of gross fraud. *Jaylore v Bowers* 1 Q. B. D. 291 Ref.

(2) Where recovery of property is sought by the fraudulent grantee against the grantor, the rule is:—If a Benamidar, who has used a fraudulent transfer to defeat an execution levied by his ostensible transferor, were to seek the assistance of Court to obtain possession from the latter, the Court might well allow the transferor to plead the real facts, even though the plea involved a declaration by the defendant of his own turpitude (20 Mad. 326, p. 332) This is allowed, not for his own sake but on grounds of public policy 31 Bom 405; 37 Bom. 217 not followed. Case Law discussed (*Mookerjee, and Chotzner, JJ.*) RAGHUPATI CHATTERJE v. NRISHINGHA HORI DAS, 71 I. C. 1 1923 Cal. 90.

**BENAMIDAR—Right to sue.**

A benamidar has no right to bring a suit claiming title and for possession when he is suing in effect the beneficial owner, 23 Cal. W. N. 521 Dist. (*Sanderson, C. J. and Ghose, J.*) DAMODAR MANDAL v. KARAMAT ALI. 1923 Cal. 536.

— — — *Right to sue in ejectment.*

A benamidar can sue for ejectment for property standing in his name. 18 All. 69, 21 All. 380; 17 A. L. J. 160, Foll. (*Stuart, J.*) SHAFI-UD-DIN v. MT. HUKMAT. 70 I. C. 849: 1923 A. 10.

— — — *Right to sue for possession.*

It is open to a benamidar to sue for possession on the strength of his purchase. 46 Cal. 566 foll. (*Newbould, J.*) MAFIZUDDIN HOWLADAR v. MAHOMED ISLAM CHOWDHURY 1923 Cal. 281.

**BENGAL ALLUVION AND DILUVION REGULATION (IX of 1925) S 4—Diluvion—Reappearance on opposite bank—Title to—Accretion to estate—Liability to pay revenue.**

On account of a change in the course of the Ganges, lands lying on one bank became diluviated and gradually reformed on the other bank. They were sold for arrears of revenue and in default of purchasers the Government purchased it and brought a suit for declaration of title and possession against the Zemindar, who claimed it as accretion and revenue free. *Held*, even as an accretion, it is liable for revenue assessment, and the zemindar cannot claim to hold it as part of his permanently settled estate. If a case of abandonment by the prior proprietors is set up and proved and then there is an accretion it must be reassessed before revenue can be demanded. (*Miller C. J. and Foster, JJ.*) MAHARAJA KESHAV PRASAD SINGH v. SECRETARY OF STATE FOR INDIA. 74 I C 881.

**BENGAL ALLUVION AND DILUVION ACT (1947)**

— — — *Applicability.*

The Bengal Alluvion and Diluvion Act applies only to land not covered by the original Decennial and Permanent Settlement. (*Jwala Prasad and Ross, JJ.*) RAMNADAN SAHAY v. JAIGOBIND PANDAY. 2 Pat. 839.

**BENG. ALLUVION AND DILUVION ACT, S. 3.**

**BENGAL ALLUVION AND DILUVION ACT (IX of 1847) Ss. 3 and 6—Survey maps—Any such new map meaning—Comparison—Evidence—Accretion—Onus.**

The expression "any such new map" plainly refers to the "new map" made according to "new survey" as contemplated in section 3. The section provides for periodical surveys at intervals of not less than ten years, after a revenue survey had been completed and approved. The object of the "new survey" is to ascertain the "changes" that may have taken place since the date of the last previous survey,—that is, changes by alluvion or dereliction (not changes by possession). Section 6 then imposes upon the revenue authorities the duty to assess what may be called added land, whenever on inspection of the new map it appears that land has been added to an estate paying revenue directly to Government. There must consequently be a comparison between two maps, made at an interval of not less than ten years and each showing the revenue paying estate concerned. That estate must accordingly be in existence as a revenue paying estate if not before at least on the date of the first of the two maps taken as the basis for comparison.

The true position is that the revenue survey map is taken as the basis of comparison; but the comparison of the map is not conclusive. The comparison sets the revenue authorities in motion, and they may, then, on the best materials they can procure, proceed to assess what land they deem to be assessable.

What is liable to be assessed with revenue is land not previously assessed not land which has been formed since the revenue survey map. In the determination of the question, whether the land sought to be assessed is added land, we have to determine the land included in the estate at the time of its creation as a permanently settled estate. For this purpose, the revenue survey map is valuable but not conclusive evidence. (*Mookerjee and Rankin, JJ.*) SAUDAMINI DASSYA v. SECRETARY OF STATE FOR INDIA  
50 C 822. 38 C. L. J. 47

—S 6—Additional assessment—Newly added lands—Burden of proof on the Crown—Revenue and thak maps—Evidentiary value of.

The object of Bengal Act IX of 1847 was to enable the Crown to impose assessment on lands gained from the sea or by alluvion or dereliction from the rivers. The expression "any such new map" in S. 6 of the Act refers to the new map according to the new survey contemplated by S. 3. The object of the new survey is to ascertain the change that may have taken place since the date of the last previous survey that is changes by alluvion or derelict on (not changes by possession) 5 Pat. L. J. 681 Ref. S 6 imposes upon the revenue authorities the duty to assess what may be called added land, whenever, on inspection of the new map, it appears that land has been added to an estate paying revenue directly to government. There must consequently be a comparison between two maps made at an interval of not less than 10 years and each showing the revenue paying estate, if not before, at least on the date of the first of the two maps taken as the basis for

**BENGAL EMBANKMENT ACT, S 68**

comparison. (*Mookerjee and Chatterjee, JJ.*) RAJA SREENATH ROY v. SECRETARY OF STATE FOR INDIA  
50 Cal. 276 70 I. C. 510 1923 Cal. 233.

**BENGAL ALLUVIAL LAND SETTLEMENT ACT, XXXI OF 1858) S. 1—Scope of**

Where alluvial land has been settled as a separate estate with jama, it ceases to have any manner of connection with the original estate. (*Mookerjee and Rankin, JJ.*) SAUDAMINI DASSYA v. SECRETARY OF STATE.  
50 Cal. 822.  
38 C. L. J. 47

**BENGAL CESS ACT (IX OF 1880) S. 54—Notice—Condition precedent to recovery of cess.**

A notice under S 54 of the Bengal Cess Act is a condition precedent to the liability to pay cess. (*Ross, J.*) MURLI MANOHAR v. RAJA NAND SINGH.  
72 I. C. 1.

**BENGAL COURT OF WARDS ACT, S. 60—Scope of—Relinquishment**

S 60 of the Court of Wards Act constitutes a prohibition on the power of a Hindu Widow to relinquish the estate in her possession without the concurrence of the Court of Wards under certain circumstances only. If the transfer is not really one of relinquishment but a voluntary act of transfer, then, S 60 will apply. (*Das and Kutwant Sahay, JJ.*) RAO BAHADUR MAN SINGH v. MAHARANI NAWALAKHBATI.  
2 Pat 607 :  
4 Pat L. T. 335 73 I. C. 822. 1923 P. 492.

**BENGAL ELECTORAL RULES, R 31—Effect of—High Court's power under S. 45 Specific Relief Act.**

Rule 31 of the Bengal Electoral Rules which provides that no election can be called in question except by way of an election petition takes away the power of the High Court under S. 45 Specific Relief Act to direct the Returning officer to do his duty in a particular manner. (*Sanderson C. J. and Richardson J.*) S. N. HALDER v. S. N. MALLIK.  
28 C. W. N. 127.

**BENGAL EMBANKMENT ACT (II OF 1882) S. 68—Erroneous order for payment of lump sum without instalments—Binding nature of.**

An order for apportionment was made by the Collector as between the proprietors on the one hand and the tenure-holders on the other. This order was made after due service of notice on the tenure-holders. The order was defective inasmuch as it specified merely the amount payable by the tenure-holder and the proprietors, but did not specify the instalments and the dates on which the sum included in each instalment was to be made payable. This final order was served upon the tenure-holder. No exception was taken to this order, though it was manifestly erroneous, whether by the proprietors or by the tenure-holders. The proprietors paid the amount due to the Collector in one instalment in accordance with that order. They then instituted the present suit for recovery of the amount from the tenure-holders. The tenure holders objected that they were not liable to pay the entire amount in one instalment. The courts below have made a decree in favour of the plaintiffs, only in respect of such sums as would have been payable by the tenure holders if an order of payment by instalments had been correctly made by the Collector under section 68. Held the Courts



## BENGAL ESTATES PARTITION ACT, S. 5.

below had in substance replaced the actual order of the Collector by an order which should have been made by him and that it was not open to the court below to adopt this method of giving relief to the plaintiffs (*Mookerjee and Chatterjee, JJ*) KUMAR ARUN CHANDRA SINHA v. MAN MOHAN SINHA ROY. 37 C. L. J. 585, 70 I. C. 784 (2).

BENGAL ESTATES PARTITION ACT, Ss. 5 (3) 30 and 115—*Applicability of—Mode of partition—Right to share in entire estate and in specified mauzas.*

Sub-clause (3) of section 5 applies only to cases where a proprietor has an undivided share held in common tenancy in specific mauzas forming part of the parent estate but where he has no interest which extends over the whole estate; in other words, it applies to proprietors who have an interest in some out of the total number of villages constituting the estate. If he has a share in the remainder also, then it follows that he has a fractional interest in the entire estate as well as a fractional interest in a part, the latter fractional interest being the difference between the larger and the smaller interest, that is to say, if, he has a halfshare in twenty mauzas, and a one-sixth share in fifty-four mauzas, it must be held that he has a one-sixth share in the entire estate and in the twenty mauzas a fractional interest represented by the difference of one-half and one-sixth.

A Proprietor of a *mahal* which is composed of two mauzas and who is in possession of a fractional interest in each is not entitled to claim an allotment in each mauza representing his assets in that mauza; such a construction would defeat the entire principle of compactness where there are many villages and when the proprietor holds a different fractional interest in each. (*Mullick and Ross, JJ.*) RADHAKANTO PARHI v. MATHURA MOHAN PARHI. 2 Pat. 403.

—S. 23—*Scope of.*

The objection contemplated by S. 23 relates to a question of right or title or extent of interest as between any applicant and any other person claiming to be a proprietor of the estate (*Das and Kulwant Sahay, JJ*) KULDIP SAHAY v. RAJKUMAR SINGH. 1 Pat. L. R. 386 : 4 Pat. L. T. 633.

—S. 25—*Declaratory suit.*

S. 25 of the Act has no application to a suit for declaration that there was such a partition as is contemplated by S. 7 of the Act and that the Collector be restricted from taking further action to make the partition (*Jwala Prasad, J*) NAR SINGH THAKUR v. BISHUN PARGASH SINGH. 74 I. C. 642 : 1923 P. 441.

## LETTERS PATENT APPEAL 4 Pat. L. T. 629.

—S. 25—*Applicability.*

S. 25 of the Bengal Estates Partition Act applies only to suits by the persons claiming right or title to a parent estate, mentioned in S. 23. It does not apply to a case where plaintiff claims the collector had no power to partition. (*Miller C. J. and Mullick, J.*) NARSINGH THAKUR v. BISHUNPARGASH. 4 Pat. L. T. 629.

## BENGAL ESTATES PARTITION ACT, S. 99.

—S. 25—*Scope of—Suit for declaration of prior valid private partition—If maintainable.*

In proceedings before the collector for partition, objection was taken that a prior private partition had taken place, but this was disallowed. The objectors filed a suit for a declaration that as prior private partition had taken place, it was not open to a Revenue Court to grant the same. Held, the suit was not barred under S. 25 Estates Partition Act, (*Das and Kulwant Sahay, JJ*) KULDIP SAHAY v. RAJKUMAR SINGH. 1 Pat. L. R. 386 : 4 Pat. L. T. 633.

—S. 49—*Sairat Rent—Assets—Calculation of—Record of rights.*

In view of considerable difficulty and uncertainty in realising Sairat rent, the value of Sairat rent is not equivalent to the assets of ordinary rent. The fact that a co-sharer accepted the system of valuation before the papers were adopted under S. 49 does not debar him from objecting Equity could only be ensured by a reasonably approximate distribution of the risk. (*Morshead I. C. S.*) MEGHRAJ MARWARI v. MUNSHI KALI SAHAL. 1 Pat. L. R. 259 (Cr.).

—S. 57—*Evidence of partition.*

Where it is shown that the parties have acquiesced in the result of a partition it must be presumed that they or their predecessors in interest were parties to the partition. Where the parties have been holding their estates in separate shares from time immemorial, the fact that the original partition proceedings were lost in antiquity is no reason for disturbing divisions which existed for a long period. Although no deed of partition can be produced and from lapse of time no direct evidence of partition could be given, yet very long possession and acquiescence in the separate holding of the lands in the estate are sufficient to prove that there was a complete partition. 3. P. L. J. 188 Foll. (*Jwala Prasad, J*) NARSINGH THAKUR v. BISHUN PARGASH SINGH. 74 I. C. 642 : 1923 P. 441.

—S. 59 (2)—*Discrepancy between partition papers and map—Which to prevail.*

Where there is a discrepancy between the entries in the partition papers and the map the former should prevail as the map can only delineate the allotments in the paper. (*Chatterjee and Cumming JJ.*) ANIL KUMAR BISWAS v. RASH MOHAN SAHA. 28 C. W. N. 46.

—S. 99—*Applicability of—Grant of tenure right—Private partition—Partition under the Act.*

The main test of applicability of section 9 is holding the land in severally under a private arrangement. This arrangement need not be so complete or so formally made as to exclude partition on the application of some of the proprietors under section 7. (*Newbould and Panton, JJ.*) PROSARNA KUMAR BEDANTA TIRTHA BHATTACHARJYA v. MADHU BADYA. 1923 Cal. 279.

—S. 99—*Applicability of—Hindu Joint family—Mortgage of—Specific immoveable property—T. P. Act S. 68 (c).*

**BENGAL ESTATES PARTITION ACT, S. 119.**

The mortgage granted in this case was a mortgage not of the mortgagor's share in the entire estate belonging to a joint Hindu family but of specific lands of which the mortgagors were in possession by an agreement with their co-sharers. *Held* that the provisions S. 99 of the Estates Partition Act had no application to such a case. The section which governs the case is S. 68 clause (c) of the Transfer of Property Act which provides that where the mortgagee being entitled to possession of the property the mortgagor fails to deliver the same to him or to secure possession thereof to him without disturbance by the mortgagor or any other person then in such a case the mortgagee has a right to sue the mortgagor for the mortgage money. Where after the partition the plaintiff's mortgagees were dispossessed of the property of which they were in possession under the Zarpeshgi. They, could resist that dispossession, and therefore they were bound to give up possession, and the result is that the mortgagors have failed to secure the possession of the property to the mortgagees and in such a case the statute expressly provides that the mortgagees have a right to sue for the mortgage money. (*Miller, C. J. and Kulwant Sahai, J.*) **RAMNANDAN PARBAT V. DENI SAHAI**  
1 Pat. L. R. 366 74 I. C. 877.

—S. 119—Civil Court—Power to question correctness of order.

A Civil Court cannot question the correctness of order passed in partition proceedings directly. (*Chatterjee and Cuming, JJ.*) **ANIL KUMAR BISWAS V. RASH MOHAN SAHA.** 28 C. W. N. 46.

—Ch. 6—Zerai land—Holders paying neither rent nor revenue to Government—Record of rights—Rent fixed in—Liability for.

The land in question in the suit belonged to an estate owned by two individuals. One of them mortgaged his zemindari rights to certain persons keeping his possession over 141 bighas of zerai land. Subsequently the mortgagees came to purchase the mortgage interest of their mortgagor and the 141 bighas of zerai land also came to be held by different persons by transfer. The defendants came to hold 4 bighas of the zerai land. The Government revenue of the entire estate used to be paid by the transferees of the zemindari interest, inasmuch as they got their names in register D of the Collectorate. The holders of the zerai land including the defendants did not pay any Government revenue or rent to the proprietors whose names were registered in the Collectorate. The entire revenue was used to be paid by the recorded proprietors, some of whom sued under the Estates Partition Act. *Held* that the holders of the zerai land were liable to pay the same rent as was payable for lands of similar nature in the neighbourhood. The presumption raised by the Record of Rights in favour of the proprietor entitles him to claim a share and equitable rent. (*Jwala Prasad, J.*) **BHOLA PANDEY V. RAM BILAS PANDEY**  
71 I. C. 395 :  
1923 P. 391.

**BENGAL FOOD ADULTERATION ACT (VI of 1919) S. 6—Prosecution under—Power of chairman of Municipality to sanction. See BENGAL MUNICIPAL ACT, S. 44.** 1923 Cal. 561.

**BENGAL LAND REGISTRATION ACT, S. 52.**

—S. 14 (2) Form of certificate.

Under S. 14 (2) of the Bengal Food Adulteration Act, the certificate of the Public Analyst is admissible in evidence only if it is submitted in the form prescribed in the Schedule. The certificate if written in the form of a letter would not be admissible without proof of the truth of the contents. (*Newbould and Suhrawardi, JJ.*) **RAGHUNATH MODY V. KURSEONG MUNICIPALITY.**  
1923 Cal. 561.

**BENGAL LAND REGISTRATION ACT, (VII of 1876) S. 28—Alteration of entries by Collector—When justifiable**

The father of the applicant gifted a 6-Anna share of Tauzi No. 13350 in 1905 and the donee got himself registered as proprietor. The applicant applied for correction of Register D on the ground that the gift did not cover all the three villages of which the estate had consisted. *Held*, that no change had occurred so as to justify the Collector in altering the entries made in 1915. (*Gunning, M. C.*) **JAIPURGASH SINGH V. RAM NANDAN SINGH.**  
1 Pat. L. R. (Cr.) 74.

—S. 29—Applicability.

S. 29 of the Land Registration Act only applies to a case in which a person whose name is recorded is no longer in possession of an interest and in which other persons' names have been recorded for every portion of the interest in which such person's name was borne on the register. (*Mr. Morshead, J.*) **BAIJNATH SINGH V. LACHHUMAN SINGH.**  
1 Pat. L. R. 120 (Cr.).

—S. 41—Patni lease—Rights of parties, *See* (1923) DIG. COL. 66. **RAJA BHUPENDRA NARAYAN SINGHA V. MIDNAPORE ZEMINDARI COY.**  
37 C. L. J. 556.

—Ss. 51 and 72—Finding of District Judge—Validity of *Kutola*—Revision.

The Land Registration Act gives no power to any Civil Court to amend or alter the entry made by the Collector in his books in pursuance of the Civil Court's orders not to interfere with the possession of the successful party. As a matter of first impression it seems that S. 62 of the Land Registration Act means that there is no right of appeal or review under any enactment whatsoever against the order of the Civil Court. (*Mulick and Bucknill, JJ.*) **KAPALESHWAR JHA V. RAGHUNANDAN PRASAD**  
1 Pat. L. R. 370.  
4 Pat. L. T. 718 : 74 I. C. 474.

—S. 52—Jurisdiction of Revenue court—Determination of title under civil court sale.

When a registration has long been completed and has become final, it is not the province of the Revenue authorities to enter into the validity of the right of another person by purchase at a civil court sale. The matter is one for the determination of the civil court. (*Morshead, M. C.*) **JANARDHAN PRASAD V. MT. SANJHARI KUER.**  
1 Pat. L. R. 104 (Cr.).

—Ss. 52 and 55—Person in possession—Mutation of names—Right to.

S. 52 of the Land Registration Act contemplates two classes of cases (1) the case in which the applicant's possession exists and (2) cases in which succession or transfer has taken place.

**BENGAL LAND REGISTRATION ACT, S. 78.**

The first class includes cases in which the applicant claims to have assumed charge as joint proprietor on behalf of his cosharer or manager. In such a case the Collector need satisfy himself only on the point of the possession of the applicant. Claims to joint ownership should not be indiscriminately accepted. But where the case of the applicant is that he had been in joint possession prior to the death of the deceased and has continued since, he cannot be refused registration. (*Morhead, M C*) BHOGRAJ SAHAY v DULHIN RAMKUMARI KUER. 1 Pat. L. R. (Cr.) 71

**Ss 78, 79 and 81—Ijaradar—Proprietor**

An ijaradar is merely a lessee and S. 81 has no application to a person who is not himself a proprietor but who has an interest subordinate to that of a proprietor.

S. 81 seems to be a rider to Ss. 78 to 80 and as those sections deal with the case of proprietors there is no reason to think that S. 81 refers to cases of persons other than a proprietor. (*Chatterjee and Sukrawardy, JJ.*) PROBODH CHANDRA MITTER v. HARISH CHANDRA NASCAR. 27 C. W. N. 888

**S. 85—Identity of applicant—Revision**

Where several years after the registration of a person's name in the records an application is made by a rival claimant on the ground that he is the person preferentially entitled and there is a dispute as regards his identity, the Revenue Court may well leave the claimant to establish his claim in the Civil Court. It is largely a matter of opinion as to the circumstances in which a Commissioner's powers of revision should be exercised. (*Morhead M C*) MT. MADHURANI KUER v. RAJLILA SINGH. 1 Pat. L. R. 261 Cr.

**S. 85—Revisional powers of Commissioner.**

S. 85 confers Revisional jurisdiction on the commissioner over orders passed by all officers subordinate to him. The power ought to be exercised when there has been a failure of jurisdiction or a signal failure of duty or it is necessary to prevent gross abuse or injustice. Where the aggrieved party has a right of appeal or a remedy by way of suit in the civil court the revisional powers should not be exercised. (*Mr. Morhead*) TULSI RAM v. MT. SHAYAMPEARI KUER. 1 Pat. L. R. 246 (Cr.)

**BENGAL LAND REVENUE SALES ACT (XI of 1859)—Notice—If necessary.**

No notice is required to be served on the proprietors before sale, where the arrears are for the current or next preceding year. (*Miller C. J. and Foster, J.*) MAHARAJA KESHO PRASAD SINGH v. SECRETARY OF STATE FOR INDIA. 74 I. C. 881:

**Sale under—Validity,**

Where a *howladar* holding a *howla* under Government asked the latter to manage during his unexpired term and during that period *karsha* fell into arrears, a sale cannot be held under the Land Revenue Sales Act to realise the same as it is not revenue. (*Walmsley and Ghose, JJ.*) UKILUDDI AKAN v. ASMAT ALI MUNSHI. 27 C. W. N. 723 : 1923 Cal. 714.

**BENGAL MUNICIPAL ACT, S. 44,**

—S. 3—Arrears. See (1922) DIG. COL 1073. MAHOMED SOLIMAN v. KUMAR BIRENDRA CHANDRA SINGH. 50 Cal. 243 : 32 M. L. T. (P. C.) 115: 27 C. W. N. 749 : 37 C. L. J. 561 : 74 I. C. 906 : 50 I. A. 247 (P. C.)

**S. 37—Patni—Creation of, by auction purchaser—Annulment of under-tenures.**

Where an auction purchaser at a revenue sale creates a *patni* that by itself is not an intimation to the under-tenure-holders that the under-tenures have been annulled. (*Greaves and Ghose, JJ.*) KULA MIAH v. NANO MIAH. 1923 Cal. 195.

**BENGAL MUNICIPAL ACT (III OF 1884), S. 15 (r)**

—Right to vote—Assessment of Income Tax on joint income of father and son as members of joint family—Rights of father and son. See (1922) DIG. COL. 20 CHARU CHANDRA MAZUMDAR v. THE CHAIRMAN OF THE FARIDPUR MUNICIPALITY. 70 I. C. 154.

**Ss. 29, 34, 37—Execution of deed by municipal council—Formalities for—Deed signed by chairman alone—Effect of**

The expression "signed" in S. 37 of the Beng. Mun. Act implies that the signature must be affixed for purposes of execution of the document and the insertion of a name, in any part of the writing in a manner to authenticate the instrument, is sufficient. But if the name occurs in a document, not as authenticating the whole, but only for a particular purpose or only with reference to a part, it is not an effective signature. (*Mookerjee and Chatterjee, JJ.*) J. D. EZEKIEL v. ANANDA CHARAN SEN. 50 Cal. 180 : 70 I. C. 794 : 1923 Cal. 35

**Ss. 34, 43, and 44—Lease by Municipality—Proof of—Statutory formalities—Onus.**

A lease of Municipal property would be void unless the lease had been sanctioned by the commissioners at a meeting. The burden clearly lies upon the defendant lessee to establish that the requirements of the statute were fulfilled. In the normal course of events, the resolution adopted at a meeting of the commissioners must be recorded; and section 43 provides that minutes of the proceedings of a meeting of the commissioners shall be entered in a book to be kept for the purpose and shall be signed by the president of the meeting, and such book shall be open to the inspection of the tax-payers. Under sub-section 5 of S. 78 of the Evidence Act, proceedings of a municipal body in British India may be proved by a copy of such proceeding certified by the keeper thereof. Where the minute book has been produced, and there is no trace of a resolution on the subject, the position is that there is no valid lease.

Where a corporation is constituted by a statute, all persons and corporations are presumed to know the nature and extent of its powers. (*Mookerjee and Chatterjee, JJ.*) AKSHAY KUMAR CHAND v. THE COMMISSIONERS OF BOGRA MUNICIPALITY. 37 C. L. J. 589 : 75 I. C. 506 : 1923 Cal. 675.

**S. 44—Prosecution under Food Adulteration Act,**

**BENGAL MUN ACT, S. 209.**

S. 44 of the Bengal Municipal Act does not empower the Chairman of a Municipality to sanction a prosecution under S. 6 of the Bengal Food Adulteration Act (*Newbould and Sukrawardy, JJ*) *RAGHUNATH MODY v KURSEONG MUNICIPALITY*. 1923 Cal. 561.

— **Ss. 209 and 353—Agreement with Municipality—Imposition of conditions.**

It is open to a Municipality by a requisition under S. 209 of the Bengal Municipal Act, to compel a person to erect a fence by the side of a tank. The person so bound can validly transfer to the Municipality the duty by conditions entered into by the latter with the former.

The language of S. 209 of the Beng. Mun Act, is only indicative of this, that there is power in the Municipality to require a person to cause a fence to be erected by the side of a tank. But, because the power is existent in the Municipality by virtue of statutory provisions, it does not follow that the Municipality cannot accept conditions imposed by a person when he made a free gift of certain land to the Municipality. There is nothing in the Municipal Act itself which can remotely suggest that the Municipality is incompetent to enter into a binding engagement of this description. If that is so, the Municipality was held in the circumstances of the particular case, not competent to require him to cause a fencing to be erected at his own cost. (*Ghose and Cuming, JJ*) *SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS, BENGAL v NARAYAN CHANDRA BANERJEE*. 38 C. L. J. 13 : 73 I. C. 776 : 24 Cr. L. J. 680.

— **S. 233—Notice under—Calculation of time of service** See (1922) DIG. COL. 72 *RAMDHANI LAL v CHAIRMAN OF PATNA MUNICIPALITY*. 69 I. C. 183 (1).

— **Ss. 261 and 273 (2)—Using a place as a kiln for making bricks—Country panjas or clamps, if within the prohibition.** See (1922) DIG. COL. 72. *SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS, BENGAL v. TRAILOKHYA NATH CHATTERJEE*. 49 Cal. 1014. 72 I. C. 356 (2) : 24 Cr. L. J. 356 (2).

— **Ss. 290 and 295—Water connection—Conditions for power of Local Govt to make rules—High Court's jurisdiction on.** See (1922) DIG. COL. 48. *NAGENDRA LAL DAS v. THE CHAIRMAN, CHITTAGONG MUNICIPALITY*. 27 C. W. N. 240.

— **S. 350—Bye-law—Sanction to prosecute—Using musical instrument—Sanction for one offence—Prosecution for another illegal.**

Where the vice-chairman of a Municipality sanctioned the prosecution of the accused for singing at night with a high-sounding instrument and the accused were convicted of beating a drum under Bye law 80 held that the conviction was illegal. Even in a case where a valid sanction has been given by the Municipality for the prosecution of certain persons for an alleged violation of one of the Bye-laws, a Magistrate is not competent to convict the accused of an offence against another. Considerable care should be exercised in putting into operation against citizens the provisions of a Bye-law such as the one against

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making notice, which can be utilised in an unduly repressive and unbecomingly restrictive manner. (*Burnett, J. RAHIM v. EMPEROR*).

1 Pat. L. R. 45 (1) : 72 I. C. 894 : 24 Cr. L. J. 478.

**BENGAL AND NORTH-WEST PROVINCES AND ASSAM CIVIL COURTS ACT—(XII OF 1887)—Valuation of suit—Valuation by plaintiff not challenged by defendant—Effect of.**

Although or mainly the valuation as made by the plaintiff is to be accepted, the plaintiff is not at liberty to make an arbitrary valuation with a view to alter the forum, either of the trial or the suit or the adjudication of the appeal. The valuation as made by the plaintiff may be challenged either by the Court of its own motion or by the defendant. In either event, there is a determination of the question of valuation. If, on such investigation, it transpires that the subject-matter of the suit has been undervalued or overvalued the Court may call upon the plaintiff to amend the valuation of the suit. If the plaintiff does not carry out the order of the Court, the consequence described in O. 7, R. 11 followed. This is the penalty for persistence in under valuation. If the order of the Court is carried out, the statement of valuation for purposes of jurisdiction or court-fees are both amended, and the amended valuation thereupon becomes the valuation of the suit. When S. 31 of the Bengal Civil Courts Act refers to the value of the original suit, the reference is to the valuation as made by the plaintiff subject to such amendment as may have been made under order of the Trial Court. The Legislature did not mean by the expression "the value of the original suit" in S. 21 the real value of the subject-matter of the original suit regardless of what may have happened in the Trial Court. Where the plaintiff stated the value of the subject-matter of the suit for purposes of jurisdiction as also of court-fees, at Rs. 3,600 and the defendant did not challenge this statement and the trial proceeded on the assumption that the valuation made by the plaintiffs was correct held that it was not competent to the defendant after they had been defeated in two successive courts to change the forum of appeal by the assertion that the value of the subject-matter of the suit exceeds Rs. 10,000—in other words, that if the suit had been properly valued that appeal would have lain to this court and not to the court of the District Judge. 34 C. 954 ; 23 C. 536 ; 18 A. L. J. 741 ; 45 C. 926 referred to. (*Mukherjee and Rankin, JJ*) *HARIHAR DAS v. RAJKUMAR MUKHERJEE*. 71 I. C. 1014 : 1923 Cal. 405.

**BENGAL PATNI REGULATION (VIII OF 1819)—Proceedings under—Sale—Validity of.**

Proceedings under the Bengal Patni Regulation, taken for the realisation of arrears of Patni rent, are against the tenure, and the mere fact that in the application to the Collector, the Zamindar mentions the name of a deceased Patnidar, which stood on his book does not make the sale held under the Regulation invalid. 19 Cal. 703 referred. (*Mookerjee and Rankin, JJ*) *BEHARI LAL BISWAS v. NASIMANNESSA BIBI*.

37 C. L. J. 222 : 73 I. C. 482 : 1923 Cal. 527.

## BENG. PATNI REGULATION, S. 11.

—S. 11—*Khudkasht raiyat—Ejection.*

Under S. 11 a person who is a *khudkasht raiyat* is protected from ejection from the holding including the part he uses for residential purposes as well as the waste land and the land he cultivates. (*Newbould, J.*) *E. KRISHNA PRAMADA DAS v. RASH BEHARI DAS.* 1923 Cal 327 (1)

—S. 14—*Remedy under if exclusive—Suit for refund, if lies.*

On reversal of a patni sale, the purchaser must have recourse to the remedy provided by S. 14 of the Putni Regulation, to the extent it is available and cannot maintain a separate suit to obtain the relief which if he had so desired might have been granted to him against the Zamindar for reversal of the sale. (*Mookerjee and Rankin, JJ.*) *CHOWDHURY MAHOMED AMIN v. MAHARAJA OF BURDWAN.* 50 Cal. 756; 38 C. L. J. 192 75 I. C. 20; 1923 Cal 732.

BENGAL PUBLIC DEMANDS RECOVERY ACT (III OF 1913)—*Suit under—Cancellation of certificate—Claim by Government for peishcush—Sustainability of.*

Where the Government makes a demand in addition to the revenue payable in respect of a permanently settled estate from the holders thereof such an additional demand can be recoverable if there is a special liability either statutory or contractual. Where the demand has been made and complied with for a very long time it must be referred to some legal origin; in other words, the inference is that at some time there was an agreement between the Government and the proprietors that the former should maintain and repair the embankments in the estate with the aid of funds contributed by the latter. 45 C. 866; 22 C. W. N. 823 referred to. (*Mookerjee and Chotzner, JJ.*) *NABADWIP CHANDRA NANTI v. SECY. OF STATE FOR INDIA.* 50 Cal. 208; 1923 Cal 609

—S. 4—*Public demand—What is—Certificate, issue of.* See (1922) DIG. COL. 75 *PROTAP CHANDRA JANA v. SECRETARY OF STATE.* 49 Cal. 1026—S. 10—*Notice—Omission to serve—Sale a nullity—Bengal Act I of 1923—Effect of*

Under S. 10 of the Bengal Public Demands Recovery Act the omission to serve a notice under S. 10 makes the sale a nullity. In such a case the plaintiff need not apply to set aside the sale but can sue for possession on the footing that the sale had not affected his title. The suit would be governed by Art. 142 of the Limitation Act. (*Mookerjee and Chotzner, JJ.*) *LALIT MOHAN SEN v. MANORANJAN GHOSH CHAUDHURI.* 72 I. C. 698; 1923 Cal. 13.

—Ss. 10 and 31—*Notice—Service of—Death of one sharer before notice—Effect.* See (1922) DIG. COL. 75 *BENI ROY v. BABU BACHA KUER.* 1 Pat. L. R. 196; 69 I. C. 700.—S. 36—*Sale of property without evidence of arrears of revenue—Sale a nullity—Suit to set aside—Bar of limitation.*

Where in 1907 the revenue authorities proceeded to sell the property in dispute for an imaginary arrear of revenue the sale is a nullity and

## BENG. REGULATION (XVII of 1806), S. 1.

there is an usurpation of jurisdiction on their part 37 Cal 107 referred to: Thereupon a right accrued to the plaintiff under the law as it then stood to institute a suit to recover the property within 12 years from the date of dispossession. A right of this description could not be affected by the retrospective operation of a subsequent statute. (*Mookerjee and Chotzner, JJ.*) *DHORENDRA KRISHNA MUKERJEE v. MOHENDRA NATH MUKHERJEE.* 27 C. W. N. 386

70 I. C. 869; 1923 Cal 428

BENGAL REGULATION (VIII OF 1793), S. 5—*No separation of jama—Presumption.*

Where a talukdar is shown to have taken no steps under the Regulation to obtain separation of his jama the presumption would be that he was not an independent talukdar under S. 5 of the Regulation. (*Mr. Ameer Ali*) *RAJA SRINATH ROY v. MAHARAJA PRATAP UDAI NATH SAHAI DEO.* 1923 M. W. N. 702; 33 M. L. T. 408 (P. C.); 28 C. W. N. 145; 1923 P. C. 217 (P. C.)

—S. 7—*Notice to mortgagor.*

S. 7 provides either for payment or tender to the mortgagor for deposit in Court, and a notice which simply informs the mortgagor that he must pay the money within the year and says nothing of the alternatives of tenders and deposits in Court is misleading. The defect is not cured merely by the addition of words in the manner provided for in S. 7 of the regulation. (*Chevis, J.*) *ZORA v. CHANDU.* 1923 Lah. 71 (2)

—BENGAL REGULATION (XVII of 1806) *Anomalous mortgage—Foreclosure—Necessity for.*

Where there is an anomalous mortgage, viz., a combined mortgage by conditional sale and usufructuary mortgage then under the Regulation the mortgagee was bound to institute proceedings for foreclosure within 12 years and the time for foreclosure does not arise till the period stipulated in the proviso for redemption had expired. A mortgagee's title must be held to be incomplete until it was confirmed by a regular suit under the regulation. Where before the expiry of the 12 years the T. P. Act came into force then the mortgage would be subject to the provisions of S. 60 of the T. P. Act. (*Prideaux, A. J. C.*) *RUPA BAI v. RODDA.* 6 N. L. J. 130; 72 I. C. 121; 1923 Nag 274.

—*Foreclosure—Delivery of possession by mortgagor to mortgagee—Surrender—Act X of 1877.* See (1922) DIG. COL. 70 *BASHIR HUSAIN v. CHANDRA PAL SINGH.* 10 O. L. J. 1.—S. 1—*Foreclosure—Observance of formalities—Presumption—Proof.*

It is settled law that the court will not presume that all the formalities required by Regulation XVII of 1806 in proceedings for foreclosure have been observed, but the mortgagee must prove affirmatively the due performance of every necessary condition.

The non-existence of the notice does not relieve the mortgagee of the burden of proving that the notice satisfied the requirements of

**BENGAL REGULATION (XXIX of 1814).**

Regulation XVII of 1806. (*Martineau and Brasher, JJ*) *MUNSHI RAM v. NAURANGA*.  
72 I. C. 575.

**BENGAL REGULATION (XXIX OF 1814)**—*Ghatwali Tenure—Kharagpur and Burhum tenures—Taluka Dunri—Succession—Impartible estate—Widow and undivided brother—Preference.*

Regn. XXIX of 1814 does not apply to Kharagpur Ghatwalis. One of the main distinctions between Ghatwalis and the Birbhum and of the Kharagpur type is that the former are inalienable except with the consent of Government by whom the settlements were made and to whom revenue is paid direct, whereas the latter are alienable subject to the consent of the landlord to whom the rent or revenue is paid. The Regulation of 1814 applies to the former only. The incidents attaching to a Ghatwali of the Kharagpur type as evidenced in the case are: (1) that it is impartible, and permanent (2) that it descends by lineal primogeniture and (3) that it is alienable at least with the consent of the Zemindar. Unless there be some peculiar feature inherent in Ghatwali tenure which prevents the operation of the Mirakshare rule of succession in the case of impartible property, the same rule would apply. In a Mirakshare family being in commensality the inheritance even of impartible estates is confined to male members to the exclusion of females, unless the estate is the separate or self-acquired property and normally in the course of succession to a male property is not different from that which regulates succession to other impartible property. (*Miller, C. J. and Foster, J.*) *THAKURAIN FULBARI KUMARI v. MAHARAJA KUMAR RAO MAHESHWAR PRASAD SINGH*. 2 Pat. 685. (1923) Pat. 161  
4 Pat. L. T. 473 : 74 I. C. 633 : 1923 P. 433.

—(XI of 1819)—Resumption—Mahikanadari—Settlement holder—Arrangement between. See (1922) DIG. COL. 77 *JAGDEO NARAIN SINGH v. BALDEO SINGH*. 2 Pat. 38 : 43 M. L. J. 460  
(1923) M. W. N. 361 : 27 C. W. N. 925 : 32 M. L. T. (P. C.) 1 : 71 I. C. 984 (P. C.)

—(VII of 1822) (Beng. Land Rev. Settlement) S. 9—*Chur lands—Temporary Settlement—Enhancement of rents of tenants.*

In the case of temporary settled estates such as is *chur* land, it would always be open to the revenue authorities to reassess the revenue and resettle the estate with effect from the expiry of a previous term of settlement. To enhance the rents of the tenants proceedings under part II of Ch. X of the B. T. Act or S. 53 of the B. T. Act should be taken. (*Richardson and Suhrawardy, JJ.*) *ASHUTOSH CHAKRABARTY v. DWARIKA NATH MATA*, 70 I. C. 119 : 1923 Cal. 207.

—(XI of 1822) (BENG. LAND REV. SETTLEMENT) S. 4 (1)—Accretion—Tenants' holding—Bed of the river forming property of landlord—Right to accretion. See (1922) DIG. COL. 77. *KHUBI MAHTON v. LACHMI DAS* 2 Pat. 18.

—(III of 1872)—Applicability—Property partly situate in Sonthal Parganas and partly outside—Jurisdiction of court not situate in Sonthal

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Parganas to try the suit See HINDU LAW, APPLICABILITY OF. 44 M. L. J. 476.  
1923 P. C. 21 : (P. C.)

—(III of 1913) Ss 3 (1) 36 and 37—Not retrospective—Cause of action accruing under S. 10 of Act I of 1895.

Act III of 1913 is not retrospective in its operation and does not extinguish or modify causes of action which have already accrued by failure to serve the notice under S. 10 of Act I of 1895. S. 36 of Act III of 1913 controls S. 3 (1), S. 37 of the Act bars the jurisdiction of the civil court only where the question relates to the making execution, discharge or satisfaction of a certificate duly filed under the Act or relates to the confirmation or setting aside of a sale held in execution of such certificate. (*Mookerjee and Chotzner, JJ.*) *LALIT MOHAN SEN v. MANORANJAN GHOSH CHOWDHURY*. 72 I. C. 698 : 1923 Cal. 13.

**BENGAL REVENUE FREE GRANTS REGN. (37 OF 1793).** S. 13—Otherwise expressed in the grant—Scope of. See (1922) DIG. COL. 78.  
*GOLAM NABI v. CHOWDHURI BASUDEB DAS*.  
69 I. C. 849.

**BENGAL REVENUE RECOVERY ACT (1890 Beng. Act)** S. 5—Sale of estate not in arrears—Jurisdiction of Collector—Title of real owner, whether affected See (1922) DIG. COL. 992 *MAHOMMED WAHEED v. MT. SUNDAR BASI KUAR*.  
70 I. C. 714.

**BENGAL REVENUE SALE LAW S. 54**—Purchase at revenue sale—Nature of estate—Burden of proof

In a suit for *Khas* possession by the purchaser at a revenue sale, the onus is on him to prove not merely that the land is within the ambit of his estate but also that it formed part of the mal assets at the time of the decennial settlement. (*Walmsley and Suhrawardy JJ.*) *SASTRI BHUSAN HAZRA v. KAZI ABDULLA*. 28 C. W. N. 143.

**BENGAL SURVEY ACT, S. 41**—Collector—Assistant Settlement Officer—Delegation of functions.

Where a Revenue Officer is appointed with the additional designation of a Settlement officer he is vested with the powers of a superintendent of Survey under the Bengal Survey Act, and he can delegate his functions under S. 41 to an Assistant Settlement Officer. (*Coutts and Ross, JJ.*) *BABU BALGOBIND RAI v. BEHARI LAL*.  
1923 P. 96 (2).

**BENGAL TENANCY ACT (VIII OF 1885)**—Applicability.

The Bengal Tenancy Act does not affect rights of occupancy acquired prior to the passing of the same. (*Walmsley and Ghose, JJ.*) *BHAJAN SHEIKH v. BALAI SARKAR*. 1923 Cal. 375.

—Applicability of—Suit in ejectment—Under-tenancy.

A suit to eject an under-tenant of a tenancy consisting of homestead and agricultural land at its inception, is governed by the B. T. Act and not by the T. P. Act. (*Newbold, J.*) *ABHAI PADA SIRCAR v. ATOR DUBE*. 1923 Cal. 294 (2).

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—*Immediate payment not necessary to create tenancy—Waste land.*

The immediate payment of rent is not an essential attribute in the creation of a tenancy. It is by no means unusual for waste lands to be granted to a tenant by his landlord with a stipulation that no rent shall be payable until they are brought under cultivation. There is nothing in the Bengal Tenancy Act which prevents such an arrangement. (*Dawson Miller, C. J., and Mukherjee, J.*) CHARTER KUMARI DEBI v. PRATAPDAJ SINGH AND OTHERS. (1923) Pat. 176.

—*Non transferable holding—Reversionary right after transfer.*

Where a ten transfer of a non-transferable holding dakhilas were received by transferees from plaintiffs who were then bargadars and after plaintiffs had become landlords by purchase of the proprietary right, and the act of the agent of plaintiffs in receiving the rent from the transferees was not repudiated by the plaintiffs, held, the transferee could not be ejected. (*Walmsley, and Ghose, JJ.*) MAHOMED KASRUDDIN PRODHAN v. BANI KANTA DAS. 1923 Cal 520.

—*Raiyats and tenure holders—Name recorded in landlord's sherista—Liability for rent.*

So far as tenures are concerned, the Bengal Tenancy Act makes it obligatory upon the tenants to have their names recorded in the landlord's sherista whenever they become entitled to them by succession. In the case of a tenure, where only one tenant takes the trouble to have his name recorded in the landlord's sherista and the others, either by design or negligence, fail to do so, it may be presumed that the tenants who failed to have their names recorded in the landlord's sherista consented to the tenant who had his name recorded representing them both in transactions and in suits affecting the landlord and the tenants. 10 C. 896; 26 C. 677 Ret.

But other principles arise where the Court has to deal with the case of the sale of a holding, as to which there is nothing in the Bengal Tenancy Act compelling rayats to have their names recorded in the landlord's sherista. No presumption as to representation can be drawn by a Court where only one of the co-rayats has his name recorded in the landlord's sherista, and the others failed or neglected to do so. 9 C. W. N. 843 Ret.

It is a question of fact in each case whether the recorded tenant does in fact represent the holding in dispute and the fact that only one tenant is registered is an item in the evidence upon the question whether he is or is not the representative tenant *qua* the landlord. (*Das and Adams, JJ.*) JAIDEEB THAKUR v. JAWAHIR VISSIR. (1923) Pat. 57; 1 Pat. L. R. 47; 69 I. C. 565.

1923 P. 206.

—*S. 3—Successive leases—Rights of lessee—Liability to pay rent.*

Under the Bengal Tenancy Act the question of the status of a tenant is not without importance and it would introduce confusion into the administration of the Act to say that a holding be leased by the landlord for the purpose of cultivation first to one ryot and then to another the second ryot would be entitled to collect the rent

## BENGAL TENANCY ACT, S. 5.

payable by the first. The plaintiff claimed rent from the defendants in possession as bargadars, and he rested his claim on oral settlement from the superior landlord. It was found as a fact that the relationship of landlord and tenant did not exist between him and the defendant and there was no proof that the superior landlord had assigned to the plaintiff the right to collect rent from the defendants. Held that the plaintiff's suit for rent was not maintainable even though the superior landlord who was impleaded as a party to the suit did not contest it. (*Richardson and Suhrawardy, JJ.*) SAEIKH SONGSOR ALI v. JAGANNATH PAL. 37 C. L. J. 263; 1923 Cal. 368.

—*Ss. 3 and 50—Tenancy—Proof of—Tenancy before the T. P. Act.*

When a landlord sues a person on the allegation that he is a trespasser and that person sets up a transfer from a tenant, it is for the defendant to prove both the tenancy and validity of the transfer and, in the absence of evidence to the contrary, homes and land comprised in a tenancy created before the Transfer of Property Act, 1882 was passed, must be presumed to be non-transferable.

Where the defendants deny the fact that the present holding came into existence before the Transfer of Property Act it is for the plaintiff to prove that the tenancy came into existence before the Transfer of Property Act. (*Kurwant Sahay, J.*) MAHADEO SARAN v. DHAKAMNATH SAHAY. 72 I. C. 662.

—*S. 3 cl. 5—Suit by co sharer landlord for damages for use and occupation—Not a suit for rent.*

Where a cosharer landlord brings a suit for that which is payable to him by a tenant for the use and occupation of his share of the land the suit is not a suit for rent as defined in S 3 cl. 5 of the B. T. Act. Consequently a decree passed in the suit is not a decree under the B. T. Act and must be executed under the C. P. Code and not as a decree for rent under the B. T. Act. (*Coutts and Das, JJ.*) MAHARAJA KESHO PRASAD SINGH v. RAVIDENI SINGH. 2 Pat. 183; 4 Pat. L. T. 639; 74 I. C. 454; 1923 P. 397.

—*S. 5—Ejection—Homestead land in municipal limits—Non-transferable holding—Sale of for residential purposes—Recognition by landlord on payment of enhanced rent—Effect of.* See (1922) Dig. Col. 79. HERENDRA KUMAR ROY CHOWDHURY v. HARAKISHORE PAL. 70 I. C. 166.

—*S. 5 (5)—Tenure-holder—Rayat—Reference to mode of use—Engagement between Government and settlement-holder.*

Where a person occupies alluvial accretion without entering into an engagement with the collector before taking possession, but he is allowed to remain in possession on payment of rent, he is a tenant—17 C. L. J. 451, 22 C. L. J. 142 Ret. The Revenue authorities are competent to make a mahsana settlement of the lands with a third person. 34 C. L. J. 779 Ret; (*Mookerjee and Cumming, JJ.*) RANI HEMANTA KUMARI DEBI v. THE MIDNAPURE ZEMINDARI COMPANY. 1923 Cal. 25.

## BENGAL TENANCY ACT, S. 6.

—S. 6 (a)—*Tenure holder—Enhancement of rent.*

S. 6 (a) of the B. T. Act prescribes that where a tenure has been held from the time of the permanent settlement, its rent shall not be liable to enhancement, except upon proof that the rent is enhanceable either by local custom or by the conditions under which the tenure is held. Where there is no proof of local custom, the court has to determine, first, whether the tenures have been held from the time of the Permanent Settlement, and secondly, what are the conditions under which the tenure is held. (*Mookerjee and Chotner, JJ.*) *NURUL HUQ v. MAHARAJAH BIRENDRA KISHORE MANIKYA BAHADUR.* 38 C. L. J. 121 : 72 I. C. 979

—S. 7—*Liability to enhanced rent.*

A stipulation that the tenure holder is to pay rent for lands besides those mentioned in the *Kabulyat* which may be under his cultivation or which may be found in excess upon measurement indicates that rent is not fixed in perpetuity and hence the same is enhanceable. (*Kampani and Sharfuddin JJ.*) *SUKIA PLESAD SIKUL v. MIDNAPORE ZEMINDARI COMPANY LTD.* 38 C. L. J. 369.

—S. 12—*Transfer of permanent tenure.*

A transfer of a permanent tenure by a registered document is complete under Section 12 of the Bengal Tenancy Act, as soon as the document is registered. (*Mr. Amier Ali.*) *SUKAPATI ROY v. RAM NARAYAN MUKERJEE.* 50 Cal 680 : 45 M. L. J. 219 : 18 L. W. 681 : 33 M. L. T. 314 : (P. C.) L. R. 4 P. C. 159 : 50 I. A 155 : 73 I. C. 193 : 1923 P. C. 88 (P. C.).

—S. 16—*Patni tenure—Interest acquired by succession—Registration.*

It is incumbent on persons, who acquire an interest in a patni tenure by succession, to get themselves registered in the books of the landlord, under S. 15 of the Bengal Tenancy Act. If they fail to take the necessary steps and at the same time make default in the payment of rent, they cannot very well be heard to assail the legality of a sale under the Patoi Regulation on the ground that their names were not mentioned in the application to the Collector. (*Mookerjee and Rankin JJ.*) *BEHARI LAL BISWAS v. NASI-MANNESSA BIBI.* 37 C. L. J. 222.

73 I. C. 482 : 1923 Cal. 527

—S. 20—*Settled raiyat—Status of—Proof of holding—Cultivation—Necessity.*

If a person is alleged to have been a settled raiyat it must be proved that he continuously held, as a raiyat, land situated in the village, although the land need not be identical throughout the period of 12 years. The holding of land is to be continuous, and, further, the holding is to be in the character of a raiyat. This becomes obvious when regard is had to the definition of the term 'raiya' given in S. 5, cl. (2). *Raiyat* means primarily a person who has acquired a right to hold land for the purpose of cultivating by himself, or by members of his family or by hired servants, or with the aid of partners and includes also to the successors in-interest of

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persons who have acquired such right. (*Mookerjee and Rankin, JJ.*) *MAHARAJA BAHADUR SIR PRODYOT KUMAR TAGORE v. UMESH CHANDRA SAHA.* 72 I. C. 640.

—S. 22—*Acquire meaning of—Accrual of Tenancy rights.*

The word "acquire" in respect of occupancy rights is really used in the Act, but in the preceding S. 21, sub section (2), the expression occurs "shall be deemed to have a right of occupancy under law then in force." But it appears to be carefully avoided in S. 22, sub section (2) in the sentence commencing "If the occupancy right in land is transferred to a person," It would appear then, from the context, that the word "acquire" implies the accrual to a raiyat tenancy of rights conferred by the Statute rather than the transfer of rights by another tenant. (*Miller, C. J. and Foster, J.*) *RAM DHYAN SINGH v. BHULOTAN SINGH.* 72 I. C. 705.

—S. 20—*Zerai land—Tenant from lessee—Occupancy rights.*

A tenant from the lessee of Zerai lands is a raiyat within the meaning of S. 10 B. T. Act and can acquire occupancy rights by holding for 12 years. (*Mullick and Bucknill JJ.*) *SHEGOBIND RAM SAHU v. MAHIPAT DUSADH.* 2 Pat. 913.

—S. 22—*Collectorate partition—Effect of—Possession. See (1922) DIG. COL. 81 QAYAMUDDIN KHAN v. RAMYAD SINGH* 1 Pat. 600.—S. 22—*Merger.*

The disputed lands were comprised in a revenue paying estate which was purchased by the plaintiffs on the 6th March 1916 at a sale for arrears of revenue. On the 11th february 1918 the plaintiffs commenced this action to eject the defendant as a trespasser. The defendant was a cultivator who had acquired the right of occupancy raiyat in the Record of Rights finally published in 1895. On the 10th July 1901 he took from the then proprietors a permanent lease under what was described as a Taluki Potah. The plaintiffs contended that the effect of the permanent lease granted to him by the proprietors on the 11th July 1901 was to extinguish the rights of occupancy which he then possessed and that thereafter he must be deemed to have held as a tenure holder. Held that the occupancy right has not been affected by the subsequent acquisition of the tenure 26 C. W. N. 565 (P. C.) Foll. (*Mookerjee and Chotner, JJ.*) *JOGENDRA KRISHNA ROY v. SHAFAR ALI.* 1923 Cal. 373.

—Ss 22 (1) and 120—*Private land—Proof of—Evidence of letting as zerai—Occupancy rights—Citation of—Purchase of holding by landlord.*

Regard should be had to any declaration made before the 2nd day of March 1883 by the landlord and communicated to the tenants in respect to the reservation of the proprietor's right over the land as his private land. The words in S. 120 (2) of the B. T. Act 'any other evidence that may be produced' must mean any other evidence tending in the same direction that may be produced to show the assertion of any title on the



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part of the proprietor, and communicated to the tenant before that date.

There is nothing in S. 120 itself to cut down the generality of the expression "any other evidence that may be produced" used by the Legislature in S. 120, paragraph (2) of the Bengal Tenancy Act. If it were the intention of the Legislature to exclude such evidence as may be furnished by the dealings between the landlords and tenants subsequent to the 2nd day of March, 1883, it should have expressed that intention in more clear terms. As S. 120 stood at the time when the Act was passed, it allowed the Court to consider "any other evidence that may be produced" in connection with the question whether the land claimed as *zamil* was in fact *zamil*. The Evidence Act deals with the question what evidence is relevant evidence and there is no power in the Court to reject any evidence as irrelevant evidence if the landlord offers that evidence and the Evidence Act says that it is relevant evidence.

A demise on the footing that the land demised is the proprietor's private land is hardly an agreement or compromise within the meaning of the terms as used in paragraph (2a) of the section but quite apart from any other consideration, the agreement or compromise which the Revenue Officer is not to regard is an agreement or compromise made before the Revenue Officer in a proceeding connected with the record-of-rights. (*Das and Kulwant Sahay, JJ.*) MAHARAJAH KESHO PRASAD SINGH v. PARMESHWRI PRASAD SINGH. 2 Pat. 414:

(1923) Pat. 65 : 4 Pat. L. T. 135 : 1 Pat. L. R. 111.  
71 I. C. 902 : 1923 F. 276.

—S. 22, Cl. 2—Non-transferable occupancy holding—Purchase by co-sharer landlord—Status of purchaser.

Where a co-sharer landlord purchases a non-transferable occupancy holding he does not acquire title in the holding as a raiyat under Sec. 22 Cl. 2 of the B. T. Act before its amendment by Act I of 1907. Consequently a person to whom he let out the holding would be a raiyat and not under-raiyat. 27 C. W. N. 759. (*Walmesley and Ghose, JJ.*) ROSHANALI v. CHANDRA MOHAN DAS, 50 Cal. 749 : 27 C. W. N. 759 : 75 I. C. 447 : 1923 Cal. 701.

—S. 22 Sub. S. (2)—Occupancy holding—Purchase by *part proprietor*—Effect of.

The effect of section 22 B. T. Act as amended by the Eastern Bengal Assam Council Act is that the occupancy holding disappears and the purchaser enjoys the land in his character of proprietor or *teuare* holder and not as a raiyat. But as upon the disappearance of the tenant right all the holders of the superior interest would *prima facie* be entitled to possession, that one amongst them who is allowed to keep exclusive possession of the land is made to pay his co-sharers a fair and equitable sum for such use and occupation. The co-sharers, who are deprived of the rent they had previously realised from the occupancy raiyat, are in this manner compensated for their loss. (*Mookerjee and Chotzner, JJ.*) PURNA CHANDRA ROY v. MATHURA MOHAN SAHA. 70 I. C. 68 : 1923 Cal. 210.

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—S. 23—Right to trees—Custom—Record of rights.

In a suit by a landlord against his tenant for recovery of the price of two mango trees alleged to have been cut and appropriated by the defendants who were his tenants, the defendants pleaded that in pursuance of a custom in the village they were entitled to cut and appropriate the trees standing on their *kasht* lands. The Court below found in favour of the custom set up by the defendants relying in support on an entry in the Record of Rights which showed that the names of the tenants had been recorded against their holdings with a note "Bakabza Raiyat". Held that on the evidence the custom had been made out. (*Jwala Prasad, J.*) MAHARAJA SIR RAMESWAR SINGH BAHADUR v. SONDHARI RAI. 1 Pat. L. R. 105.

—S. 29—Applicability—Purchaser of non-transferable occupancy holding—Enhancement of rent.

S. 29, Bengal Tenancy Act, does not apply to the case of the purchaser of a non-transferable occupancy holding whose title the landlord does not recognise, but who afterwards is recognised as a tenant on agreeing to pay a fixed rent. (*Ghose, J.*) FERASAT ALI MULLIK v. PRIAMBODA DEVI. 69 I. C. 414 (2).

—S. 29—Enhanced rent—Claim for.

The true effect of S. 29 B. T. Act is that there is no permanent enhancement when there is an attempt to increase rent without writing registered. But still the legislature allows the landlord to realise the rent at the increased rate provided rent at that rate has been actually paid for a continuous period of not less than 3 years immediately preceding the period for which rent is claimed. If the landlords do not bring themselves within the precise language of the clause, they are not entitled to the benefit. (*Mookerjee and Chotzner, JJ.*) JANAKI BALLAV ROY v. ENAT MONDAL. 37 C. L. J. 489 : 72 I. C. 136 : 1923 Cal. 600.

—S. 29—Rate of rent—Evidence of—Rent collection papers.

In coming to a conclusion as to the rate of rent the Court should not treat as independent evidence rent collection papers which are not proved by the persons who are alleged to have made the collection. (*Suhrawardy, J.*) FAJADDIN v. AGNI KUMAR SARMA. 71 I. C. 300.

—Ss. 29 and 147 (A)—Suit in ejectment by landlords—Expiry of lease—Compromise—Enhancement of rent—Legality of. See (1922) DIG. COL. 1073 SHEGOBIN SINGH v. MAHABIR MISSEER. 4 Pat. L. T. 301 : 71 I. C. 143.

—S. 30 (a)—Enhancement—Record of rights—Entries in—Presumption.

In a suit for enhancement of rent under S. 30 B. T. Act, the plaintiff succeeded in showing that the holdings as recorded in the Record of Rights did not exist in that condition in prior years. Held, the tenants have then to show their holdings are made up of the other holdings on which uniform rent was being paid all along. (*Das and Kulwant Sahay, JJ.*) NAND LAL CHAUBE v. KESHO PRASAD SINGH. (1923) Pat. 339.

## BENGAL TENANCY ACT, S. 30.

———Ss. 30 (a) and 31 B—*Prevailing rates—Ascertainment of.*

The prevailing rate of rent in any local area is a question of fact depending on the actual rents existing from time to time. It increase and diminishes according to existing circumstances, the process being automatic. When the rate has been determined it will be deemed to be the prevailing rate unless there is an increase in rent in the village or a rise in the price of staple food crops. The expression is used in the same sense in Ss. 30 and 31 B. T. Act (*Dawson Miller C J. and Kulwant Sahay J.*) RAMJI RAM V. KAM KUMAR. (1923) Pat 345 : 75 I. C 411

———S. 30 (b)—*Enhancement of rent—Occupancy raiyat—Homestead*

The rent of an occupancy raiyat of homestead lands is liable to enhancement under S. 30 (b) of the Act. (*Walmsley and Ghose JJ*) RAJA RESHEE CASE LAW V. TRAILOKHYA MOHATA. 1923 Cal. 370.

———Ss. 30 (b) and 182—*Homestead land—Enhancement of rent—Money for rent—Occupancy raiyat* See (1922) DIG. COL. 84. RAJA RESHEE CASE LAW V. CHINTAMONI DALAL.

27 C. W. N. 962 : 70 I. C 535.

———S. 40—*Commutation of rent—Application—Right to make.*

Where a court is unable to decide who is the tenant of the holding in the eye of the law and in the face of the decree for rent, commutation does not proceed until it is made more clear as to with whom the relation of landlord and tenant exists. (*Moreshead M. C.*) RAMANUGRAH MAHTON V. CHURAMAN MAHTON. 1 Pat. L. R. 157 (Cr.).

———S. 40—*Commutation of rent—Compromise between tenants and Co-sharer landlord—Effect of*

Where the Court below held that an order requiring the tenants to pay the commuted rent to the landlords who were parties to the compromise but to continue to pay rent in kind to others, is not only very undesirable but also not warranted by the law, *Held* that the view of the court below was erroneous.

The Revenue Court may apply section 40 of the B. T. Act or may refuse to apply for the purpose of commuting rent, but its refusal need not affect the validity of any arrangement the proprietors or any of the proprietors may have made with the tenants.

Whether the compromise is or is not valid as between the co-sharers and the raiyats may be left to the Civil Court to settle. (*Moreshead*) THAKUR SINGH V. RAI PERMATHO NATH MITRA. 1 Pat. L. R. 172 (Cr.).

———S. 40—*Commutation of rent—Deterioration in irrigation facility—Effect of.*

In considering the question of commutation of rent the case should be regarded not merely from the standpoint of the landlord and tenant. The public is also interested in the food supply of the country and if there is the danger of deterioration

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in the irrigation system of the lands it is a reasonable ground for refusing commutation (*Moreshead, M. C.*) RANI BHUBNESHWARI KUER V. MT. SHAM SUNDER KUER. 1 Pat. L. R. 65 (Cr.).

———S. 40—*Commutation of rent—Manhunda rate.*

Where the tenants did not apply for commutation before undertaking the *Manhunda* rate they must be held to have forfeited their right to commutation on the comparison of cash rents of the neighbouring villages. (*Dixon, C.*) RAMDIHAL KAHAR V. BABU BALDEO LAL 1 Pat. L. R. (Cr.) 76.

———S. 40—*Commutation of rent—Mode of calculation—Price of landlord's share.*

On an application for commutation the original Court in calculating the average price to be adopted in respect of the paddy due to the landlord's share worked it out for the village to be rupees 28-0 per mond. The Commissioner reduced this to rupees 24-0 per mond on the basis of experience in previous cases. *Held* that the right principle in these cases was to decide on the merits whenever possible and resort to general standards only when there was nothing more reliable to go by. (*Moreshead M. C.*) NAMMUL HUDA V. SEWAKA MAHTON. 1 Pat. L. R. 263 (Cr.).

———S. 40—*Commutation of rent—Notice to be given to parties—Order without—Jurisdiction.*

Although S. 40 of the B. T. Act does not state explicitly that no order of commutation is to be made till opportunity has been afforded to the party liable to be affected thereby to appear and contest the applications, it is obvious on first principles that no order should be made till notice of the application has been served. The object of the application for commutation is to secure an alteration of the most essential element of the tenancy, namely, the rent. It is of the utmost importance to the party whether the rent is to be paid in kind or in cash and if the rent is to be paid in cash, what sum should be taken as the proper amount payable in lieu of rent previously paid in kind. An order for commutation cannot be made without notice to the party affected and where it is so made by the Revenue Court it acts without jurisdiction and its order is *ultra vires*. An order under S. 40 made by a Revenue Court without jurisdiction does not bind the Civil Court. 45 C. 769 : 18 C 467 Ref (*Mookerjee and Chotzner, JJ.*) GORA CHAND HALDAR V. RAKHAL CHANDRA GOPE. 37 C. L. J. 473 : 72 I. C. 37 : 1923 Cal. 364.

———S. 40—*Commutation of rent—Preliminary objection.*

The issue of grant or refusal of commutation of rent is one that should rightly be determined before the enquiry with a view to determining the sum to be paid as a money rent is undertaken since otherwise the labour and the expenses to the parties of the enquiry may be spent to no purpose. (*Moreshead, M. C.*) BHAGWAT PRASAD *In re.* 1 Pat. L. R. 92 (Cr.).

———S. 40—*Rent—Commutation—Occupancy holding—Transferability of holding—Consideration*

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On an application by the transferee of an occupancy holding for commutation of rent under S. 40 of the B. T. Act it was held that the onus lay on the applicant to establish his status as occupancy tenant which status was challenged. The applicant can establish his right by proving that occupancy holdings are transferable by custom without the consent of the landlord or that the landlord has in fact recognised the transfer. It is not incumbent on the Revenue officer to decide the question of the custom of transferability in entertaining an application for commutation. It is a question for the Civil Court and the Revenue Court need only enquire whether the transferee has been recognised as a tenant. (*Morshead, M. C.*) KULDIP NARAIN SINGH v. MT. JASODA KOER 1 Pat. L. R. 62 (Cr.).

— S. 40 (4) (b)—Commutation of rent—Preceding ten years—Meaning of

The natural interpretation of S. 40 of the B. T. Act is that in commutation proceedings the average should be taken for the years preceding the time at which is had regard to this factor. Where an appeal is pending against a decree for rent at the time of commutation proceedings, the decree rents ought not to be included in the average, especially if the decretal amount far exceeds the actual realisations of the previous years. (*Morshead, M. C.*) RAM CHARITAR BARHI v. MT. GANGESWAR KUER. 1 Pat. L. R. 111 (Cr.).

— S. 40 (5), (6)—Appeal when lies.

S. 40 (5) of the B. T. Act does not govern cl. (6) of the same section. The appeal contemplated under cl. (5) is an appeal against an order passed under cl. (3) determining the sum to be paid as a money rent. No appeal lies against an order refusing or allowing an application for commutation and the remedy is by way of revision. (*Mr. Gruning.*) INDERDEO SINGH v. ANOOP SINGH. 1 Pat. L. R. 123 (Cr.).

— S. 44—Homestead land—User for agricultural purpose—Ejectment—Urban holdings—Occupancy right.

Where homestead land cases to be such and is let out for cultivation and both cereals and vegetables are grown upon it, the land is governed by the provisions of the B. T. Act and a lessee is a non-occupancy raiyat liable to be ejected only on any one of the grounds specified in S. 44 of the B. T. Act.

*Quære*: Whether the B. T. Act applies to urban holdings as for instance in the city of Patna (*Chamier, C. J.*, and *Sharfuddin, J.*) MT. WANBUNNISSA BEGAM v. FAKIRA MAHTON. 1923 P. 94

— S. 48—Applicability of—Jury—Zurpeshgi lease—Mortgage—Raiyati interest—Transfer of—Lease by mortgagee in favour of mortgagor—Rent—Default in payment—Effect of.

On 16—1—1917 defendants executed Zarpesgi lease of 2 bighas of Kasht land in favour of the plaintiff in consideration of Rs. 975. On 18—1—1917 the defendants executed a kabuliat in favour of the plaintiff for a term of 9 years from fash 1324 to 1333 in respect of the same land the rent reserved being Rs. 75 As. 5 per year. As they defaulted in payment of the reserved rent

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the plaintiff brought a suit for fash 1325 and part of fash 1326. The defendants pleaded that during the revisional survey the rent was recorded at Rs. 24 8-0 and that the plaintiff was not entitled to pay more. The trial Court decreed the suit at a rental of Rs. 24-7 0. The appellate Court held that the tenancy created by the kabuliat was a new tenancy and that the defendant while executing the zarpesgi lease did not lose his original status of a raiyat and decreed the suit in full. *Held* that the transactions of mortgage and lease were independent of each other and the rent recoverable by the plaintiff was regulated by S. 48 of the B. T. Act and the plaintiff was not entitled to a greater rent than that to which he was entitled under the section. (*Ross, J.*) CHATURGUN BIND v. TILAKDHARI SINGH. 71 I. C. 470 : 1923 P. 402.

— S. 49—Agreement to lease to two tenants—Notice in ejectment to one—Validity.

When an agreement is made to lease the property to two tenants and they enter into possession though no lease is executed law treats them as tenants and the notice in ejectment should be served on both under S. 49 B. T. Act. But when the lessees obtained a decree for specific performance did but not execute the decree and a lease was executed only in favour of one of them, notice need be served only on that person. (*Chatterjee and Cuming, JJ.*) PITAMBUR GAIN v. RAM CHARAN MURAL. 28 C. W. N. 157.

— S. 49 (b)—Notice under—Formalities of.

On the 26th December, 1914 a notice was served by the plaintiffs upon the defendant. This notice was described as a notice under S. 49 Bengal Tenancy Act. It stated in the first place that the plaintiffs did not admit that the defendants were under-rayats. But it was added that if they were under-rayats, they should vacate the land. There was no specification of the date when the defendants were required to vacate the land. The suit in ejectment was not instituted till the 7th January 1918. On a question arising as to the validity of the notice, *Held*, that technicalities of the English Law relating to the form and contents of a notice to quit should not be introduced in connection with the provisions of S. 49, Bengal Tenancy Act. There was sufficient compliance with the requirements of S. 49 if what was served upon the tenant gave notice to quit the land at the end of the agricultural year next following and the suit was instituted after the lapse thereof. (*Mookerjee and Cholsner, JJ.*) PURNA CHANDRA DAS v. ALI MAHOMED. 37 C. L. J. 548 : 70 I. C. 999.

— S. 50—Applicability to suits or proceedings under the Act—Suit in ejectment.

S. 50 (2) is, by its terms, limited in its application to suits or proceedings under the Bengal Tenancy Act. A suit for ejectment does not all within that description. But it has been ruled that even in cases where S. 50 is not directly applicable, the Court may act on a presumption similar to the one arising under the section, if the facts justify the necessary inference. The same principle plainly applies to suits or proceedings where the rule embodied in S. 50 is extended by analogy. (*Mookerjee and Rankin, JJ.*) MANMATHA NATH KAR v. PROBODH CHANDRA. 37 C. L. J. 52 : 73 I. C. 416 : 1923 Cal. 102.

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—S. 50—Continuity of tenure—Variation of rent—Sub-division—Effect of.

A Sub-division of a tenure does not deprive the tenant of the benefit of S. 50 of the B. T. Act, nor does it affect the continuity of the tenure. A slight variation in rent, though unexplained, does not deprive the tenant of the benefit of the presumption under S. 50 of the B. T. Act. (*Mookerjee and Chotzner, JJ.*) **TARAKUMAR GHOSE v. KUMAR ARUN CHANDRA SINGH.**

74 I. C. 383 : 1923 C. 261.

—Ss. 50 and 29—Distinction between.

S. 50 of the B. T. Act contemplates a case where a tenancy has been held at a certain rate, while S. 29 applies only to a case where rent has been actually paid for a period of three years. (*Mookerjee and Chotzner, JJ.*) **JANAKI BALLAV ROY v. ENAT MANDAL.**

37 C. L. J. 489.

72 I. C. 136 : 1923 Cal. 600.

—S. 50—Presumption—Rebuttal—Contract of tenancy subsequently entered into between the parties.

Where there is a uniform payment of rent for 20 years, it is open to the landlords to rebut the presumption arising in favour of the tenants by a contract of new tenancy entered into subsequently which entitles the landlords to claim rent from the tenants after the expiry of the term of the lease at the rate of rent payable for the cultivated lands of the village. (*Mookerjee and Cuming, JJ.*) **SARAT CHANDRA DE DAS v. TARAPRASANNA BHATTACHARYYA**

1923 C. 141 : 70 I. C. 437.

—Ss. 50 and 104 (h)—Presumption of fixity of rent—Origin of tenancy known—Suit under S. 104 (h)—Maintainability.

The presumption as to the fixity of rent laid down in S. 50 of the B. T. Act does not apply where the origin of a tenancy is known. It is not competent to a Civil Court to revise the rent fixed in the Settlement Rent Roll Where a person is not really affected by an entry of rent in the Record of Rights he would not be entitled to claim a revision of rent under S. 104 (h) Cl. 4 of the B. T. Act even though his case may fall under Cl. 3 of the Section (*Woodroffe and Suhrawardy, JJ.*) **SECRETARY OF STATE FOR INDIA v. RAM CHARAN ACHARJYA,** 70 I. C. 207.

—S. 50—Rent—Enhancement—Presumption—Uniform rate—Long period. See (1922) DIG COL. 86 **ABINAS CHANDRA DAS v. MAJUB ALI CHOWDHURY.** 70 I. C. 273.

—S. 50—Rent—Partly payable in kind and partly in cash—Fixed rent—Produce rent.

Raiyats who pay their rent in kind partially or entirely are not disentitled to the benefit of the statutory presumption corresponding to the rule now embodied in S. 50. In S. 50 the term 'rent' cannot be restricted to 'money rent' and it bears the meaning attributed to it in S. 3, Cl. (5). (37 C. 626 Doubtful), (*Mookerjee and Chotzner, JJ.*) **DINA NATH PAL v. RAJA SATI PRASAD GARGA BAHADUR.** 72 I. C. 663 : 1923 C. 74.

—S. 50—Settlement of fair and equitable rent—Enhancement—Plea that defendant is a fixed rate raiyat—Evidence.

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Under S. 50 sub s (1) where a raiyat and his predecessors in interest have held at a rent or rate of rent which has not been changed from the time of the permanent settlement, the rent or rate of rent shall not be liable to be increased except on the ground of alteration in the area of the holding. This embodies a substantive rule of law. Sub. S. (2) lays down that if it is proved in any suit or other proceeding under the B. T. Act that a raiyat and his predecessors in interest have held at a rent or rate of rent which has not been changed during the twenty years immediately before the institution of the suit or proceeding, it shall be presumed, until the contrary is shown, that they have held at that rent or rate of rent from the time of the Permanent Settlement. This deals with the mode of proof and raises a rebuttable presumption. There is no reason why an occupancy raiyat should be excluded from the category of a raiyat for the purposes of this section. A raiyat at a fixed rate is not created by S. 50 which merely furnishes a rule of evidence to enable a person to prove with facility that he is a raiyat at a fixed rate. S. 115 of the B. T. Act does not come into operation at all until all possible proceedings under Ch. X have been exhausted. If discontinuous receipts for rent produced by the tenant show that rent has been paid at the same rate for the years covered thereby, the court may, by an application of the principle of continuity, infer that there has been no change in the intervening periods. 36 C. L. J. 336 R.1 (*Mookerjee and Walmsely, JJ.*) **NARENDRA LAL CHOWDHURY v. BENODE BEHARI SADHU KHAN.**

27 C. W. N. 740.

—S. 50 (1 and 2)—Applicability of—Permanent Settlement—Presumption.

The word settlement refers to permanent settlement of 1793 and not to any other settlement. To gain the advantage of S. 50, it is necessary to show that the rate of rent has not been changed from the time of the Permanent Settlement of 1793. (*Greaves and Panton, JJ.*) **OSMAN MANDAL v. RADHIKA MOHAN ROY.** 1923 Cal. 298.

—S. 50 (2)—Presumption under.

On the construction of the kabuliati in the case *Held*: that it proceeded upon the basis that there were pre existing rights, and consequently it could not be relied upon for the purpose of showing that there had been a change in the rent since the date of the Permanent Settlement (*Lord Buckmaster*) **KUMAR PRASANNA DEB RAIKAT v. UDDHAB CHANDRA.** 45 M. L. J. 779 :

33 M. L. T. 492 (P. C.) : 75 I. C. 556 :

18 L. W. 147 : 1923 P. C. 86 (P. C.)

—Ss. 50 Cl. (2) and 115—Presumption of fixity of rent—Publication of Record of Rights—Payment of uniform rent for 33 years—Effect of.

In view of the provisions of S. 115 of the Bengal Tenancy Act, the tenants are not entitled to the benefit of the presumption which arises under S. 50 Cl. (2) of the B. T. Act. In order to establish that they are entitled to their holding on payment of a fixed rent in perpetuity, they must prove by evidence that they have held the land at a rate of rent which has not been changed since the change of the Permanent Settlement

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45 C. 913; 1 Pat. L. J. 67 not followed. 37 C. 30; 54 I. C. 672 followed. The production of rent receipts showing payment of uniform rate of rent for 33 years is not sufficient to prove that the rate of rent has not changed since the date of the Permanent Settlement. (*Coutts and Das, JJ.*) MAHARAJA BAHADUR KESHO PD. SINGH v. RAM JAS PANDE. 2 Pat. 92 : 1923 P. 324.

## —S. 50 (2)—Proof of payment of uniform rate of rent—Procedure.

What has to be established to raise the presumption under S 50 (2) B. T. Act is, not that rent has been actually paid at a uniform rate during 20 years, but that the tenant has held at a rent or rate of rent which has not been changed during 20 years. Such holding at a uniform rent may be established, even if it is not proved that rent has actually been paid during a portion of the 20 years (*Mookerjee and Rankin JJ.*) SATIS CHANDRA BISWAS v. NIL MADHAB SAHA. 37 C. L. J. 598 : 73 I. C. 77 : 1923 Cal. 665.

## —S. 51—Suit for rent—Bhaoli rent—Previous judgment between parties dismissing suit for produce rent—Effect of.

The decision in a prior suit for rent as to the amount of rent payable does not operate as res-judicata in a suit for rent for the subsequent year, although it may give rise to a presumption under S. 51 of the B. T. Act, namely, that the rent for the subsequent year remained the same 5 C. L. J. 92, 12 C.W.N. 904; 11 C. W. N. 1100 distinguished. (*Ross, J.*) PARMESHWAR PRASAD SINGH v. NARSING RAI 1 Pat. L. B. 109 : 72 I. C. 138.

## —Ss. 52 and 105—Claim for excess rent for additional area—Enhancement of rent—Question as to.

Where a landlord applied for excess of rent for excess area and also for enhancement of rent, and gave up his claim to the latter but a decree for enhancement of rent was passed held the Special Judge should not have considered the question of enhancement but should have confined himself to the question of fair and equitable rent having regard to the provisions of S 52 of the Act. (*N. R. Chatterjee and Pearson, JJ.*) RAM RENU ROY v. MIDNAPUR ZEMINDARI CO. LTD. 1923 Cal. 111.

## —S. 52—Enhancement of rent—Excess area—Proof of—Nature of the suit.

If the landlord can show that since the creation of the tenancy, rent had been assessed, and that when rent was last assessed, the assessment was on the basis of a certain area and that the defendants are in possession of land in which no rent was assessed at the time then the landlord is entitled to increase of rent. (*Newbould and Pantou, JJ.*) RAJA JOGENDRA KISHORE ROY CHOUDHURY v. AKTAR. 1923 Cal. 278.

## —S. 52—Rent claimed on basis of excess in area—Burden of proof.

In a suit for additional rent on the basis of excess in area the landlord has to prove the excess and this implies he has also to prove what area of land was originally let. The section is

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concerned with cases of alteration of area and not miscalculation of area.

As the mere proof that a tenant's rent has been calculated at some date in the past upon the supposition that his holding is of a certain size, a contract cannot be inferred that he is liable at any time to re assessment upon the actual area.

When a letting as the basis of management is proved the tenant has to show that the rent was consolidated rent for all land within specific boundaries, but if the landlord fails to prove the original area his suit must fail. (*Rankin and Buckland, JJ.*) MANINDRA CHANDRA NANDI v. KAULAT SHAIK. 50 Cal 957, 28 C. W. N. 264.

## —S. 52—Suit for enhanced rent—Increased area—Proof

If a landlord can prove what was the area upon which rent has been paid and what is the increased area upon which he claims, the Court will give him a decree in respect of the excess. (*Mullick and Bucknill, JJ.*) RADHIKA RAMAN v. SATNARAIN KOERI. 74 I. C. 961.

—S. 52 (1) (b)—Patni lease—Lessee not put in possession of all lands—Mistake—Abatement of rent. See (1922) DIG. COL. 90 BENI MADHAB ROY v. KRISHNA KAMINI GUPTA. 70 I. C. 177.

## —S. 52, Cl. 1 (B)—Suit for rent by co-sharer—Application by tenant for reduction of rent

Where a co-sharer landlord under an arrangement with the other co-sharer landlords and the tenants brings a suit for recovery of his share of the rent separately the tenants are entitled to apply for the reduction of rent on account of reduction in area, 27 C. 417, 21 C. L. J. 315, 17 C. 695, 33 C. 1010 referred to. (*Coutts and Das, JJ.*) MAHARAJA KESHO PRASAD SINGH v. RAMDENI SINGH. 2 Pat 183 : 4 Pat L. T. 689 : 74 I. C. 454 : 1923 P. 397.

## —Ss. 53 and 57—Rent—Provision for payment by monthly instalments—Interest how calculated—Tender, validity of—Part satisfaction.

A contract to pay rent in monthly instalments and in default to pay interest at 12½ per cent per annum, entered into before the enactment of Ss. 53 and 67 of the B. T. Act is valid. It is competent to the parties to enter into an agreement for payment of money rent in modification of the provision of four instalments. 18 C. L. J. 175 followed. (*Mookerjee and Rankin JJ.*) BEHARI LAL BISWAS v. NASIMUNNESSA BIBI. 37 C. L. J. 222 : 73 I. C. 482 : 1923 Cal. 527.

## —S. 55—Arrears of rent—Interest—Tender of smaller sum—Acceptance by landlord—Appropriation.

S. 55 of the B. T. Act does not abrogate the rule that a creditor cannot be compelled to accept any sum in part satisfaction of his dues. That section treats not of tender but of appropriation. Where a tenant tendered the amount of arrears of rent due without the interest thereon the landlord is not bound to accept even the principal amount of rent. The principal and interest constitute one indivisible and entire claim.

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A tender must be unconditional or, at all events, free from any condition to which the creditor may rightfully object (*Bookerjee and Rankin, JJ.*) *BEHARI LAL BISWAS v. NASIMUNNESSA BIBI*

37 C. L. J. 222 73 I. C. 482 :  
1923 Cal. 527.

—S. 60—*Applicability of—Fractional proprietor—Lease—Suit by ijaradar of lessor for rent—Plea of discharge—Bengal Land Registration Act, Ss. 78, 79 and 81.*

S. 60 of the B. T. Act deals with cases where rent is due to the proprietor of an estate. Where the rent is not due to the proprietor the plaintiff being not a proprietor but an ijaradar, and as ijaradar, the plaintiff could not get his name registered under the Land Registration Act, S. 60 has no application. No doubt "proprietor" is defined in S. 3, Cl. (2) of the B. T. Act as a person owning an estate or part of an estate. But S. 60 lays down that the receipt of the person registered under the Land Registration Act "as proprietor of that estate" shall be a sufficient discharge, so that although a proprietor may be the owner of an estate or a part of an estate the section merely speaks of the proprietor of that estate which indicates an entire estate.

The case where rents payable to two or more proprietors the extent of whose interest is required to be registered under the Land Registration Act, and which is dealt in the second part of S. 78 of that Act, is not dealt with by Sec. 60 of the Bengal Tenancy Act.

The object of sec. 60 of the Bengal Tenancy Act appears to be to afford indemnity to tenants who pay rents to the person whose name is registered under the Act, and to debar them from pleading in defence to a claim for rent by such person that the rent is due to a third person but the section does not appear to have provided for cases where the names of all the part proprietors have been registered under the Land Registration Act. (*Chatterjee and Suhrawardy, JJ.*) *PROBODH CHANDRA MITTER v. HARISHCHANDRA NASKAR.*

27 C. W. N. 888.

—S. 60—*Fixed rates tenancy—Entry in Record of Rights—Payment at uniform rate.*

Where the Record of Rights is against them, the tenants are not entitled to the benefit of the presumption afforded by S. 50, Cl. 2 of the Bengal Tenancy Act. Where the tenants could not have the benefit of the presumption of S. 50 (2) of the Bengal Tenancy Act he has to establish by evidence that the rate of rent has not been changed from the time of Permanent Settlement; in other words once the Record of Rights shows that the tenant is not a tenant at a fixed rate of rent, it is for the tenant to establish by cogent evidence that his rent or rate of rent has not been changed from the time of the Permanent Settlement. (*Das and Adami, JJ.*) *MAHARAJAH BAHADUR KESHO PD SINGH v. ISSER DUBEY.*

1 Pat. L. R. 32 :  
71 I. C. 15

—S. 60—*Scope of—Payment of rent to transferee for a long time—Effect of—Registered proprietors—Rights of.* See (1922) DIG. COL. 90, MT. ADAYAVATI v. JANARDHAN THAKUR.

1 Pat. L. R. 24.

## BENG. TENANCY ACT, S. 85.

—S. 87—*Arrears of rent—Interest due on—Kabuliyat before the passing of the Act—Rent sale—Effect of.*

Where a kabuliyat has been executed prior to the B. T. Act the provisions of S. 67 of the Act are not applicable to the case and the interest on arrears of rent must be calculated as provided in the contract. But where the holding has been sold in execution of a rent decree, the purchaser takes the holding with the ordinary incidents of a tenancy. A stipulation for the payment of interest at an exorbitant rate cannot be supposed to be an incident of a tenancy which would attach to it even after a sale for arrears of rent. The distinction between usual and unusual terms of a contract of tenancy is a distinction which should be taken into consideration in determining whether the incident in question continues to attach to the tenancy notwithstanding its sale for arrears of rent. 26 C. 315, 24 C. 37 Rel. (*Chatterjee and Cumming, JJ.*) *ANNADAMOYE DEBI v. SAUDAMINI DEBYA.*

37 C. L. J. 333 : 27 C. W. N. 502 :  
72 I. C. 719 : 1923 Cal. 559.

—S. 87—*Scope of—Rent sale—Enforcement of charge.* See (1922) DIG. COL. 90, SITAL CHANDRA MAJHI v. PARBATI CHARAN CHAKRABARTI.

69 I. C. 841.

—S. 69—*Appraisal—Discretion—Exercise of*

Under S. 69 B. T. Act an order for appraisal of crops is dependent upon the conditions of sub-clauses (1) (a) and (b) being fulfilled and thereafter upon the discretion of the Collector. Where it is alleged that the rayats had deliberately grown a poor crop, the landlords are entitled to an enquiry into the allegation. So also if misappropriation is alleged. (*Mr. Morshead*) *SHEFAYET HUSAIN v. NEMCHAND MAHTON.*

1 Pat. L. R. 125 (Cr.)

—S. 69—*Appraisal—Procedure.*

An application for appraisal or division is not likely to be made unless the landlord and tenants are on bad terms. In such cases the proper course is not to depute an amn, but a responsible officer. The division or appraisal must be made by him on the spot at or very near the time when crops are ripe for harvest. (*Mr. Gruning*) *MAHARAJ KUMAR GOPAL SARAN NARAIN SINGH v. KESHWAR SINGH.*

1 Pat. L. R. 128 (Cr.)

—S. 70 (5)—*Finality of order.*

Under S. 70 (5) of the B. T. Act the order of an officer having the powers of a Collector is final, though the Commissioner can exercise supervision where the officer acts without jurisdiction. (*Mr. Gruning*) *MAHARAJ KUMAR GOPAL SARAN NARAIN SINGH v. KESHWAR SINGH.*

1 Pat. L. R. 128 (Cr.)

—S. 72—*Scope of—Transferee—Right to rent.* See (1922) DIG. COL. 91, MT. ADAYAVATI v. JANARDHAN THAKUR.

1 Pat. L. R. 24.

—S. 85—*Ryot at fixed rate—Settlement with under ryot.*

It is competent to a ryot holding at fixed rates to make a permanent settlement with the under-ryot or to give the under-ryot a transferable and

## BENG. TENANCY ACT, S. 86.

heritable interest in the land. (*Newbould and Panton, JJ.*) PROBODH CHANDRA DAS v. BIRSINHA BAGANI. 71 I. C. 319.

—S. 86 (6) and (7)—*Surrender by tenant—Prior transfer of portion of non-transferable holding—Landlord's rights*

A surrender of a non-transferable holding by an occupancy raiyat to his landlord, where the raiyat has previously transferred a portion of the holding to another person, entitles the landlord to enter upon the whole holding and eject the transferee or to settle it with another tenant. Case lawfully considered. History of legislation traced and English principles analysed. (*Miller, C. J. Mullick, Jwala Prasad, Foster and Macpherson JJ.*) MT. SHEORAH KUER v. DHANI MIAN. (1923) Pat. 305 : 4 Pat. L. T. 581 : 1 Pat. L. R. 402 : 1924 P. 1 (F. B.)

—S. 87—*Abandonment—Question of fact.*

Whether there has been an abandonment or not is in each case a question of fact. 27 C. W. N. 802 referred to. (*C. C. Ghose and B. Ghose, JJ.*) SARAT CHANDRA MAJUMDAR v. PRASANNA KUMAR. 71 I. C. 304

—Ss. 93, 95—*Common Manager—Appointment of.*

A common manager can be appointed only to an entire estate or tenure. A court cannot appoint such a person to a portion thereof. (*Newbould and Sukrawardy, JJ.*) BASANTA KUMAR CHAKRAVARTY v. ASHUTOSH CHAKRAVARTI. 27 C. W. N. 1040.

—Ss. 103, 104—*Entry in record of rights—How can be challenged—Plea of dispossession of portion—If maintainable in rent suit.*

Where in a suit for rent, the tenant pleads that he was dispossessed from a portion of the holding and hence the rent should be suspended, he is not prevented from raising it under Ss. 103 and 104 of the B. T. Act. The correctness of the entries which is presumed under S. 103-B, the right to challenge it only by a suit under S. 104-H and the conclusiveness of the entry as to area under S. 104-J do not apply to such a plea. (*Chatterjee and Cuming, JJ.*) PRIYA NATH BASU v. TARA CHAND MORAL. 27 C. W. N. 982

—S. 103 A—*Presumption—Records of Right—Khasra papers.*

The inference under S. 103 A of the Tenancy Act can only be drawn from the finally published Record of Rights and not from the khasra papers upon which the finally settled Record of Rights is founded. (*Greaves and Panton, JJ.*) ALTAP ALI CHOUDHURY v. SRIMATHI JARINA BIBI. 1923 Cal. 184.

—Ss. 103. B and 106—*Suit for correction of entries in Record of Rights—Presumptions of correctness—Road cess returns and quinquennial register prepared under Regn. 48 of 1793—Admissibility of.*

In a suit by the landlords for correction of an entry in the Record of Rights to the effect that the rent of a tenure was fixed the pliffs. alleged that the rent was open to enhancement and adduced in evidence quinquennial registers prepared under Regn. 48 of 1793 and the tenant produced some

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road cess returns to prove that the rents had been unchanged for over 20 years. Held the road cess returns were inadmissible in evidence having regard to the provisions of the Bengal Cess Act. To start with, there was a presumption in favour of the defts from an entry under S. 103 B of the B. T. Act. Therefore the onus of proof rested entirely on the plaintiffs landlords to negative the effect of the said presumption. Assuming the entries in the quinquennial register were admissible in evidence they were not sufficient to negative the presumption under S. 103 B of the B. T. Act. (*Ghose and Chotzner, JJ.*) PROMODE CHANDRA ROY CHOWDHURY v. BINAYAKDAS ACHARJYA. 27 C. W. N. 548 : 75 I. C. 201 : 1923 Cal. 611.

—S. 103 (b)—*Record of rights—Presumption of correctness—Rebuttal.* See (1922) DIG. COL. 91. BISHUN PRAGASH NARAIN SINGH v. SHEOSARAN TELI. 69 I. C. 866.

—S. 103 (b)—*Survey—Entry as to malikana or rent free land—Burden of proof.* See (1922) DIG. COL. 92. JAGDEO NARAIN SINGH v. BALDEO SINGH. 45 M. L. J. 460 : 27 C. W. N. 925 : 32 M. L. T. (P. C.) 1 : 2 Pat. 38 : 71 I. C. 984 : (1923) M. W. N. 361 (P. C.)

—S. 104—*Effect of entry in Record of Rights* See (1922) DIG. COL. 32. PROTAP CHANDRA v. SECRETARY OF STATE. 49 Cal. 1026.

—S. 104—*Presumption under—Record of rights* See (1922) DIG. COL. 92. JYOTI PRAKAS CHATTERJEE v. BAGALA KANTA CHOWDHURI. 70 I. C. 822.

—Ss. 105 and 103—*Enhancement of rent—Proceedings for—Limitation.*

It is not necessary to sue for a declaration that an entry in the Record of Rights that the defendants were raiyats at fixed rates is wrong before instituting a proceeding for enhancement of rent under the Bengal Tenancy Act.

If a suit is substantially such a declaratory suit as is contemplated in the proviso to section 111-A of the Bengal Tenancy Act, then the plaintiff cannot, by adding a prayer for confirmation of possession, escape the six years' rule. The point from which limitation is to run is the date of the publication of the adverse entry in the Record of Rights unless there has been any subsequent invasion of the plaintiff's right, in which case, it starts from the later date. (*Bucknill, J.*) SHEOPRATAP DUBEY v. SHEOGULAM LAL. 72 I. C. 781.

—Ss. 105, 105 A—*Lands held at fixed rate of rent—Enhancement.*

In the case of lands held at a fixed rate of rent as per the terms of the deed of grant, an application for the settlement of a fair and equitable rent will not lie. (*Mookerjee and Chotzner, JJ.*) MAHOMED JANU MIA, v. MAJUBALI CHOUDHURI. 27 C. W. N. 328.

—S. 105—*Landlord and tenant—Purchase of jote by landlord in execution of rent decree.*

In execution of a decree for rent obtained by his predecessor in interest a landlord caused seven jotes held by the tenant to be sold. The plots were

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divided into two jotes and the landlord purchased both of them. The sale as regards one of the jotes was set aside on the objection of the tenant and the sale as regards the other was made absolute as no application had been made by the tenant to set aside the sale. On a question arising as to the legality of the dispossession of the tenants consequent upon the sale, *Held* that there was no wrongful eviction of the tenant at the instance of the landlord, as the decree for rent was valid and binding and had not been impeached. (*Ghose and Chotner, JJ.*) **DEBI PRASAD BHAKAT v. OFFICIAL TRUSTEE OF BENGAL.** 37 C. L. J. 314; 72 I. C. 1013; 1923 Cal. 333

———S. 105—*Maurasi Makrari patta*—*Provision to assess excess land—Enhancement.*

Where a *maurasi makrari patta* is granted, a perpetual grant on a fixed rent is implied when the patta provides that excess lands as measurement should be assessed at the rates fixed in the lease, this did not alter the nature of the tenancy. (*Mookerjee and Chotner, JJ.*) **BHAIRAB CHANDRA DAS v. MIDNAPORE ZEMINDARI CO. LTD.**

38 C. L. J. 372.

———S. 105—*Proceedings under—Purchaser's rent sale bound by subsequent decision.*

Any one who buys a holding at an auction must be taken to know perfectly well that he is buying a holding the rent of which may be enhanceable. If it is subsequently increased by proper process beyond the figure in the sale certificate of previous decree the question of estoppel is not in point. The question is not of encumbrance created by the tenant and binding his own interest only. (*Rankin, J.*) **KHETRA MOHAN DE v. SATISH CHANDRA GIRI.** 1923 Cal. 438.

———S. 105—*Settlement of fair and equitable rent—Second appeal.*

The decision of a special Judge settling a fair and equitable rent under S. 105 of the B. T. Act is not open to second appeal but if he decides that the proceedings are maintainable under S. 105 then his decision would be open to second appeal. (*Adami and Bucknill, JJ.*) **MADHAV SURENDRA SAHI v. AWADH MISSER.** 1923 P. 86.

———S. 105—*Settlement of rent—Application filed by all landlords, but signed by some—Maintainability.*

It is doubtful if proceedings under S. 105, B. T. Act are suits. Where an application was filed by all the joint landlords but some withdrew, it must still be decided as regards those who want to proceed with it. Defect in signature and verification do not make the application invalid; nor the absence of the name of one of the proprietors. (*Miller, C. J. and Kulwant Sahay, J.*) **HAZARI LAL SAHU v. AMBICA GIRI.** (1923) Pat. 273.

———Ss. 105, 107 and 109—*Suit for ejectment—Prior decision in proceedings under S. 106 of the B. T. Act—Res Judicata.*

Where a landlord brings a suit in ejectment alleging that the defendant is not a tenant but a trespasser, the decision that the defendant was his tenant in a previous proceeding by the landlord under S. 106 of the B. T. Act operates as *res*

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*judicata* 3 Pat. L. J. 379 followed 16 C. L. J. 67; 9 I. C. 651 referred 30 C. 339 distinguished. (*Chatterjee and Pearson, JJ.*) **JATINDRANATH CHOWDHURY v. AZIZUR RAHAMAN SHANA.** 50 C. 79; 1923 Cal. 433

———Ss. 105, 108 and 109—*Suit for rent—Compromise—Different rate entered in record of rights—Suit for rent on basis of record of rights—Res judicata.*

Where in accordance with a compromise in a proceeding under S. 105 of the Bengal Tenancy Act, the rate of rent has been fixed and in a subsequent suit for recovery of rent a lessor rate is decreed on the basis of an entry in the record of rights, the decision in that suit does not operate as *res judicata* having regard to S. 109 of the Act. (*Coutts and Ross, JJ.*) **MAHARAJA SIK RAMESHWAR SINGH BAHADUR v. YOUNUS MOMIN.** 1923 P. 101

———Ss. 105 (a) and 109—*Applicability of—Suit in civil court—Bar.*

In order to attract the operation of S. 109, of Bengal Tenancy Act, which contemplates creating a bar to the jurisdiction of the Civil Courts under certain circumstances, it is essential to establish that the Civil suit had for its subject a matter which had already formed the subject of an application under S. 105 of the Bengal Tenancy Act.

The introduction of S. 105 (a) has not altered the scope of S. 109 which has to be construed on the same line as before introduction of that subsection. (*Bucknill, J.*) **SHEOPRATAP DUBEY v. SHEOGULAM LAL.** 72 I. C. 781.

———S. 105 (3)—*Single tenancy—Appeal from order—court fee.*

In an appeal from an order under S. 105 (3) B. T. Act a stamp of 8 *as* is to be levied in respect of each tenancy not in respect of each tenant who may be one of a group of tenants holding a particular tenancy. (*Mookerjee J.*) **SACHHIDANANDA THAKUR v. MAHES CHANDRA DAS.** 50 Cal. 903; 28 C. W. N. 116.

———S. 106—*Scope of—Suit involving question of title—Govt. Rules, R. 40—Transfer to Civil Court*

Under S. 106 of the B. T. Act a Revenue officer is competent to decide the question whether the relationship of landlord and tenant subsists, if the question is not one between neighbouring estates. Where a recorded tenure-holder brought a suit under S. 106 of the B. T. Act for declaration that the entry in the survey was wrong and that he was himself the proprietor, the suit raised a question of title between rival proprietors. (*Das and Bucknill, JJ.*) **MOORE v. RAI BABU GULAB CHAND SAHIB.** 4 Pat. L. T. 68; 1 Pat. L. R. 157; 73 I. C. 5; 1923 P. 213.

———S. 106—*Settlement officer—Suit—Power to transfer.*

Where a settlement officer has no jurisdiction to entertain a suit under S. 106 of the B. T. Act; he has no jurisdiction to transfer the case to a competent court for trial and the Civil Court



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cannot try the case (*Das and Bucknill, JJ.*)  
MOORE v. RAI BABU GULAB CHAND SAHIB.  
4 Pat. L. T. 68 : 1 Pat. L. R. 157 :  
73 L. C. 5 : 1923 P. 213.

—Ss. 109, 105—*Application before Revenue Office, for settling rent—withdrawal—subsequent suit in Civil Courts—If lies.*

Where after applying for the settlement of a fair rent under S. 105, B. T. Act, before a Revenue Court, the same is withdrawn and a suit is filed for enhanced rent in a Civil Court, S. 109, B. T. Act operates as a bar. (*Walmsley and B. B. Ghose, JJ.*) SASI KANTA ACHARJA v. SALIM SHEIKH.  
50 Cal. 626 : 27 C. W. N. 987 :  
74 L. C. 1001 : 1923 Cal. 624.

—Ss. 109 and 105—*Res judicata.*

Where the tenant claimed abatement of rent under S. 52 but no such question was raised or investigated in the proceeding under S. 105, on a plain and literal reading of S. 109, the position could not be maintained that the suit concerned a matter which had already been the subject of an application under S. 105. The appellant, urged a wider construction to be put upon S. 11. Where it was contended that as in a case where S. 11, C. P. C. is applicable, a question which might and should have been raised is deemed to have been raised and decided the High Court should hold under S. 109 that a matter has been the subject of an application under S. 105 whenever it might, if the defendant had so chosen, have been raised and decided under S. 105 read with S. 105 A. Held that this contention was unsound. If the construction put forward by the appellant were accepted words which are not found there would have to be read into S. 109. It would be held on the analogy of the doctrine of constructive res judicata, that the jurisdiction of the Civil Court had been constructively excluded even when a point had been neither raised and decided under S. 105 A, (*Das, J.*) MAHARAJAH BAHADUR KESHO PRASAD SINGH v. BHAGWAT SARAN PANDE.  
1923 P. 174.

—S. 109 (A)—*Appeal—Order of special Judge refusing to set aside abatement of appeal.*

S. 109 (A) of the Bengal Tenancy Act is no bar to an appeal from an order of a special Judge refusing to set aside an abatement of an appeal. 45 C. 638 foll. (*Cunning and Panton, JJ.*) KRISHNADAS ACHARJEE CHOWDHURY v. SAMSAN ALI SHEIKH.  
37 C. L. J. 139 : 74 L. C. 925 :  
1923 Cal. 431.

—S. 109 (c)—*Fair and equitable rent—Computation of—Contract contravening the section—Enforceability of.*

In every case where the provisions of S. 109 (c) of the Bengal Tenancy Act are invoked there should be a strict compliance with its requirements. The Settlement officer has to determine, in the first place whether the terms of the agreement are really such that if they were embodied in a contract, they would not be enforced under the Act. If the conclusion is in the affirmative he is to satisfy himself that the rent agreed upon is fair and equitable. It is only in the event of his being so satisfied, but not otherwise that he can settle such rents as fair and equitable. Where

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the Revenue Officer instead of complying with the terms of S. 109 (c) passed an order in these terms "The tenant agrees. Though the increase is rather large, the attested compromised rent may be settled as fair and equitable". Held that S. 109 (c) did not contemplate settlement of fair and equitable rent on the basis of such an ambiguous order and in accordance with a contract, which contravenes the provisions of the B. T. Act (*Mookerjee and Chotzner, JJ.*) MOYDHANNESSA BIBI v. SATIS CHANDRA GIPi.  
37 C. L. J. 118 : 70 I. C. 895 :  
1923 Cal. 435.

—Ss. 115 and 50—*Record of Rights—Finality of—Enhancement of rent—Presumption See (1922) Dig. Col. 95. PRASANNA KUMAR SEN v. DURGA CHARAN CHAKRAVARTY.*

49 C. 919 : 70 I. C. 537,

—Ss. 115 and 50—*Scope and effect of—Presumptions as to fixity of rent—Entry in record of rights.*

S. 115, Bengal Tenancy Act, provides against clashing of presumptions. It will not permit the presumption under S. 50 of the Act to override that raised from the record of the particulars under Chap. X. It will not be reasonable to suppose that the Legislature intended by enacting S. 115 to preclude evidence of uniform payment of rent for the statutory period in support of the entry of fixity of rent in the record of rights where such entry is presumably based on the evidence of such uniform payment. It will be shutting out a very valuable piece of evidence in favour of a comparatively weak one. If the tenant succeeds in proving a uniform payment of rent from the time of the Permanent Settlement, the rent shall not be liable to be increased whereas the presumption of the correctness of an entry in the record of rights though based on such uniform payment is only a rebuttable one, (*Richardson and Suhrawardy, JJ.*) RASH BEHARI GUHA v. DWARKA NATH BANDOPADHYA.  
27 C. W. N. 936 : 1923 Cal. 365.

—S. 120—*Zerai land—Proof of—Diara land—Right of proprietor to confer occupancy rights.*

The Bengal Tenancy Act does not pretend to enumerate the different modes by which rights of occupancy could be acquired at the time when the Act came into force; it merely saves such rights as had already been acquired. The acquisition of occupancy rights by grant was, up to the passing of the B. T. Act, foreign to the law of Bengal. There is nothing in either S. 20 or S. 21 or in any other section of the B. T. Act which provides that a right of occupancy can be acquired either by grant or by contract. An occupancy right is inherent in the status of the raiyat and is not the landlord's to grant. If a landlord confers occupancy right on a tenant in zerai land that does convert the zerai into raiyati land for all time. If a question arises as to the character of the land purchased by the landlord from the tenant there must be an enquiry as to the original character of the land. If it was originally raiyati land the landlord cannot by getting khas possession treat it as zerai. But if it is proved that the land was zerai land within the meaning of S. 120 of the B. T. Act, the

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land regains its character as such if it comes into the possession of the landlord. The tenant with whom the land is settled subsequently cannot acquire the rights of occupancy in it. When a question arises as to whether land which is claimed to be *zerait* land is in fact *zerait* land, an assertion of title on the part of the landlord and communicated to the tenant before 23-1883 will be conclusive evidence in his favour. Assertions after that date though not conclusive may be taken into consideration as evidence in favour of the landlord (*Das and Kulwant Sahay, JJ.*) MAHARAJA KASHO PRASAD SINGH v. PARMESHWRI PRASAD SINGH

2 Pat 414 : 1923 Pat 65 : 4 Pat L. T. 125 : 1 Pat, L. R. 111 : 71 I. C. 902 : 1923 P. 276.

—S. 120, 2 (a)—*Object and scope of the amendment—Zerai land—Agreements and compromises between landlord and tenant—Admissibility.*

The object of the new sub-section was, as the report of the Select Committee on the Bill of 1907 makes clear, to assert the principle that agreements or compromises made before a revenue officer should not be held to affect the rights of third parties. It was thought that the question whether the land is proprietor's private land affects not merely a tenant for the time being but also all future occupants of the lands and the Legislature considered it desirable to safeguard their interests as far as possible. But it is one thing to frame rules for the guidance of revenue officers, it is another thing to tell the Civil Courts that they are not to regard as evidence that which is evidence under the Evidence Act. The last paragraph of S. 120 undoubtedly says that the Civil Court is to have regard to the rules laid down in S. 120 of the Bengal Tenancy Act for the guidance of the revenue officer whenever any question arises in a Civil Court as to whether land is or is not a proprietor's private land, but there is nothing in S. 120 which tells the Civil Courts definitely and clearly that they are to exclude from their consideration that which is relevant evidence under the Evidence Act, and when they are bound to regard under S. 120 paragraph (2), of the Act. The landlord is entitled to rely upon any evidence that may be produced to show the assertion of any title on his part and communicated to the tenant whether before the 2nd day of March, 1883, or after that date. All such evidence is relevant evidence under the Evidence Act and is admissible as such, though it may be that such evidence standing by itself will be of small value and will not induce the Courts to hold that the land claimed as proprietor's private land is in fact the proprietor's private land. If there is any evidence of an assertion of a title on the part of the landlord and communicated to the tenant before the 2nd day of March, 1883, the matter is conclusive under the Bengal Tenancy Act, but if the evidence is to the effect that there was an assertion of a title communicated to the tenant after the 2nd day of March, 1883, that evidence will not be conclusive on the question whether the land claimed as *zerait* is in fact *zerait* land: it is open to the Court to take that evidence although into consideration in coming to the conclusion whether the land

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claimed as *zerait* is in fact *zerait* land. (*Das and Kulwant Sahay, JJ.*) MAHARAJA KASHO PRASAD SINGH v. PARMESHWRI PRASAD SINGH

2 Pat. 414. 1923 Pat. 65 : 4 Pat L. T. 125 : 1 Pat, L. R. 111 : 71 I. C. 902 : 1923 P. 276.

—S. 147 A.—*Compromise decree not complying with terms of the section.*

Where the provisions of S. 147 A. of the B. T. Act have not been complied with, a compromise decree fixing the rent as between a landlord and tenant is a nullity and no effect can be given to it, 17 C. W. N. 496 Ref. The fact that the rate of rent recorded in the compromise was also recorded in the partition proceedings can make no difference.

Where the original rate of rent is known or proved (as by an entry in the Record of Rights) it is not open to the parties to effect an enhancement of rent under the cloak of a compromise, (*Ross, J.*) KUNJ BEHARI CHAUDHURY v. CHARAN SINGH

72 I. C. 40.

—S. 147 A.—*Consent decree in contravention of—Not a nullity*

A consent decree passed as between a landlord and tenant in contravention of the provision of S. 147 (a) of the B. T. Act is not a nullity and it cannot be set aside in a separate suit or questioned in collateral proceedings. (*Das and Adam, JJ.*) DEOLAGAN SINGH v. MT. GULBANSI KOER.

1 Pat. L. R. 43 : 69 I. C. 616.

—S. 148—*Claim for rent—Claim for money had and received—Jurisdiction to try.*

Where a suit for rent against the tenant and an alternative claim for money had and received was tried under the summary procedure prescribed by S. 148, the jurisdiction of the court is not in any way affected and the decision will be binding. (*Rankin and Buckland, JJ.*) KRISHNA KUMARI BASU v. NAGENDRA PRASAD BASU.

27 C. W. N. 716 : 50 C. 807 : 1923 Cal. 699.

—S. 148—*Procedure under—Questions of title if can be gone into*

The procedure under S. 148, Bengal Tenancy Act is not a special but a summary one. There is no rigid rule of law that in a rent suit properly so called and filed under S. 148, a question of title may not be determined if it arises. Even if a claim which is not for rent is included in a suit tried under that section, there is no lack of jurisdiction on the part of the judge to deal with the claim. (*Rankin and Buckland, JJ.*) TINKARI BOSE v. NAGENDRA PRASAD BASU.

27 C. W. N. 716 : 50 C. 807 : 1923 Cal. 699.

—Ss. 148 (A and 188)—*Co-sharer landlords—Suit for rent—Maintainability.*

Where a tenant makes a contract by which he is liable to pay rent to several cosharers jointly, one cosharer cannot maintain a suit for the whole rent. S. 188 of the B. T. Act demands that landlords shall do jointly anything which they are under the Acts required or authorised to do, but there is nothing to prevent one cosharer from bringing a suit for the whole rent after making the co-sharers who refuse to join as plaintiffs, defendants in the suit 35 Cal. 331 Ref. Again if a co-sharer can prove that there is a contract

## BENG. TENANCY ACT, S. 153.

express or implied by which a tenant is liable to pay him his share of the rent separately then he may bring a suit for that part of the rent without joining his co-sharers as defendants, but the decree obtained by him is to be executed as money and not a rent decree. On the other hand, notwithstanding such arrangement for separate collection all the co-sharers may sue jointly for the whole rent.

To further facilitate the recovery of arrears of rent due to a co-sharer who is in dispute with his tenants or with his fellow landlords, the legislature enacted S. 148 A of the Bengal Tenancy Act. The section requires firstly, that the co-sharer shall sue to recover the rent due to all the co-sharer landlords in respect of the entire holding, secondly that he must make all the remaining co-sharers parties to the suit, and thirdly that he must state that he is able to ascertain what rent is due for the whole tenure or holding or whether the rent due to other co-sharer landlords has been paid, owing to the refusal or neglect of the tenant or of the co-sharer landlords, defendants in the suit, to furnish him with direct information on these points or on either of them. In such a case the plaintiff co-sharer will be entitled to proceed with the suit for his share only of the rent and a decree obtained in a suit so framed shall be as effectual as a decree obtained by the Sole landlord in a suit brought for the rent due to all the landlords. If in the suit it is found that the co-sharer landlords have realised rent in excess of their shares, then they will be liable to reimburse the plaintiff to the extent of the excess realised by them. 4 Pat. L. J. 500 Ref. (*Miller C. J. and Mullick, J.*) RAJGIRI SINGH v. JADUNATH SINGH. 1923 P. 41 : 4 Pat. L. T. 39.

—S. 153—Rent suit—Revisional power of District Judge—Transfer to Additional District Judge—Jurisdiction.

An Additional District Judge to whom a District Judge transfers for disposal an application under S. 153 B, T. Act, is quite competent to dispose of the same, as the District Judge is empowered to assign work for him under the Civil Courts Act, (*Richardson and Ghose, JJ.*) LAL BEHARI BASAK v. AKHIL CHANDRA SANTRA, 27 C. W. N. 315 : 72 I. C. 794 : 1923 Cal 469.

—S. 153—Second appeal—Suit for cess.

S. 153 Bengal Tenancy Act bars a second appeal in suits for rent where the decree is passed by a District Judge, Additional District Judge or Subordinate Judge and the amount claimed in the suit does not exceed Rs. 100 unless a question of a special character has been decided by the decree under appeal. Held that in cases where the plff. has not published the notice under the Bengal Cess Act, no second appeal lies from the decision of the Dt. Judge deciding the question of the liability of the deft. to pay cess. (*Mookerjee and Chotzner, JJ.*) MAHARAJA BIRENDRA KISHORE MANIKYA BAHADUR v. TRAILOKHYA NATH ROY. 37 C. L. J. 521 : 74 I. C. 547 : 1923 Cal. 673

—S. 155—Ejectment—Compensation—Misuse of tenancy—Notice—Contents of.

A notice under S. 155 not requiring the tenant to remedy the misuse, though it is capable of

## BENG. TENANCY ACT, S. 167.

remedy, but only asking for compensation to remedy the misuse, is not valid. (*Woodroffe and Ghose, JJ.*) SHIB CHARAN CHAKRABURTHY v. BIPIN BEHARY CHAKRABURTHY. 1923 Cal. 149(1).

—S. 158—Assessment of rent—Application for—Dismissal for default—Subsequent suit for compensation—Not barred.

A claim for assessment of rent under S. 158 of the B. T. Act was dismissed for default under O. 9 R. 8 C. P. Code in the year 1915. The landlords subsequently instituted a suit against the defendant claiming compensation for occupation of the same land and a determination of the annual rent payable by the defendant. Held that an application under S. 158 of the B. T. Act was not a suit and its dismissal for default did not bar the subsequent claim for the determination of the annual rent payable by the defendants. (*Miller, C. J. and Mullick, J.*) JANKI RAY v. RAJA KALANAND SINGH. 2 Pat. 193 : 4 Pat. L. T. 705 : 74 I. C. 464 : 1923 P. 381.

—S. 158 B—Execution sale—Decree for consolidated rent of two holdings.

If a suit has been brought for the consolidated rent of two holdings, a subsequent sale in execution of the decree would not confer upon the purchaser any greater title than the right, title and interest of the judgment-debtor. There is nothing in S. 158 B of the B. T. Act which would give the purchaser the right to acquire the rights therein mentioned except by a purchase of the holding. (*Miller C. J. and Mullick J.*) DIPMA MAHTON v. LALA SHEONANDAN PRASAD, 1 Pat. L. R. 467.

—S. 158 B.—Notice to co-sharer landlord—Absence of—Effect.

The omission to serve upon a co-sharer landlord the notice required by S. 158 B of the Bengal Tenancy Act need not necessarily make the rule null and void. If the co-sharer landlord adopts the sale and withdraws his portion of the purchase money, the sale is quite valid as the provision is not based on grounds of public policy but for the benefit of the individual who can waive the same. (*Mookerjee and Chotzner, JJ.*) RAJANI KANTA GHOSE v. SHEIKH RAHAMAN GAZI. 27 C. W. N. 765 : 37 C. L. J. 447.

—Ss. 161 and 86 (6)—Incumbrances—Who is—Purchaser of portion of holding.

The purchaser of a portion of a non transferable occupancy holding from an occupancy raiyat is not an incumbrancer within the meaning of Ss. 161 and 86 (6) of the B. T. Act and hence the landlord after a surrender can eject him. (*Miller, C. J., Mullick, Jwala Prasad, Foster and Macpherson, JJ.*) MT. SHEORAJI KUER v. DHANI MIAN. 1923 Pat. 305 : 4 Pat. L. T. 581 : 1 Pat. L. R. 402 : 1924 P. 1 (F. B.)

—S. 167—Annulment of encumbrance—Notice essential.

Before an encumbrance could be validly annulled it is essential under S. 167 of the B. T. Act that a notice should be served as provided in the section. (*Sanderson C. J. and Ghose, J.*) JATINDRA MOHAN CHAKRAVARTHI v. BIJOY CHAND MAHATAB, 71 I. C. 284.

## BENG. TENANCY ACT, S. 167.

—S. 167—Incumbrance—Annulment of—Mortgage—Landlord purchaser and mortgagee purchaser—Rights of—Mortgage not annulled—Effect of—Mortgage of part of occupancy holding—Sale for arrears of rent. *See* (1922) DIG. COL. 99. SITAL CHANDRA MAJHI v. PARBATI CHARAN CHAKRABARTI. 69 I. C. 841.

—S. 170—Decree for rent—Attachment of holding—Claims under O. 21, R. 58.

When the jurisdiction of a Court is sought to be excluded on the ground that the property attached is of a particular description, it is open to the Court to ascertain the true nature of the property.

The Court executing the decree can go into the question whether the decree was a decree under the provisions of the Bengal Tenancy Act so as to bring into play the operation of S. 170 of the Act and prevent a claim being preferred to the property attached. (*Richardson and Ghose, JJ.*) JOTINDRA MOHAN PAL v. BHOLA NATH BHAKT 27 C. W. N. 817. 1923 Cal. 715

—S. 170 (2)—Decree-holder—Application to certify satisfaction—Bona fides of applicant—Enquiry into.

Under S. 170 (2) of the B. T. Act no enquiry is needed as to whether an application by the decree holder to certify satisfaction is *bona fide* or not. The only condition laid down is that the application should have been made before the tenure or holding is knocked down to the auction purchaser. (*Jwala Prasad, J.*) JAGDHARI RAI v. LANGAT GOPE. 4 Pat. L. T. 495 : 75 I. C. 676 (2) : 1923 P. 572

—S. 170 (3)—Application for deposit under—Notice.

On an application for a deposit under S. 170 of the B. T. Act, notice must be given to the judgment debtor and the decree holder and it is the duty of the Court to decide whether the applicant has or has not a *locus standi* to deposit. (*Bucknill, J.*) KUNJA SINGH v. BARHO RAY 4 Pat. L. T. 247. 73 I. C. 12. 1923 P. 353.

—S. 170 (3)—Non-transferable occupancy holding—Sale of—Deposit.

The transferee of a non transferable occupancy holding is not entitled under S. 107, sub-section (3) of B. T. Act to make a deposit to avert a sale in execution of a decree for rent. (*Panton, J.*) RADHA BENODE MONDAL v. NITAI CHAND SANT 38 C. L. J. 147.

—S. 170 (3)—Right to make a deposit—Execution of decree against Hindu widow—Right of reversioner to make a deposit. (1922) DIG. COL. 100. MOHENDRA NATH NANDA v. BAIDYA NATH TRIPATHI 70 I. C. 127.

—S. 171—Payment into court—Payment direct to decree holder.

Where, on an application to make payment into court under S. 171 of the B. T. Act, the court permits the applicant to pay directly to the decree holder, the provisions of the section have been complied with. (*Coutts and Das, JJ.*) MOSAFIR LAL DAS v. GANESH JHA. 4 Pat. L. T. 134 : 71 I. C. 473.

## BENG. TENANCY ACT, S. 182.

—S. 173 (2)—Purchase by judgment debtor in execution—Sale if void.

Where the purchaser at the execution sale is the judgment debtor himself the sale is not void but only voidable (*Mullick and Bucknill, JJ.*) SAYYID MUHAMMAD AMIRUL HASAN v. MUHAMMAD JEWAD HUSAIN. 5 Pat. L. T. 13 : 74 I. C. 769.

—S. 174—Applicability.

S. 174, B. T. Act, applies to a rent sale, under the Bengal Rent Recovery Act, of property in Orissa. (*Lord Dunedin.*) KSHETRABASHI MAHANTI v. RATNAKAR. 38 C. L. J. 229 : 75 I. C. 278 (P. C.)

—S. 174—Setting aside sale—Deposit of amount—Validity of deposit—Mistake.

A judgment debtor who was permitted to deposit the decretal amount with costs and compensation, went to the execution moharrir who drew up an account and showed that the amount paid in by the judgment-debtor petitioner was correct and on the basis of that account he deposited the sums specified. It was found that no order had been passed by the Court as to what the costs were and the judgment-debtor came well within the time allowed for the deposit and obtained the permission of the Court to deposit the amount. He also obtained an order in the order sheet from the Court that he had deposited the full decree amount with costs and compensation. He was therefore permitted to believe that he had paid the full amount until after the time allowed for the deposit had elapsed, when the decreeholder came forward and pointed out that the amount was not sufficient. *Held* that the judgment-debtor having been misled by an honest mistake ought to be allowed to deposit the deficiency in the amount and that the sale should be set aside on such deposit being made. An executing Court is lacking in the due discharge of its duty in entertaining an application to set aside a sale until it has satisfied itself that the statutory condition provided by S. 174 of the B. T. Act have been fulfilled. It is the duty of the executing Court, before entering in the order sheet that the full decretal amount with costs and compensation had been deposited, to satisfy itself what were the costs to be paid by the judgment-debtor and where owing to this neglect of duty on the part of the Court, the petitioner was lulled into security, and the amount of shortage was not very great the judgment debtor should not be prejudiced on account of the default on the part of the Court. (*Adami, J.*) DIDAR ALI v. KUSUM KUMAR. 4 Pat. L. T. 642 : 71 I. C. 925.

—S. 178—Tenancy on new terms—Acceptance by raiyats at fixed rates of rent.

S. 178 of the B. T. Act does not affect the validity of a contract creating a tenancy on new terms entered into between the landlord and tenants who had the status of raiyats at a fixed rate of rent in 1890. (*Mookerjee and Cuming, JJ.*) SARAT CHANDRA DE DAS v. TARAPRASANNA BHATTACHARYA. 70 I. C. 437 : 1923 Cal. 141.

—S. 182—Applicability of—Homestead land.

## BENG TENANCY ACT, S. 182.

S. 182 is not applicable unless the land is held homestead, in other words, it is not sufficient for a *rayat* that the character of land is such as would justify its use as a homestead, and must be established that the land is used by the *rayat* as his homestead. (*Mookerjee and Rankin, JJ*) MAHARAJAH BAHADUR SIR PRODYOT KUMAR TAGORE v. UMESH CHANDRA SAHA. 72 I. C. 640.

## —S. 182—Homestead—User for keeping agricultural cattle—Ejectment.

The debt. was found to be a settled *rayat* of the village where the disputed land was situated. He was also found to have lands under cultivation; he got these lands cultivated by hired labourers whom he supplied with his own cattle and ploughs. He had also his granary and khamar within his own homestead. Held on these circumstances it was plain that as the defendant was a *rayat*, the disputed land was governed by either S. 182 or by the other provisions of the Bengal Tenancy Act.

It cannot be maintained that because a settled *rayat* takes settlement of a piece of land, adjacent to his homestead though for purposes not agricultural, the tenancy of the new plot of land is governed by S. 182 of the Bengal Tenancy Act (*Mookerjee and Chotzner, JJ*) GIRIS CHANDRA BHATTACHARYA v. BHABATARAN SHAKARI.

37 C. L. J. 524. 74 I. C. 552  
1923 Cal 667

## —S. 188—Applicability.

S. 188, B. T. Act applies only to cases of landlords and can have no application to a suit in ejectment against trespassers. (*Sanderson, C. J. and Ghose, J.*) REAJUDDIN PATWARI v. SYED ABDUL JOBBAR.

69 I. C. 504.

## —S. 188—Suit for rent—Mitakshara joint family—Suit by managing member without impleading junior members—Maintainability of.

S. 128 of the B. T. Act has no application to the institution of a suit for rent and it is competent to the managing member of a Mitakshara joint Hindu Family to sue for rent without impleading the junior members either as plaintiffs or as defendants. The tendency of modern decisions, especially those of the Judicial Committee is in favour of recognition of the representative character of the manager, though, no doubt, the question must be decided in each individual case or special class of cases, subject to the operation of relevant statutory provisions. (*Mookerjee and Chotzner, JJ*) RAJA SATIPRASAD GARGA v. KALI PADA DAS.

27 C. W. N. 372: 72 I. C. 722

## —Sch. III Art. 3—Applicability—Suit between two tenants—Dispossession by landlord.

Sec (1922) DIG. COL. 102 JANOKI NATH SAHA v. BAIKUNTHA NATH GHOTTA.

27 C. W. N. 259. 70 I. C. 602.

## —Sch. III, Art. 3—Suit by landlord—Limitation.

Where there is no relationship of landlord and tenant between the parties the general law of limitation and not the special period prescribed by Sch. III, Art. 3 of the B. T. Act, applies (*Greaves and Ghose, JJ.*) GOPINATH JALUA v. BHARAHARI DAS.

1923 C. 327 (2).

## BERAR LAND REVENUE CODE. S. 4

—Sch. III Art. 6—Special period of limitation—Applicability of—Execution of rent decree—Payee for declaration. See (1922) DIG. COL. 103 DARGAHI MIAN v. MT. MANGO.

(1923) Pat 5:1 Pat. 779.

—(Amendment) Act (II OF 1918) Ss. 49 (e) and (f)—Aboriginal—Power to mortgage—Sanction of Collector.

The power of an aboriginal to effect a mortgage of his land is restricted by the provisions of section 49 E, sub-section (2) of the Act under which such a tenant is empowered only to make a complete usufructuary mortgage of his land and the permission of the Collector cannot enlarge the power of an aboriginal to effect a mortgage of his holding in any other way than by a complete usufructuary mortgage. (*Walmsley and Ghose, JJ*) GANGARAM MAJHI v. BAMPADA MAHAPATRA.

1923 C. 313 (2).

## BERAR—Is not British India but not foreign territory

Berar is not British India and the Limitation Act as such does not apply to those territories though it has been separately applied to that Province. A Berar Court can hardly be said to be a foreign Court but it is not a Court contemplated by S. 14 of the Limitation Act, namely a Court in British India. (*Burton J. C. and Prideaux, A. J. C.*) RAJANNA v. NARAYAN.

1923 Nag. 321.

## BERAR ALIENATED VILLAGES TENANCY LAW

## S. 40—Ante-alienation tenant—Rights of.

The rights of an *izara* tenant are transferable notwithstanding any contract to the contrary and the tenant could not be ejected from his holding by his landlord as such for any case. (*Prideaux, A. J. C.*) SHAIKH IMAM v. RAMCHANDRA.

71 I. C. 25: 1923 Nag. 69 (2).

## BERAR INAM RULES—RULE VII (2)—Deshmukhi cash inam not within the rule

A Deshmukhi cash inam does not fall under rule VI (2) so as to be governed by rule V (2). The grant is a perpetual hereditary grant for the maintenance of the dignity of the members of the family and each person entitled for the time being to a share must be held to be holding that share for his life only. (*Kotwal, A. J. C.*) SHANKER. KAO v. KHUSHAL RAO.

1923 Nag. 329.

## —Chapter V, R. 7.—Service tenure—Maintenance—Resumption of grant.

A perpetual tenure granted in view of services and maintenance is not liable to be resumed so long as there is any member of the family of the first grantee rendering the stipulated service (*Kotwal, A. J. C.*) WAZIRUDDIN v. SHAHABUDDIN.

71 I. C. 150.

## BERAR LAND REVENUE CODE Ss. 4 and 56—Amount payable by ante jagir tenant to Jagirdar if revenue—Charge on the holding.

The sum payable by *antejagir* holder in respect of alienated land is land revenue and is a paramount charge on the holding under S. 56 of the Berar Land Revenue Code. There is nothing in Ss. 49 to 56 to show that S. 56 gives no charge in respect of land revenue which is not a payment

**BERAR LAND REVENUE CODE, S. 78.**

due to the Government (*Kotwal, A. J. C.*)  
**SHAMRAO v. SHRI SITARAM MAHARAJ.**

18 N. L. R. 206 : 1923 Nag. 5.

———S. 78 (2)—*Tenancy—Unknown origin—Meaning of—Protection given by the statute when available.*

Where it is clear that the tenancy could not have commenced before 1868 it cannot be said that the origin of the tenancy was unknown. If it can be proved with certainty that the tenancy did not commence till after a certain point of time then it cannot be said of such a tenancy that evidence of its commencement has been lost by reason of its antiquity. A tenant of such holding is not protected by S. 78 (2). 14 N. L. R. 111 foll. In the absence of any proof that the tenancy was perpetual or that the defendant was a *rautajagir* tenant, it must be assumed that he was an annual tenant (*Dhobley, A. J. C.*) **YESHWANT v. SHIVAPPA.** 1923 Nag. 129 (2).

———Ss. 201 and 205—*Co-occupant—Meaning of Temple*

There is nothing in the Berar Land Revenue Code to indicate that the co-occupant who is entitled to pre-empt must be a human being. A temple acting through its trustees can also pre-empt (*Kotwal, A. J. C.*) **BAKARAM v. RAMCHANDRA MAHARAJ.** 71 I. C. 39. 1923 Nag. 96.

———S. 205—*Mehernama for no fixed amount is not within the section.*

A Mehernama without indicating the amount of mehr is not a sale or a relinquishment. It is the giving of the land as a family settlement (*Prideaux, A. J. C.*) **MAHATAP KHAN v. MT. ASHABI.** 1923 Nag. 330.

———S. 205—*Right to preemption—Agreement to resell—Effect of.*

A pre-emptor's right under S. 205 of the Berar Land Revenue Code cannot be defeated by the vendor reselling to the vendor after a pre-emption decree has been passed. 2 N. L. R. 150 Ref. (*Prideaux, A. J. C.*) **BAPU v. BHOMJI.**

1923 Nag. 26.

**BERAR PATELS AND PATWARIS LAW, s. 20—**  
*Suit for patel allowance—Maintainability—In Civil Court.*

Under S. 20 of the Berar Patels and Patwaris Law a Civil Court has no jurisdiction to try a claim for a share of the arrears of allowance due to a Patel in virtue of his office. (*Kotwal, A. J. C.*) **CHAMPAT v. GANPAT RAO.** 1923 Nag. 16.

**BIHAR AND ORISSA PUBLIC DEMANDS RECOVERY ACT, Ss. 10 and 45—Non-service of notice—Burden of proof—Sale held more than a year before the Act—Limitation.**

The burden of proving non-service of notice under S. 10 of the Behar and Orissa Public Demands Recovery Act is upon the person applying to set aside the sale on that ground. 45 C. 496 followed. S. 45 of the Act does not apply to a suit to set aside a sale held more than a year before the coming into force of the Act. (*Ross, J.*) **GOKARAN PRASAD SINGH v. WARIS ALI.** 1 Pat. L. R. 285 : 71 I. C. 957.

**BOMBAY BHAGDARI ACT, S. 3.**

———S. 32—*Proceedings before certificate officer—Termination of—Proceedings if judicial.*

Proceedings before the Certificate Officer under the Bihar and Orissa Public Demands Recovery Act, 1914, terminate when the sale has been held and the proceeds realised. The only proceedings of a judicial nature contemplated by the Act after realization of the sale proceeds is an inquiry under S. 32 (2) in cases in which the certificate-debtor disputes a claim made by the certificate-holder to receive any amount which might be due to him under S. 32 (1) (c). (*Mullick and Bucknill, JJ.*) **JHARU LAL v. MAHANTH MADAN DAS.**

2 Pat. 257 : 74 I. C. 713 : 24 Cr. L. J. 809 : 1923 P. 410.

**BILL OF LADING—Shortage—Burden of proof—Suit for damages.**

Where the Bill of lading expressly stated "weight, contents, and value when shipped unknown" in a suit for damages for short delivery, the burden of proving shortage is on the plaintiff. (1917) 2 K. B. 679 followed (*Krishnan, J.*) **SUBRAMANIA CHETTY v. THE BRITISH INDIAN STEAM NAVIGATION CO., LTD.** 17 L.W. 363 72 I. C. 408. 1923 Mad. 523 (1).

———Terms in—Condition of goods shipped—Damage—Onus of proof. See BURDEN OF PROOF, 1 R. 146.

**BOMBAY ACT (XI OF 1852) SCH. B, R. 8—Powers of Govt.—Rules for Resuming grants.**

The Govt. has power to regulate by rules the question of emoluments relating to service performed to the state under Sch. B, R. 8 (5). But it has no power to frame any rules with reference to the resumption of land given as emoluments of any hereditary office.

The Govt. have no inherent power of authorising the collector to resume lands summarily when they appertain to the office of a village servant mentioned in R. 8. It cannot be assumed, apart from any specific provision, that the collector has the power of disturbing the possession of third parties who may have acquired rights in respect of such lands under the operation of law. (*Shah, A. J. C. and Kemp, J.*) **PATDAYA MUPPAYA v. SECRETARY OF STATE FOR INDIA.**

25 Bom. L. R. 1160.

**BOMBAY BHAGDARI ACT (V of 1862) S. 3—Unrecognised sub-division—Alienation—Lease—Possession of alienee.**

The property in dispute formed an unrecognised sub-division of a Narva. On 28-4-1892 it was conveyed by its owners, the plaintiff's predecessors, to defendants for a long term of 500 years in consideration of a sum of money. In a suit for redemption by the plaintiffs in 1918 treating the transaction of 1892 as a mortgage, the defendants pleaded that the alienation was void in view of the Bombay Bhagdari Act and that their possession had been adverse for over 12 years. Held, that the transaction of 1892 was not an out and out sale but a lease for a long term and that as the alienation was void, the defendants had acquired by prescription a leasehold interest. (*Shah A. J. C. and Crump, J.*) **HATURBHAI LALLUBHAI PATEL v. MOTIBHAI BAPUJI.** 1923 Bom. 147.

## BOMBAY CITY MUNICIPAL ACT, S. 33.

**BOMBAY CITY MUNICIPAL ACT (III of 1883)**  
 S. 33—Election petition—Municipal Council—  
 Decision of Chief Judge of the Small Cause Court  
 —No open to revision by the High Court See  
 C. P. CODE, S. 115. 25 Bom. L. R. 463.  
 1923 Bom. 421.

—S. 36.—*Municipal Corporation—Meeting—  
 Right to vote—Disqualification by reason of  
 interest—What constitutes—Validity of votes—  
 Decision by Civil Court—Suit by Councillor.*

The interest contemplated by S. 36 (p) and S. 16 Sub S. (1), (1) of Bombay Act III of 1888 must not be too speculative and remote. Again it must not be a mere sentimental interest. It must be a pecuniary or at least a material interest. Where there is a pecuniary advantage or a reasonable expectation of a pecuniary advantage, it must be regarded as an interest within S. 36. If the interest in a contract is pecuniary it is immaterial that the amount involved is trifling. The object of the provision imposing the disqualification is to prevent the conflict between interest and duty that might otherwise inevitably arise.

It is clear on the language of S. 36, cl. (p), that a Councillor, whose name stands as a shareholder on the register of the said company, and who has a beneficial interest in the shares, is disqualified from voting or taking part in the discussion of any matter pertaining to the said company. It is also clear that if the shares stand, not in his name but in the name of a nominee of his, the beneficial interest being in him, he is similarly disqualified. The shares again may stand in the name of a Councillor who holds them not in his own right but as a trustee for another. Where the shares stand in the name of a person who has no beneficial interest in them but is a mere trustee, he cannot it seems vote at meetings of the company in which he holds the shares in a manner inconsistent with the interest of the beneficiaries. The reason is that he derives the position which he holds as a member of the Company from the legal ownership of the shares. But if such person is also a member of the Corporation, he is not, disqualified from voting or taking part in the discussions of any matter relating to the Company at meetings of the Corporation. He is under no obligations to vote at such meetings in a manner beneficial to the interests of the *cestui-que* trust, for he does not owe the membership of the Corporation to the fact that he is a shareholder of that Company. He commits no breach of the trust, if he votes at meetings of the Corporation in contravention of the interests of his beneficiary. It is no part of his duty as a trustee to vote at meetings of the Corporation in matters affecting the company as the beneficiary would have him to do. If no such duty is imposed upon him by law, it cannot be a case of conflict between two duties. Nor can it be a case of conflict between interest and duty, the interest which he has in the beneficiary being no higher than what a father has in the prosperity of his son. The question of the validity of the vote is a question of law and a court of law has jurisdiction to entertain it. Questions relating to the validity of votes are not questions relating to the internal management of a Corporation,

## BOMBAY CIVIL COURTS ACT, S. 32

They are questions that can be disposed of only by a Court of law. If councillors disqualified from voting at a meeting of the Corporation vote at the meeting and by so voting create a majority, has a remedy in a court of law. The question of the validity or invalidity of the votes could only be disposed of by a court of law.

When the question is one of the validity of the votes, it is open to the members of the corporation to bring an action in their own names. It is open to one or more councillors to bring a suit in their own name without filing a representative suit under O. 1, R. 8 C. 1, Code. (*Mulla, J.*) **NARIMAN v. MUNICIPAL CORPORATION OF BOMBAY** 47 Bom. 809; 25 Bom. L. R. 689; 1923 Bom. 305.

—S. 147—*Landlord—Taxes and rates—  
 Liability to pay—Increase of assessment on the  
 basis of rents obtained by sub-letting of members.*

S. 147 of the City of Bombay Municipal Act is an involved section, but it means this, that the lessor from whom taxes are leviable under S. 146 has a claim against a tenant if the rateable value of the premises exceeds the amount of rent payable by the tenant. The only question in any particular case is whether the lessor has contracted himself out of the protection afforded by S. 147. Held on a construction of the lease in question that the lessor was entitled to the protection afforded by S. 147. Ordinarily when the lease was granted, it would be intended that the lessor should be liable to pay the taxes which would be based on the rent payable under lease and it is difficult to suppose that the parties contemplated that in case of an increase in the assessment, the responsibility for paying the tax in accordance with that increased assessment should fall on the landlord and not on the tenant. (*Macleod, C.J. and Shah, J.*) **DARASHAH BOMONJI DUBASH v. LIPTON & CO., LTD.** 1923 Bom. 70.

—S. 515—*Nuisance—Abatement—Power  
 of magistrate to order.*

A magistrate acting under S. 515 of Bombay City Municipal Act can direct the Municipal Commissioner not to issue a license, if the effect of the grant would be to cause nuisance to residents in the locality.

S. 515 gives the power in case of such nuisance to any resident to complain to the court about such nuisance. In such proceedings, the owner of the premises ought to be made a party. (*Shah A. J. C. and Crump, J.*) **THE MUNICIPAL CORPORATION, BOMBAY v. MALLANDINE.**

25 Bom. L. R. 1321.

**BOMBAY CIVIL COURTS ACT, S. 32—Suit in a  
 subordinate Judges' Court—Secretary of State a  
 party—Maintainability.**

Where a suit was filed in the Court of a Subordinate Judge in Bombay for an injunction with regard to a Municipal election, the Secretary of State is both a necessary and a proper party, and hence the suit is not triable in that court. (*Shah, A. C. J. and Coyajee, J.*) **SECRETARY OF STATE FOR INDIA v. NARSIBAI DADABHAI PATEL.**

25 Bom. L. R. 992.

## BOMBAY DISTRICT MUNICIPAL ACT.

**BOMBAY DISTRICT MUNICIPAL ACT—Octroi Schedule—Construction—Ad valorem duty.**

The Municipality claimed to charge on the plaintiff's goods, which were bales of cloth, an *ad valorem* rate on the value of the maunds according to their present value and not according to the value, appearing in the schedule of rates. The octroi Schedule was divided into three columns; in the 1st column were the names of various articles; in the 2nd column was the rate percent load, in the 3rd column was the weight in maunds or price. For cloth the rate percent load was 12 annas per every Rs. 100 or part of it. In the 3rd column the price was to be taken at Rs. 500 per cent load of 16 maunds.

*Held*, that Rs. 500 was the limit value of a full cart load of cloth of all sorts and articles made of cotton, silk, etc., upon which the rate of 12 annas per cent was to be levied, otherwise the amount of Rs. 500 in the third column has no meaning. If it is considered desirable in the interests of the Municipality that certain articles should be charged on their actual value *ad valorem*, it would certainly be necessary to add to the schedule, rules prescribing how the real value of these goods was to be ascertained. It would also be necessary to set up the proper machinery for arriving at such valuation. (*Mackoad, C. J. and Crump, J.*) **LAXMI CHAND JAVERMAL v. THE MUNICIPAL COMMITTEE OF NANDURBAR,** 74 I C 205 : 1923 Bom 413

—(III OF 1901) S. 3 (12)—*Open space abutting by houses—If a street.*

A vacant space with houses abutting upon it and used by the occupiers of the houses as a means of access is a street within S. 3 (12) of the Bombay District Municipal Act (*Shah, A. C. J. and Crump, J.*) **DAYABHAI LALLUBHAI v. AHMEDABAD MUNICIPALITY,** 25 Bom. L. R. 1218.

—S. 14 (3)—*Water rate under S. 71 (1) (b).*

Water rate under S. 71 (1) (b) is not a tax under S. 14 but only a contractual charge. 22 Q. B. D. 145 followed. (*Fawcett, J. C. and Kemp A. J. C.*) **COMMITTEE OF MANAGEMENT OF HYDERABAD v. SETH RAMCHAND,**

1923 Sindh 1 : 16 S. L. R. 98.

—S. 40—*Water rate under S. 71 (1) (b).*

S. 40 does not apply to water rate under S. 71 (1)(b) though it is a contractual charge. (*Fawcett, J. C. and Kemp A. J. C.*) **COMMITTEE OF MANAGEMENT OF HYDERABAD v. SETH RAMCHAND,** 1923 Sindh 1 : 16 S. L. R. 98.

—(1901) S. 48 (f)—*Bye-law—Legality of—Bombay Primary Education Act (I of 1918)—Census of School going children.*

The powers of a Municipality to frame by-laws under S. 48 of the Bom. Dt. Mun. Act are not in any way curtailed by the powers conferred under S. 18 of Act I of 1918 upon the Local Government to frame rules for the purposes of the Act. Bye-laws 4 and 5 framed under S. 48 (b) of the Bom. Dt. Mun. Act are not *ultra vires*. Under that Act read with the rules framed by the Local Govt. under that Act it is obligatory upon the Municipality to keep a register of the children of school going age; and with a view to fulfil

## BOM. DISTRICT MUNICIPALITIES ACT, S. 60.

that obligation it is open to the Municipality to frame a by-law which would enable them to take a census of such children within the municipal area. In order to keep such a register certain information would be necessary and the Municipality are entitled under S. 48 (b) of the Act to take the power to demand such information from persons living within the municipal area.

Where a notification of a Municipality never received the sanction of the Government nor was it published in the Gazette it is open to the municipality to rescind or cancel it by a subsequent resolution without reference to the Local Government (*Shah and Kujju, JJ*) **EMPEROR v. PARSHOTTAM JAGJIVAN** 25 Bom. L. R. 767.

—S. 50 A—*Street Survey—Claim by private owner—Adverse decision by Survey Officer—Suit against Municipality—Govt. if necessary party*

The mere fact that Govt. has an interest in all public streets vested in Municipalities is not a ground for holding that Govt. is a necessary party to a suit by a private individual adversely affected by the decision of a Survey Officer under S. 50 A of the Bom. Dt. Mun. Act. (*Shah A. C. J. and Crump, J.*) **BAI PARVATI v. THE NADIAD MUNICIPALITY,** 25 Bom. L. R. 63 :

47 Bom. 315 : 1923 Bom 459.

—S. 50 A—*Survey of street—Decision of the Survey Officers that a particular land is street and—Effect of—Suit for declaration that land is private property—Secretary of State if a necessary party.*

The suit contemplated by S. 50 A (2) of the Bombay Act III of 1901 is one as between a private party and the Municipality and the Secretary of State is not a necessary party thereto. In the course of a govt. survey of a municipality under S. 50 A of the Bombay District Municipalities Act the Survey Officer decided that a certain disputed plot, of land was a 'street land' within the meaning of S. 3 (2) of the Act and this decision was confirmed by the Collector. The alleged owner of the land sued the Municipality for declaration of his title without impleading the Secretary of State. *Held* that the suit was maintainable. (*Shah A. C. J. and Crump, J.*) **NATHALAL RAMDAS v. THE NADIAD MUNICIPALITY,** 47 Bom 306 : 25 Bom. L. R. 58 :

1923 Bom. 456.

—Ss. 60, 71 (1)(B) and 46 (1)—*Water rate—Rules—Publication.*

Plaintiff sued the committee of management of Hyderabad for the refund of charges paid for supply of water by the Municipality to a private connection to his house on the ground that the rules were not first published under S. 60. *Held* apart from the words "subject to the provisions of Chapter VII" rules under S. 46 (1) do not require preliminary publication for the purpose of inviting objections but merely require the sanction of the Governor in Council or the Commissioner under proviso (a) to S. 46. The words "subject to the provisions of Chapter VII" cannot in themselves make the provisions of S. 60 applicable to case of water rate under S. 71 (1) (b) which is outside the particular one dealt



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with, namely, the case where the Municipality proposes to impose a tax. The main provision in the rules under S. 46 (1) and S. 71 (1) is that Municipality will supply water to private persons on certain terms and this clearly makes an offer to such private persons to supply them with water on the terms laid down and the water rate revised is a contractual charge. (*Fawcett, J. C. and Kemp, A. J. C.*) **COMMITTEE OF MANAGEMENT OF HYDERABAD v. SETH RAMCHAND.**

1923 Sindh 1 : 16 S. L. R. 98

—S. 90 (3)—Notice to level the road—Channel it and light it—Validity

Where the manner of executing is not specified as required by S. 90 (3) but notice requires the person to level the road, channel it and light it, notice is vague and indefinite and cannot be enforced. (*Shah, A. C. J. and Crump, J.*) **DAYABHAI LALLUBHAI v. AHMEDABAD MUNICIPALITY.**

25 Bom. L. R. 1218

—Ss. 96 and 3 (7)—Erection of wall on old foundation—Permission necessary.

Rebuilding of a wall from its foundation is equivalent to 'Building' under the Act and Committee's permission is necessary. (*Macleod, C. J. and Crump, J.*) **THE BANDRA CITY MUNICIPALITY v. D' MONTE** 1923 Bom. 407

—Ss. 122 and 155—Projection—Construction of an otla—Notice to remove—Disobedience—Penalty.

Where an accused constructs an otla and is asked by a notice under S. 122 of the Bom. Dt. Mun. Act to remove it, in case he disobeys the notice, the proper course for the municipality is to remove the otla themselves and charge him with the cost of the removal. The accused cannot be convicted under S. 155 of the Act of having disobeyed a lawful order. S. 122 of the Act gives no power to a municipality to issue a notice to a person alleged to have effected an encroachment to remove it, although the municipality may send such a notice, it is not a notice under the section, such a notice might be sent as a matter of courtesy, preliminary to the Municipality taking action under the powers given them by the section to remove the encroachment themselves. Since these special powers have been given that is the proper remedy as laid down by the legislature in cases of failure to comply with such a notice. (*Macleod, C. J. and Coyajee, J.*) **EMPEROR v. ATMARAM SHAMJI.** 1923 Bom. 30 (1).

—S. 160 (3)—District municipality—Order of District Court under S. 160 (3) of the Bom. Dt. Mun. Act.

An order of the District Court under S. 160 (3) of the Bombay District Municipal Act 1901 can be executed as a decree. It is not necessary to make an application to the Court to pass a decree in accordance with the award. (*Macleod, C. J. and Crump, J.*) **THE BROACH CITY MUNICIPALITY v. GULAM RASUL.** 47 Bom. 654 :

25 Bom. L. R. 305 : 72 I. C. 636 : 1923 Bom. 289.

—(Primary Education) ACT (I OF 1918) Ss. 7, 10—Instruction—Meaning of—Attendance at an unrecognised Primary School—Conviction.

**BOM. HEREDITARY OFFICES ACT, S. 18.**

The two necessary conditions of a valid conviction under S. 10 are: (1) there must be an order passed by the School Committee under S. 9 i.e., an order passed in strict compliance with the procedure laid down in that section (2) the parent must be shown to have failed to comply with the provisions of S. 7 on and after the date specified in such order.

The powers conferred under the Act on the School Committee are wide. They are in curtailment of the right of the parent to give efficient instruction to his child according to his own ideas. It is therefore essential that an attendance order passed by the Committee must be shown to have been passed in strict compliance with the procedure therein prescribed, namely "after giving the parent an opportunity of being heard" and after such enquiry as it considers necessary. The second requirement of S. 10 is that it must be shown that the parent has failed to comply with the provisions of S. 7 on or after the date specified in the attendance order passed by the Committee. (*Shah, A. C. J. and Coyajee, J.*) **EMPEROR v. NEMCHAND NATHA.**

47 Bom. 942 : 25 Bom. L. R. 896

**BOMBAY DISTRICT POLICE ACT, Ss. 57 and 58(2)**

—Finder of property not claimed by anybody—Right of finder. See (1922) Dig. Col. 109 **MARUTI BABAJI SONAR In re.** 47 Bom. 71.

**BOMBAY HEREDITARY OFFICES ACT (3 of 1874) Ss. 9, 11 and 11A—Bombay Revenue Jurisdiction Act (10 of 1876)—Forfeiture of land—Arrears of Revenue—Limitation—Jurisdiction.**

The defendants, predecessor-in-title alienated his vatan land to plaintiff and died subsequently. The defendants applied to the Collector to take proceedings for the protection of the vatan. Acting under S. 11 of the Bombay Hereditary Offices Act the Collector made a declaration on 5-10-1904, that the alienation was null and void. The collector resolved to assess the land at a full rent and on 6-7-1908, the Collector held further proceedings and assessed the land at a rental of Rs. 75 per annum. On 15-3-1915, the Collector ordered forfeiture of the land owing to the default of the plaintiff in payment of arrears of rent then due. The plaintiff sued for a declaration that the order of forfeiture was invalid on the ground that the rent was due from 6-7-1908 when the assessment was fixed and on that footing, no arrears of rent had become due. Held that the assessment of land was an alternative to the summary resumption of possession and the order that the land was liable to assessment, means assessment from the date of the order; that S. 9 Cl. 1 of the Act provided that an order giving the vatandars profits of the vatan should have effect from the date of the Collector's order, and there was nothing in S. 11A of the Act to the contrary; and that the plaintiff's suit was barred by limitation under Art. 14 of the Limitation Act. (*Ratt and Fawcett, JJ.*) **DHONDI. SUBHANE v. SECRETARY OF STATE FOR INDIA.** 25 Bom. L. R. 785 :

1923 Bom. 478.

—S. 18.—Hereditary office dispute—Maharki Vatan—Arbitration—Award See (1922) Dig. Col. 109. **MAHADU KASHIBA v. KRISHNA.**

47 Bom. 95.

**BOM. H. C. RULES (ORIGINAL SIDE) R. 214.**

**BOMBAY HIGH COURT RULES** (Original side) R. 214—*Originating summons—Suit for declaration that covenant for reconveyance or pre-emption is void—Grant of relief.* See (1922) DIG. COL. 110 *DINKAR RAO v. NARAYAN*

47 Bom. 191.

———R. 215—*Originating Summons—Question as to existence of partnership.*

The question as to the existence of a partnership (which is denied) is not one that can be disposed of on an originating summons, (*Mulla, J.*) *SUKHANAND GURUMUKHRAI v. BHIMRAJ R. POTDAR*

25 Bom. L. R. 390.

73 I. C. 254 : 1923 Bom. 394.

**BOMBAY HIGH COURT RULES Rr. 253 and 266—Receiver—Charges for brokerage—Accounts—Amendment of decree.**

The court can enter into questions as to the Receiver's accounts even although the suit may not be pending, especially where the decree is preliminary with regard to the Receiver taking certain action and passing his accounts. That being so, R. 258 of the Bom. H. C. Rules applies, namely, in every decree and order that is not final, liberty to apply shall be implied. It is open to the party interested to apply in regard to any question that may arise as to the Receiver's accounts, so far as they are accounts in any liability subsequent to his appointment as Receiver taking effect, and to that extent R. 266 does not bar any alteration of or addition to the terms of the preliminary decree. (*Fawcett, J.*) *KISHEN PRASAD AND CO. LTD. v. FULLMAL HIRALAL*

25 Bom. L. R. 888.

**BOMBAY KHOTI ACT, S. 10—Transfer includes simple mortgage.**

A simple mortgage is a transfer of the interest of the tenant within the meaning of the section. Even payment by Khatedar of the mortgage amount prior to suit by Khot does not destroy the right of Khot. (*Shah and Crump, JJ.*) *VASU KRISHNA YENKAUDA v. MAHADHAVRAO MORESHAR.*

1923 Bom. 33 (1). 73 I. C. 880.

**BOMBAY LAND REVENUE CODE, S. 53—Occupancy Rights—Assessment paid by tenants—Presumption—Satara District rent equivalent to assessment—Enhancement of rent.**

The fact that the tenants pay the amount of assessment may not be conclusive evidence but it would afford strong presumption that the tenants have attained to occupancy rights by virtue of their long holding. The word 'Miras' should not be used in case of persons who by virtue of their long holding are presumed by reason of the provision of S. 53 to have acquired fixity of tenure.

In cases where rent is equivalent to assessment it cannot be enhanced unless a right to do so is established by custom or otherwise (*Macleod, C. J. and Crump, J.*) *SITARAM SADASHIV SASTRI v. PARSHURAM*

1923 Bom. 449.

———S. 83 (V of 1879)—Duration of tenancy—Presumption as to—Commencement of the tenancy. See (1922) DIG. COL. 111. *NARAYAN RAM CHANDRA v. PANDURANG BALKRISHNA.*

47 Bom. 4.

**BOM. PREVENTION OF GAMBLING ACT, S. 3.**

———S. 83—*Permanent tenancy—Presumption—Execution of Kabulyat—Effect of.*

When it has been proved that a tenant has been in occupation of certain land for so long that one cannot ascertain the commencement of the tenancy, the mere fact that during the currency of his holding he has signed a Kabulyat which purports to be in terms an agreement for an annual tenancy, may not be sufficient to displace the advantage he has obtained from his long holding, if he continues in possession for many years after he had signed the kabulyat, on the same rent. But each case of this class must stand entirely on its own facts. At first, the tenant claiming to hold as a permanent tenant must establish the facts which would entitle him to the presumption of S. 83. But that can be rebutted by the landlord by the production of a kabulyat. Again the effect of the kabulyat can be destroyed by further evidence on the part of the tenant. The fact of the signing of the kabulyat as merely an isolated instance in the midst of a long holding at the same rent, will not necessarily prevent the tenant from succeeding (*Macleod, C. J. and Crump, J.*) *VIJBUKHAN-DAS v. ISHVARDAS.*

25 Bom. L. R. 431.

74 I. C. 292 1923 Bom. 137.

**BOMBAY MAMLATDARS' COURTS ACT (II of 1906), S. 5—Suit in Mamlatdar's court—Mode of trial—Procedure—Revision.**

A Mamlatdar in whose court a possessory suit was brought dismissed it on the ground that the matter could be more properly tried by the Civil Court. On revision the Collector directed the mamlatdar to proceed with the case and returned it for necessary action. The mamlatdar after recording some evidence sent the papers for orders to the Collector who heard the parties and declined to vary the original order of the mamlatdar. On an application for revision to the High Court *Held* that immediately, the case was sent back by the Collector, the Mamlatdar's duty was to try the suit under the Mamlatdar's Courts Acts and to give his own decision thereon; and that the High Court in revision should direct the mamlatdar to resume the suit to his file and dispose of it according to law (*Shah, A. C. J. and Crump, J.*) *RASUL MUSA MAFAT v. ASMAN MUSA DADI.*

1923 Bom. 60.

**BOMBAY PREVENTION OF GAMBLING ACT (IV OF 1887) S. 3 Common Gaming house what is.**

To satisfy the definition of "Common gaming House" the prosecution must establish that the person keeping or using the house knew that profit or gain will in all probability result from the use of the instruments of gaming. The profit or gain may not actually result from such use. But if profit or gain is the probable and expected result of the game itself and if that is the purpose of keeping or using the instruments it would be sufficient. It must also be established that the purpose is profit or gain. This may be done either by showing that the owner was charging for use of instruments or use of the house, room or place or in any other manner possible under the circumstances (*Shah A. C. J. and Coyajee, J.*) *EMPEROR v. DATTATRAYA SHANKAR.*

47 Bom. 960 : 25 Bom. L. R. 1089.

## BOM. PUBLIC CONVEYANCES ACT, S. 22

**BOMBAY PUBLIC CONVEYANCES ACT. (VII of 1920) S. 22—Carriages let for hire to approved customers—Letting—Public conveyance.**

Under Bombay Act VII of 1920 a public conveyance is a vehicle which is used for the purpose of plying for hire for the conveyance of passengers and goods. A person who owns carriages which are let for hire to approved customers cannot be said to let them for hire within the meaning of S. 22 of the Bombay Public Conveyances Act 1920. (*Macleod, C. J. and Crump, J.*) *EMPEROR v NASARVANJI BOMANJI.*

25 Bom. L. R. 95 : 72 I C 70 : 24 Cr. L. J. 310.  
1923 Bom. 248.

**BOMBAY REGULATION (II OF 1827) S. 5—Powers of interference—High Court. See C. P. CODE, S. 115.**

25 Bom L R. 992

———(V OF 1827) S. 14—Effect and scope of—Tender—Mortgage debt if included—Partial tender—Validity of.

S. 14 of Bombay Regulation V of 1827 provides that, if a debtor can prove that he has tendered to a creditor the whole or any portion of the amount due, all further interest shall cease on the amount tendered. The word "debtor" in S. 14 is certainly wide enough to cover a debtor who has given security by way of mortgage, and this is in fact, shown by S. 15 of the same Regulation, which deals with the case of an usufructuary mortgage or pledge and speaks of a creditor of the debt. Similarly in Act No. XXVIII of 1855, providing for the Repeal of the Usury Laws, S. 6 speaks of the lender and borrower of money upon any mortgage, so that there is no reason to suppose that S. 14 (literally construed) would not cover the case of a mortgagor and mortgagee.

S. 14 of Bombay Regulation of 1827 is still in force in the Presidency town of Bombay, as well as the rest of the Bombay Presidency. In the case of a mortgagor seeking to redeem the entire mortgage and tendering only a part of the mortgage debt really due S. 14, so far as it relates to a tender of part of a debt can be held to apply to a case of that kind. (*Fawcett, J.*) *NADANSHAW v. SHIRINBAI.*

25 Bom. L R. 839.

**BOMBAY RENT ACT (II of 1918) S. 2 (1) (b)—Landlord and tenant—Relationship—Stabling accommodation for horses and carriages—License—Enhancement of rent**

The distinction between a lease and license is that in the former case there is an exclusive right to possession on the part of the tenant while in the case of a license, the licensee has not got such a right. Plaintiffs owned a stable in which there were open spaces for keeping carriages as they came in and stalls for horses. There were open spaces for motor cars as well as cubicles large and small. Defendant hired stabling accommodation for the horses, carriage and three motor cars. The carriage was kept in the open space and the horse in the stalls. One of the motor cars was kept in the open space, another in the large cubicle along with other cars and the third in a small cubicle separately. The owner of the stables wanted an enhanced rent.

Held that the relation between the parties was not that of landlord and tenant but merely of

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licensor and licensee and that the provisions of the Bombay Rent (War Restrictions) Act were no bar to enhancement of the rent. (*Fawcett, J.*) *THE INDIAN HOTELS CO, LTD. v. PHIROZ SORABJI.*

25 Bom. L. R. 84 : 1923 Bom. 228.

———(War Restrictions) ACT (II OF 1918) S. 8—Premium for arranging lease:—1) allowed

Where a sub-lessee of premises granted a lease for the unexpired portion of his period and agreed to get a renewal for a further period, in consideration of which he stipulated for a premium in addition to the standard rent the agreement is contrary to S. 8 of the Bombay Rent Act, and specific performance will not be enforced. (*Shah A C. J. and Crump J.*) *SHAVAKSHAV DINSHAW DASAR v. MOTOR UNION INSURANCE CO.*

25 Bom L R. 1813.

———S. 9—Scope and object of.

The first part of S. 9 of Act II of 1918 refers to the act of a tenant whose lease has terminated and therefore the subletting must have occurred at the expiry of the lease, so also in the second part of the sub-section the term of the lease must be lease fixed before the sub-letting.

The object of the sub-section is to prevent a statutory tenancy being used as a source of profit by a tenant who does not require the premises for his own occupation. The first part refers to a tenant who holds over under S. 9 (1) and the second part to a tenant who sublets beyond his term in expectation of statutory tenancy. (*Pratt, C. J.*) *MADHAVJI VIRJI v. LAKSHMIDAS MULJI & CO.*

25 Bom L. R. 1178.

———S. 9 (1)—Non-payment of rent—Ejection by landlord—Defence—Payment of rent after suit—Effect of

The conditions in S. 9 (1) of the Bombay Rent Act are conditions precedent which must be fulfilled at the date of the cause of action. Consequently where a landlord brings a suit to eject a tenant whose rent is in arrears for a long time, the tenant cannot, by paying the arrears of rent into court, resist the suit in ejectment. Where the tenancy is determined not by forfeiture but by a notice to quit the court has no power to grant relief against eviction by the landlord. (*Pratt, J.*) *MATHURA DAS MAGAN LAL v NATHUBAI.*

25 Bom. L R. 345.

47 Bom. 756 : 70 I C. 920 : 1923 Bom. 387.

———S. 10 A—Limitation for application—Starting point—Copy of notice of motion filed with prothonotary within the period of limitation—Motion in Court after the expiry of the period—Limitation.

Though it is open to a defendant to apply direct to the Court for a rule nisi calling upon the plaintiff to show cause why the relief prayed for should not be given under S. 10 A of the Rent Act, the usual procedure where a party wishes to obtain a relief of an interlocutory nature, is by motion, and necessarily the first step which has to be taken is to file a notice of motion in court. The filing of the notice of motion in such a case is deemed to be the application which the applicant wishes to make and though the application

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is moved in Court after the expiry of the prescribed period, it is not barred by limitation if it is filed in the proper office of the court within time. (*Macleod, C. J. and Crump, J.*) **KANEMAR VENKAPAIYA v. NAZERALLY TYABALLY.**

47 Bom. 764 : 25 Bom. L. R. 484

—S. 10 (a)—*Notice of motion—Limitation—Copy of notice filed with prothonotary—Motion in court after expiry of prescribed period—Effect of.*

The period of limitation for applications by way of motion to the High Court is to be calculated from the date on which the motion is brought on in Court and not from the date on which the copy of the notice of motion is lodged with the prothonotary. It is only when the motion is brought on that an application can be said to be made to the court. The copy of the notice of motion lodged with the prothonotary does not amount to an application; it is only an intimation to the court that an application is intended to be made. 31 C. 150 foll; 17 M. L. J. 215 dist. The law will be different so far as the Madras High Court is concerned for there it is the court that issues notice of motion, (*Pratt, J.*) **NAZARALLY v. KANEMAR**

25 Bom. L. R. 18.

**BOMBAY REVENUE JURISDICTION ACT, (X of 1876) Ss. 4 and 5—Claim as Jangam—Claim to restrain levy of rent in excess of assessment.**

A suit for a declaration that plaintiff was Jangam is based under S. 4 (a) (2) of the Bombay Revenue Jurisdiction Act. But he can ask under S. 5 for a declaration that the Collector could not levy rent on his lands in excess of the full assessment by Government and can restrain the Government from collecting the excess. (*Shah A. C. J. and Kemp, J.*) **PATDAYA MUPPAYA v. SECRETARY OF STATE FOR INDIA.**

25 Bom. L. R. 1160.

—Ss. 4 (b) and 5—*Inamdar—Miraspotra—Effect—Survey settlement—Introduction of—Right to levy building fines.*

Defendants were inamdars of the village and they were grantees of the soil as well as assignees of the revenue. The plaintiffs were mirasi class of permanent tenants holding under the Inamdars under comparatively recent Miraspotra of 1859 and 1864. Survey settlement was introduced into the village at the request of the inamdars and a revised assessment of agricultural land came into effect under S. 217 of the Bom. Land Rev. Code, all holders of land in the village became liable in respect of such lands to the provisions of the Land Revenue Code. The Collector under rules framed by the Government and at the request of the inamdar purported to levy building fines for the benefit of the inamdar assignees of the land revenue. The pliffs sued for a declaration of their rights to hold the land free from building fines and for an injunction restraining the inamdars from levying such fines. The Inamdars pleaded that the suit was barred under S. 4 (b) of the Bom. Rev. Jurisdiction Act. Held that the suit was not barred by S. 4 of the Bom. Rev. Jurisdiction Act. If without questioning the legality or propriety of the amount or incidence *per se* the pliff asserts a right independent of and having no relation to it, such as a right to

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pay a certain fixed amount annually under a contract between him and the Inamdar, he cannot be said to object to the amount of incidence of the assessment within the meaning of S. 4 (b). An objection to come within either of the two heads of cl. (b) of S. 4 must be an objection which reaches them directly (*i. e.*) an objection to them *per se* which admits the liability to pay land revenue on the part of the objector but quarrels with its amount or incidence of the validity and effect of the notification of survey settlement as by themselves objectionable, not because some other right affects them or makes them inapplicable to this particular case. 28 B. 74 Ref. (*Shah, A. C. J. and Pratt, J.*) **DAMODHAR MAHADEV BHONDE v. KASHINATH SADASHIV.**

1923 Bom. 79.

—S. 11—*Collector's refusal to grant sanad—Suit.*

S. 11 clearly prevents the High Court from entertaining any suit on account of the Collector's refusal to grant the plaintiff a sanad, as the plaintiff has to prove, previously to filing the suit, that he had presented all such appeals allowed by the law for the time being in force, as within the period of limitation allowed for bringing such suit it was possible to present, (*Macleod, C. J. and Crump, J.*) **AMBARAM KUBERDAS v. SECRETARY OF STATE FOR INDIA.**

74 I. C. 196 :  
1923 Bom. 416.

—S. 12—*Reference under.*

Where the applicant was seeking to have it declared that the suit lands were subject to Summary Settlement and there was thus a claim against the Government jurisdiction as to which was excluded under S. 4 of the Bombay Revenue Jurisdiction Act it is open to the High Court to entertain a reference under S. 12 of the Act, (*Viscount Haldane*). **MAHARAJA OF KOLHAPUR v. BALA MAHARAJ.**

(1923 M. W. N. 638) 33 M. L. T. 378 (P. C.) :  
50 I. A. 308. 1923 P. C. 194. (F. C.)

**BOMBAY SEA CUSTOMS ACT, S. 30 (a) and (b)—Customs duty—Assessment—Whole sale price, meaning of—Costs of the goods to importer. See (1922) DIG. COL. 116. VACUUM OIL COMPANY v. SECRETARY OF STATE FOR INDIA.**

47 Bom. 174.

**BOMBAY VATAN ACT, S. 2—Daughters—Succession.**

Under the Bombay Vatan Act, neither the daughters nor a brother's widow of the last male holder can claim priority over the male members. (*Macleod, C. J. and Crump, J.*) **GAVARAWA KOM v. MALLANGOWDA**

1923 Bom. 382.

**BROKER—Commission—Right to—Contract not completed.**

Those who bargain to receive commission for introduction of a contractor have a right to their commission as soon as they have completed their portion of the bargain irrespective of what may take place subsequently between the parties introduced and whether or not the contract is completed. Where there was a letter in the nature of an authority to negotiate a lease and it contained a certain term that brokerage was to be net Rs. 2,530, and it also contained a promise on

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the part of the defendant to pay that amount on a future date if he succeeded in getting a lessee to agree to the terms of the lease, and the lease could not be put through as the defendant had failed to make out a title to the premises. Held that the brokerage was payable. (*Chaudhuri, J.*) PUNDIT RAGHUNANDAN LAL SARMA v. MADAN MOHAN DASS. 38 C. L. J. 139.

**Commission—When payable.**

Where the remuneration of a broker is payable on the performance by him of a definite undertaking he is entitled to be paid that, as soon as he has substantially done all that he undertook to do even if the principal acquires no beneficial interest from his services, and except where there is an express agreement or special custom to the contrary, even if the transaction in respect of which the remuneration is claimed falls through, provided it does not fall through in consequence of any act or default of the broker. The terms must be ascertained through reference to the contract. (*Mookerjee and Rankin, JJ.*) SATCHIDANANDA DUTT v. NRITYA NATH MITTER. 50 Cal. 878 : 27 C. W. N. 1007.

**Liability of — Principal contract—Undisclosed principal—Calcutta jute market—Custom of.**

There is a difference between a broker and an agent for sale. Under the custom of the Calcutta Jute Market brokers are liable to both buyers and sellers in the case of what are called "principal contracts" as distinguished from "direct contracts." Under the custom of the market there is a liability for the performance of the contract resting upon the brokers and a right in them to enforce the contract. It makes no difference whether at the time of the making of the contract buyers are informed of the name of the sellers and sellers of the name of the buyers. In the case of such contracts the only person to whom the sellers can really be giving credit—the only person mentioned in the contract—is the broker. Either the sellers do not know the name of the other party, or if they do and still prefer a "principal contract" they prefer the broker's credit. Consequently in the case of a breach of contract by the seller the broker is entitled to go to arbitration on an arbitration clause of the contract. (*Rankin, J.*) JITMULL GIRDHARI v. RAM GOPAL BOHITRAM. 50 Cal. 12 : 74 I. C. 273 : 1923 Cal. 419.

**Sub-broker receiving money from constituent and misappropriating — Payment to broker for other transactions—Suit for money.**

Where a sub-broker entered into a business transaction with the plaintiff on behalf of the debts the broker received a large sum of money as advance and misappropriated the same, using a major portion of it in settlement of his own private accounts with the defendants, who never knew of the source of the money or the business transaction entered into with the plaintiff, a suit by the plaintiff against the defendant for the recovery of the amount advanced does not lie. 13 Ch. D. 696, (1893) A. C. 282 and 44 Bom. 139 fold (*Fawcett and Coyajee, JJ.*) MORARJI PREMJI GOKULDAŠ v. MULJI RANCHHOD VED & Co. 25 Bom. L. R. 1014

**BUDDHIST LAW.****BUDDHIST LAW—Applicability of—Shan Buddhists of Burma.**

The personal law of Shan Buddhists resident in Burma does not appear to be in any way different from that of Burman Buddhists and there is no doubt that the ordinary Buddhist Law applies to the case (*Heald and May Oung, JJ.*) MA SHWE YIN v. MAUNG BA TIN. 1 R. 343 : 2 Bur. L. J. 114 : 1923 Rang. 218.

**Burmese—Adoption—Essentials of—Proof.**

There is no special ceremony in Burmese adoption, but the adoption must be a matter of publicity and notoriety. It is strong evidence of such publicity and notoriety if the adopted *Kest-tima* daughter lived continuously for a long period in the house of the adopter from her childhood and was put to school by him as his daughter. (*Lord Parmoor.*) MA THAN THAN v. MA PWA THIT. 33 M. L. T. 361 (P. C.) : 2 Bur. L. J. 260 : 1923 P. C. 156 (P. C.)

**Burmese—Adoption—Manukye Dhammathat.**

The Manukya Dhammathat requires that a *kittima* son or daughter should have been adopted with the intention, publicly signified, of taking the adoptee as son or daughter who will inherit. This intention may have been expressed at the time of the taking or later, or may be inferred from a long course of conduct making such intention public. (*Robinson, C. J. and May Oung, JJ.*) MAUNG PO KAN v. DAW AT. 1 R. 102 : 1923 Rang. 189.

**Burmese—Ancestral estate—Jointness—Burden of proof.**

§ Buddhist law does not say that ancestral land must be presumed to remain undivided until the contrary is proved. There is no such presumption in Buddhist law. No general rule can be laid down as to the burden of proving jointness or separation without regard to the facts and circumstances of each particular case. (*Maung Kin, J.*) MAUNG SHWE LA v. MA KYWE. 74 I. C. 9 : 1923 Rang. 92.

**Burmese—Ceremonies—Act of Shin-bu-ying—Presumption.**

Though the act of Shinbyuing is, in some cases, *prima facie* evidence that the donor of the feast regarded the novice as his son, it is by no means a clear indication in every instance that anything more than a charitable intent, sometimes coupled with a love of display, was in the donor's mind. Where several boys are Shinbyued at the same time, and none of them is a natural-born son, no presumption in favour of adoption can properly arise in the absence of a direct and public declaration of relationship or about the time of the ceremony. (*Robinson, C. J. and May Oung, JJ.*) MAUNG PO KAN v. DAW AT. 1 R. 102 : 1923 Rang. 189.

**Burmese—Custom—Re-marriage—Provision for children of first marriage.**

Among Burmese Buddhists when the mother dies and the father marries again, it is usual to make a family partition and settle on the children on the first marriage. It is most unusual for a

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father merely to make gifts on such an occasion, but still more unusual to include in these gifts the bulk of his property, (*Duckworth and Pratt, J.*, MAUNG PO LUN v. MA E MAI.

74 I. C. 47 : 1923 Rang. 57.

—Burmese—Divorce—Adultery—Cause of action—Partition.

The Dhammathats clearly give the husband of an adulterous wife the right to require her to leave the house with only the clothes on her back. The husband has also a right to ask for partition of possession of all the joint property. (*Carr, J.*, MAUNG PO HAN v. MA SO VI. 2 Bur. L. J. 65 : 75 I. C. 6 : 1923 Rang. 160.

—Burmese—Divorce—Ex parte divorce—Conditions.

A husband or wife is entitled to a divorce on payment of the costs of the suit and foregoing all claim to the joint property of the marriage. 2 U. B. R. (1904—1906) 1011. 7 L. B. R. 79 ; 7 B. L. T. 83 appr. (*Pratt, J.*) MAUNG THEIN MYA v. MAUNG TUN HLA. 1923 Rang. 86.

—Burmese—Ecclesiastical—Power-authority to decide disputes of laymen—Effect of.

In settling a dispute between a *pongyi* and a layman relating to private land, ecclesiastical authorities in Burma have no jurisdiction, and any decision arrived at must be of the nature of an arbitration. Such arbitration will not bind parties who have had nothing to do with the reference to arbitration. (*Macgregor J.*) U MEDA v. U SANDIMA. 1 B. 494.

—Burmese—Gift to children—Effect only after death—Validity—F. P. Act S, 123.

Where the question at issue was regarding the validity of a deed of gift by another to her children to take effect after her death, the matter being one of inheritance. Buddhist Law applied to the case and being a testamentary disposition in the guise of a gift, the deed is invalid.

Though possession is necessary under Buddhist Law to constitute a gift, the matter is now governed by S, 123 T. P. Act which also gets the rule of Buddhist Law on the point. (*Robinson C. J. and Beasley J.*) MA THEIN MYAING v. MAUNG GYI. 1 B. 351 :

75 I. C. 166 : 1924 Rang. 13.

—Burmese—Gift by monk—Validity.

A gift by a monk whether to a layman or another monk, of a monastery or of a site for a monastery whether it has been dedicated to him personally or not, is invalid. (*Macgregor J.*) U MEDA v. U SANDIMA. 1 B. 494.

—Burmese—Inheritance—Exclusion from—Disobedient child. See (1922) Dig. Col. 119, MAUNG NYI MAUNG v. MA NU.

70 I. C. 904.

—Burmese—Marriage—Cohabitation as man and wife—Right of husband.

It is open to a Buddhist minor girl of the age of 16 to marry without the consent of her guardian. Where she openly lived and co-habited with a person for several years till the time of her death it is right to hold that the parties were living

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as man and wife, although the intimacy may have been begun in a clandestine manner. (*Maung An, J.*) MAUNG SEIN TUN v. MAUNG SAN NYAN. 1 Bur. L. J. 144 1923 Rang. 76 (1).

—Burmese—Marriage—Dissolution—Burden of proof.

Marriage even in Burma is ordinarily a permanent bond, which subsists until it is actually broken and the burden of proving that it has been broken is on the person alleging it. (*Heald and Lentaigne, JJ.*) MA LUN ME v. MAKIN

2 Bur. L. J. 67 :

74 I. C. 1637 : 1923 Rang. 155.

—Burmese Marriage—Polygamy—Rights of junior wives—Presumption—Proof

Polygamy is undoubtedly lawful under the Burmese Buddhist Law and a man may have at the same time two or more wives who are on equal footing.

When a claim to inheritance is made by a junior wife courts must examine closely the relations that subsisted between her and her spouse, in order to determine her true status. Wives may under the law occupy identical positions or the junior wife may not be endowed with proprietary as well as personal rights. The junior wife has to prove that she was endowed with such rights before she can succeed to her claim.

No ceremony of any kind is essential for the purpose of lawful wedlock. Although there may not be sufficient evidence of actual giving and taking the conduct of the parties subsequent to their coming together may raise a strong presumption of marriage, especially when the union has lasted for a long period. (*Heald and May Oung, JJ.*) MAUNG THA DUN v. MA THEIN YIN.

1 B. 1 : 73 I. C. 1044.

—Burmese—Monk—Effect of becoming—Remuneration—Effect—

By becoming a monk, a person divests himself of all earthly ties of relationship and property and dies a civil death. If he afterward renounces the monastic life, he does not *ipso facto* occupy the same position as he did before with regard to his property and his relationship. The old status can be gained only by overt acts recognised by law. (*Duckworth, J.*) MA SHWE THE v. MAUNG KAN

1 B. 430.

—Burmese—Monk—Gift to—Power of disposal

In the case of a gift by a monk under the Buddhist Ecclesiastical law, delivery of possession need not accompany the declaration of gift. He has full powers of disposition in his lifetime and may make a death bed gift. (*Po Han, J.*) MA SE v. U LUN. 2 Bur. L. J. 266.

—Burmese—Succession—Death of husband and wife at short interval.

Where both husband and wife die one after the other, if it is not ascertainable who died first, the relations of both can claim the inheritance. Where the interval between the deaths is short, that the same rule applies. Held on the facts, an interval of 2 months and 14 days was not short to justify the application of the rule. (*Maung Kin and Macgregor, JJ.*) MA PWA OP v. MA LAY.

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*Burmese Succession—Grandchildren.*

Grandchildren whose parents are dead succeed to their grandparents or their own right and not as representing their parents. The division is *per stirpes* but not *per capita*. (*Robinson, C. J.*) *May Oung and Beasly JJ.* MAUNG PO THU DAW v. MAUNG PO THAN. 1 R. 316

*Burmese—Succession—Half brothers and sisters—Grand parents.*

Inheritance shall not ascend and half brothers and sisters succeed in preference to grand parents. 12 B. L. T. 103, 8 L. B. R. 1, 10 L. B. R. 107; 4 U. B. R. 20 *Rei. (Pratt and Heald, JJ.)* MA GYI v. MA KHIN DAW. 1 Bur. L. J. 263. 72 I. C. 4. 1923 R. 124

*Burmese—Succession—Letters of administration—Wife living apart from husband for 8 years*

The mere fact that a wife has lived apart from her husband by mutual consent on account of incompatibility of temperament does not constitute misconduct or unfaithfulness entitling the husband to a divorce. Consequently the wife is not deprived of her right to inherit her husband's estate and is entitled to grant of administration in preference to the grandson. (*Robinson, C. J. and Pratt, J.*) MAUNG MAUNG LIN v. MA HLA U. 2 Bur. L. J. 58; 75 I. C. 200. 1923 Rang. 150.

*Burmese—Succession—Orasa daughter—Necessity for joint residence.*

While on the death of the father the eldest son succeeds as *Orasa*, on the death of the mother the eldest daughter enjoys the same privilege. The rules regarding competency are not so definite, the *Orasa* must be legitimate and must have attained the age of majority, possibly, there must be no physical or moral incapacity. Conjoint residence is also demanded by some Dhammathats; *Vide* those set forth in ss. 30, 37, and 41 of the Digest, Volume 1. It is noticeable, however, that the *Manugye* does not appear in any of these sections. No doubt, in its origin, the rule regarding the *Orasa's* one-fourth depended to some extent on his or her residence with the family and performance of the duties of the deceased parents, but this requisite seems to have been dropped in most of the latest Dhammathats. At any rate, the modern disregard of separate residence as a disqualification for inheritance in the case of blood relatives is a circumstance which applies to the claim of the *Orasa* no less than to those of the children left surviving on the death of both parents, (*May Oung, J.*) MA HLA U. v. MAUNG SHWE YIN.

1 Rang. 370; 2 Bur. L. J. 138; 1923 Rang. 271.

*Burmese—Succession—Partition—Letitpwa property—Right of sons of first marriage.*

Where a partition is entered into between a father and the children by his first marriage, just prior to his marrying a second time, the latter have no further rights of inheritance in the *letitpwa* property of the father's marriage with his second wife. (*Duckworth and Po Han, JJ.*) MA TOKE v. MA U LE. 1 R. 487.

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—Succession—Burmese—Inheritance—Step grand children collaterals—Application of Buddhist law. See (1922) DIG. COL 120. KHOO HAING SEIN v. KHOO PEING HEO. 70 I. C. 855.

*Chinese—Inheritance—Widow—Remarriage*

When a man dies his property is equally divided among all his sons, daughters succeed only in the absence of sons and the widow in the absence of both sons and daughters. When a Chinese widow remarries a Burmese Buddhist and dies leaving both her first husband's property and subsequently acquired ones, the customary law of Chinese Buddhist will apply. The second husband would be entitled to all the property belonging to her at the time of the marriage, while the first husband's children would get the property which came from their father. (*Heald and Lentaigne, JJ.*) MAUNG PO MAUNG v. MA PYIT YA. 1 R. 161; 2 Bur. L. J. 79; 74 I. C. 933; 1923 Rang. 180.

*Chinese—Widow—Remarriage.*

A Chinese widow can marry again at least after the period of mourning for her first husband has expired. (*Heald and Lentaigne, JJ.*) MAUNG PO MAUNG v. MA PYIT YA. 1 R. 161. 2 Bur. L. J. 79. 74 I. C. 933; 1923 Rang. 180

*Chinese—Widows—Rights.*

A Chinese Buddhist widow has only a right of maintenance in her husband's estate and is not entitled to a share therein. (*Lentaigne and Heald, JJ.*) BOX KWI v. MA KYE YON. 2 Bur. L. J. 102; 1923 Rang. 236.

*Divorce—Payin Property—Partition.*

In connection with a partition on a divorce by mutual consent, *payin* property is to go to the party who brought it to the marriage and this rule is still to apply even though the property may have been changed in form provided it has not been merged entirely in the jointly acquired property and so changed its character. Change of form does not affect the rule so long as the *payin* can be identified. (*Robinson and Macgregor, JJ.*) MAUNG SHWE THA v. MA WAING. 70 I. C. 562.

*Inheritance—Child of divorced wife living some time with mother and some time with father—No rupture of filial affection—Child entitled to inherit.*

There is no provision in the Dhammathats enabling a father to disinherit his child except by giving him away in adoption to another, though a child who behaves as an enemy towards his parents is debarred from inheriting. A child who merely at his father's request lives separately from him is not included amongst the six classes of children who are not entitled to inherit. The Buddhist Code does not give any meritorious value to mere living together or make the opposite state of things a reason for exclusion, and there must be filial neglect to exclude. But if a child on the divorce of his mother accompanied by partition of property goes to live with her and ceases to be a member of his father's household he is debarred from inheriting from his father,

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The plaintiff after her mother's divorce lived for a short time with her father and then went and lived with his sister. Later she returned and lived with her father and was doing so when he married his last wife. She continued to live with her father and her stepmother or some time and then was sent by her father to live with her mother and she continued to live with her mother until her father's death, but during that time she paid two or three visits to her father. *Held*, she was entitled to inherit. (*Maccolt, J.*) MA NGWE KIN v. MA HME. 1 R. 42. 74 I. C. 100 : 1923 Rang 206.

———*Succession—Relationship, evidence of.*

Plaintiff claimed to be the grand-daughter of the deceased. Her father had predeceased her grandfather and there were no other blood relations competent to give evidence as to her relation with the deceased.

*Held*: this is a case in which evidence of general repute is of considerable importance provided it is cogent. (*Robinson, C. J. and May Oung, J.*) MA HMUN v. MA NGWE THIN. 1 R. 34. 74 I. C. 104 : 1923 Rang. 171.

———*Succession—Share of grand child as against grandmother*

In the estate of her deceased grand father grand child gets, as against the step grand mother, in the absence of issue of the second marriage, one half of the "payin and 1/8 of the "lette-pwa. (*Robinson, C. J. and May Oung, J.*) MA HMUN v. MA NGWE THIN. 1 R. 34. 74 I. C. 104 : 1923 Rang. 171.

———*Succession—Wives—Equal right—Divorce.*

Where a Burman Buddhist has a large amount of property and several wives, the mere fact that he has purchased the property in the name of one wife does not show conclusively that the other wives have been divorced. (*Heala and Lentaing, J.J.*) MA LUN ME v. MA KIN. 2 Bur. L. J. 67. 74 I. C. 1037 : 1923 Rang 155.

BUNDELKHAND LAND ALIENATION ACT (I of 1903) S. 3 (1) (b)—*Scope of—Alienation—Residence.*

S. 3 (1) (b) of the Bundelkhand land Alienation Act appears to imply that a member of an agricultural tribe can alienate to another member of the same tribe, even though the latter resides in a different district. (*Burn, J. M.*) MANGAL SINGH v. SANWANT SINGH. L. R. 4 All. 322 (Rev.)

———*Ss. 6, 17 and 22—Transfer of lands by Collector—Limits of Collector's power—Lambardar—Powers of.*

There is nothing in the Bundelkhand Land Alienation Act which authorizes the Collector to make a partition of the patti behind the backs of other co-sharers for the benefit of the mortgagee from a co-sharer. The Collector could only mortgage the right which the judgment-debtor has and except as regards the plots in the possession as khudkash that right was a right to receive his share on a distribution of the profits of the patti. The fact that he happened to be a lambardar at the time is irrelevant. The lambardar is the agent of the co-sharers for purposes

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of collection, but the fact of his being lambardar in no way increases or alters his personal rights as proprietor. The argument that the other co-sharers are in no way prejudiced is fallacious. (*Ryves and Daniels, J.J.*) PRAG NARAIN v. JWALA PRASAD. 45 A 450 : 21 A. L. J. 335 : L. R. 4 A. 197. 74 I. C. 665. 1923 A 458.

## BURDEN OF PROOF—Adverse possession. See LIM. ACT ART. 142. 1923 All. 565.

———*Adverse possession—Exclusion of period.*

If in a suit by a landlord, the tenant proves continuous possession for more than 12 years the Zemindar has to prove which portion of the period did not count for the accrual of rights. (*Fremantle S. M. and Burn J. M.*) TORIA v. KUNWAR OBAIDULLAH KHAN. L. R. 4 A. 185 (Rev) : 9 O. and A. L. R. 1011.

———*Adverse possession—Joint Hindu family—Widow in possession—Nature of interest.* See ADVERSE POSSESSION. 74 I. C. 869.———*Alienation by Hindu father—Sale preempted—Suit by sons challenging alienation.* See HINDU LAW—JOINT FAMILY. L. R. 4 All. 545.———*Arbitration—Stay of suit.*

Where an application is made for stay of suit pending arbitration, the respondent has to show reason why a stay should not be granted. (*Schwabe, C.J. and Krishnan, J.*) ANGLO PERSIAN OIL CO. LTD., v. PANCHAPAKESA IYER. 45 M. L. J. 653 : 18 L. W. 753 : 38 M. L. T. 103. (H. C.) : (1923) M. W. N 773.

———*Bailment—Loss of goods—Onus on bailor.*

In a suit for damages for loss of goods entrusted to a bailee, the burden of proof lies on him to show that such care as a man of ordinary prudence would have exercised, was taken by him. (*Pratt, J.*) MAUNG PO THAIK v. MAUNG SHA BYAW. 74 I. C. 18 (1) : 1923 Rang. 74 (2).

———*Benami—Onus on person claiming against tenor of deed.* See BENAMI. 28 C. W. N. 62.———*Benami—Onus of proof—Sale by husband in favour of wife.*

When a sale-deed executed by a husband in favour of his wife is challenged as a benami transaction, the onus is upon the person challenging it to prove by evidence that the apparent state of things is not the real state of things. Mere suspicion does not amount to proof.

The mere fact that the husband continued to live in the house or that he had some debts is insufficient.

The production of the sale-deed from one's custody is sufficient proof of his title unless and until some evidence is adduced by the other side to disprove it. (*Mullik and Kulwant Sahay, J.J.*) PURAN MALL v. MT. DILWA. 4 Pat L. T. 54 : 72 I. C. 1003 (2).

———*Benami—Onus on party alleging.*

Primarily the party alleging that a person is a benamidar is bound to prove it. (*Newbould and Cuming, J.J.*) TUKA MIAN v. BABIN CHANDRA MAZUMDAR. 1923 Cal. 292 (2).



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—Bill of lading—Condition of goods.

In a suit for damages on the ground of damage done to goods shipped, the bill of lading is *prima facie* evidence that the description of the goods therein with the actual condition of the goods. If the shippers want to escape liability the onus is on them to show the goods were in a damaged condition when shipped. (*Robinson C. J. and May Oung J. BIBBY BROTHERS v CHARLES COWIE AND CO.* 1 R. 146 : 74 I. C. 916.)

—Bill of lading—Shortage—Burden of proof on plaintiff, See BILL OF LADING. 17 L. W. 363 : 1923 M. 523 (1).

—Consideration—Mortgage—Execution—Registration. See (1922) DIG. COL. 105 THAN-  
NERU GANGAYYA v. SUBBAMMA 69 I. C. 284

—Consideration—Old mortgage—Presumption. See (1922) DIG. COL. 123 JAGNA  
SANTASIAH v. M. P. ATCHANNA NAIDU. 70 I. C. 759.

—Consideration—Recitals in bond—Denial of execution found to be false—Inference of consideration.

In a suit to enforce a bond the defendant denied execution as well as consideration. The Court found that the bond was genuine and from the recital therein drew an inference that the bond was supported by consideration. Held, that there was no error of law committed by the lower Court. (*Newbould and Panton, JJ.*) JADU MONDAL v. JAGENDRANATH BANERJEE. 1923 C. 319 (1)

—Consideration—Recitals in sale deed.

Where a mortgage document was executed by the father of the deft. and contained a recital that the consideration had been received by the executant, the burden lay upon the executant or his representative to prove that the recital was untrue and to satisfy the Court how he became a party to a document which contained untrue recital of this description. (*Mookerjee and Rankin, JJ.*) BENOY BHUSHAN RAY v. DHIRENDRA NATH DEY. 38 C. L. J. 114 : 74 I. C. 178.

—Consideration—Want of—Admission in sale deed.

Where the execution of a sale-deed is admitted by the defendant, the burden is on him to establish that consideration did not pass. (*Coutis and Das, JJ.*) HARI PRASAD CHOWDHURY v. HARIHAR PRASAD CHOWDHURY (1923) Pat 20: 70 I. C. 804 : 1923 P. 205.

—Consideration—Want of—Onus on defendants.

Where in a suit on a promissory note the defendants admit execution but plead want of consideration, the burden is upon them to substantiate their plea. (*Broadway and Abdul Qadir, JJ.*) MAHOMMAD HUSSAIN v. RAM LAL. 5 Lah. L. J. 199 : 71 I. C. 783 (1)

—Co-sharers—Suit for arrears—Lambar-dar holder. See CO-SHARERS. 1923 Nag. 287.

—Custom in derogation of Hindu Law and agricultural custom. See CUSTOM. 4 Lah. 297.

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—Custom at variance with general law—Who to prove. See CUSTOM. 69 I. C. 495.

—Discharge—Lands subject to mortgage—Lease

Where land subject to a mortgage is leased to one of the mortgagees there is nothing from which it could be presumed that the mortgage was discharged (*Pearson, J. M.*) SAHEBDIN. KALWAR v. MAJEE KALWAR. L. R. 4 A. 43 (Rev).

—Disqualification—Leprosy—Inheritance—Hindu law, See HINDU LAW, INHERITANCE. 50 Cal. 604 : 1923 Cal. 331.

—Ejectment—Landlord and tenant—Nature of tenancy.

Where in a suit by a person as owner of land to eject the defendant the latter sets up the existence of a tenancy entitling him to retain possession the burden is upon him to prove the nature of his tenancy and of his rights to remain in possession. (*Newbould and Panton, JJ.*) PROBODH CHANDRA DAS v. BIRSINHA BAGANI. 71 I. C. 319.

—Ejectment—Landlord and tenant—Onus on landlord of proving a right to eject. See LANDLORD AND TENANT, EJECTMENT 45 M. L. J. 238.

—Ejectment suit—Failure in proceedings under S. 145 Cr. P. C. and Survey Proceedings See EJECTMENT. 1923 P. C. 128.

—Execution of document—Admission of signature—Effect of. See (1922) DIG. COL. 125  
PIRBHU DAYAL v. TULA RAM. 9 O. and A. L. R. 43.

—Fraud on registration law.

Where a party attacks the validity of a registered document on the ground it was not registrable in the place where it was done and proves that there was no such plot as the one in the registration area or that it did not belong to the party, then the onus is on the other party to show there was no fraud on the registration law. (*Daniels, J. C.*) MT. SURJA v. BIJAI BAHADUR SINGH. 26 O. C. 336 : 9 O. and A. L. R. 107 : 73 I. C. 13.

—Fraud—Removal of—Effect of—Onus on person guilty of fraud. See C. P. CODE O, 21, R. 90. 4 Pat. L. T. 306.

—Good faith and valuable consideration—Assignee of document or title—Right of stoppage in transit. See CONTRACT ACT, Ss 99, ETC. 27 C. W. N. 231.

—Grant—Authority to give—Donee must show grantor had authority—Shifting of burden in case of long acquiescence. See GRANT. 27 C. W. N. 964.

—Hindu law—Mortgage decree—Sons challenging, See HINDU LAW—JOINT FAMILY. 10 O. L. J. 252.

—Immaterial when evidence is taken. See (1922) DIG. COL. 126 SRI CHIDAMBARA SIVAPRAKASA PANDARA SANNADHIGAL v. VEERAMA REDDI. 27 C. W. N. 245 : 37 C. L. J. 199 (P. C.)

## BURDEN OF PROOF.

———Impartibility—Nature of proof. See MALABAR LAW—THATTANS. 44 M. L. J. 274.

———Landlord and tenant—Relationship—Denial of. See LANDLORD AND TENANT. L. R. 4 A. 190 (Rev.)

———Landlord and tenant—Tenant setting up adverse possession.

Where a tenant sets up adverse possession against his landlord, and the Revenue Records show him to be a tenant, the onus is on him to show he is not a tenant. The onus is not discharged by the fact that the rent which he paid did not exceed the amount of the revenue and the cesses. (*Martineau, J.*) RAM DAS v. CHANDI. 69 I. C. 363 (1) : 1923 Lah. 35 (2).

———Legitimacy—Period of gestation under Mahomedan Law—Extraordinary and abnormal time—Proof of. See MAHOMEDAN LAW—LEGITIMACY 69 I. C. 491.

———Limited owner—Compromise decree—Malabar law. See (1922) DIG. COL. 126 SUBRAMANIA PATTAR v. KIZHAKKARA UTHENATHIL. 69 I. C. 363 (2) : 44 M. L. J. 596.

———Materiality of—Evidence gone into.

Where both sides have given evidence in full and the Court has come to a conclusion on the evidence the question of burden of proof entirely disappears, 48 C. 757 referred to. (*Kotwal, A. J. C.*) GOVERDANDAS v. HARLAL RAM SUKH. 69 I. C. 541 : 1923 Nag. 62.

———Materiality of—Evidence given on both sides. See (1922) DIG. COL. 126 MUHAMMAD ANWAR KHAN v. JHANDA SINGH. 69 I. C. 888.

———Materiality of, after evidence. See (1922) DIG. COL. 126 ABINAS CHANDRA<sup>\*</sup> DAS v. MAJUB ALI CHOWDHURY. 70 I. C. 273.

———Mortgage—Execution admitted sham nature of.

Where the execution of the mortgage document is admitted but it is pleaded it was fictitious and merely a sham, the onus of proving it lies on the party who sets it up. (*Lindsay and Kanhaiya Lal, JJ.*) CHIDDU v. DESRAJ. 21 A. L. J. 793.

———Mortgage—Redemption.

In a suit for redemption the burden of proving a mortgage is upon the mortgagor. (*Daniels, J.*) RAMJI DAS v. MIHEIN LAL. 71 I. C. 654 : 1923 A. 441.

———Nature of document.

Where a deed is attacked after a long period of years, the burden of proving that it is not what it purports to be lies heavily on the person attacking it. (*Ryves and Daniels, JJ.*) BISHAMBAR NATH v. MUHAMMAD UBAIDULLAH KHAN. 45 A. 581. 21 A. L. J. 503 : L. R. 4 A. 433 : 1923 A. 586.

———Necessity—Alienation by Manager of Hindu family—Proof of *bona fides* See HINDU LAW—JOINT FAMILY. 4 Lah. 208.

———Notice—Contract to sell—Specific performance—Subsequent purchaser without notice—

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Burden of proving notice of prior contract to sell. See SP. REL. ACT, S. 27. 25 Bom. L. R. 375 1923 Bom. 410.

———Notice—Plea of purchase without notice of prior agreement—Onus.

The burden of proving a purchase without notice of a prior mortgage or contract is on the subsequent purchaser and the rule is the same for moveable as well as immoveable property. (*Heald and Lentaigne JJ.*) MAUNG CHIT U. BANSI DHAR BAZAZ. 2 Bur. L. J. 63 : 75 I. C. 328 1923 Rang. 153.

———Ownership of trees—Presumption *Rebuttal*.

There is a presumption the owner of land is the owner of trees standing thereon. But this is not a strong one as in India ownership of trees is frequently divorced from ownership of land. Possession of trees raises the presumption of ownership and hence where the plaintiff admits defendant is in possession of trees the presumption of ownership of trees in the defendant is very strong and the burden is on the plaintiff to rebut it. (*Simpson, A. J. C.*) BHAGWAN v. GANGA BAKSH. 9 O. and A. L. R. 412.

———Patwaris papers—Entries in—Correctness. See EVIDENCE. L. R. 4 All. 414 (Rev.)

———Purdanashin lady—Deed executed by—Validity See PURDANASHIN 4 Pat. L. T. 335.

———Question when material.

The question of onus of proof only arises where there is a question of fact to be determined and there is no evidence one way or the other which will enable the Court to come to a conclusion. Where evidence is adduced by both parties, then the question of the burden of proof becomes immaterial and the Court has to determine on the evidence before it. (*Campbell and Moti Sagar, JJ.*) NIHAL CHAND v. GURDITTA MAL. 1923 Lah. 641.

———Question when immaterial.

When the entire evidence on both sides is once before the court, the debate as to onus of proof is purely academical. The controversy having passed the stage at which discussion as to the burden of proof is pertinent, all that remains is to draw the inference from facts. (*Mookerjee and Chotzner, JJ.*) MAHOMED JANU MIA v. MAJUBALI CHOUDHURI. 27 C. W. N. 328.

———Railway company—Suit against—Loss of goods consigned under risk note—Plaintiff to prove how loss occurred. See RAILWAYS ACT Ss. 72 AND 76. 18 L. W. 322.

———Railways—Consignment of goods—Loss See RAILWAYS ACT, S. 72. 73 I. C. 642 (2)

———Railway—Consignment of goods—Owner's risk rate and ordinary rate—Liability of destruction. See RAILWAY. L. R. 4 All. 619.

———Record of rights—Correctness of entries. See RECORD OF RIGHTS. 1923 P. C. 217.

———Record of rights—Entries in—Correctness of.

**BURDEN OF PROOF.**

Where the record of rights contain an entry showing a person as possessing occupancy rights; the person who wants to challenge it ought to show it is wrong. The mere fact he was holding without rent is not sufficient. (*Burn J. M.*) GAURI SHANKAR v. JHANDA.

L. R. 4 A. 372 (Rev.)

Record of rights—Entry in *patwari's papers*.

Where the entry of the plaintiff as a tenant in the *patwari's papers* was made by a competent authority after due enquiry, the burden of proof that he was not a statutory tenant lay on the defendant. Where the defendant was misled by an error into not producing any evidence of his case, that the plaintiff was in possession without his consent, further enquiry appeared to be necessary. (*Fremantle S. M. and Burn J. M.*) KOER NAUNIHAL SINGH v. BHUPPA.

L. R. 4 A. 289 (Rev.)

Rent—Payment of—Onus—Suit in ejectment.

Where the rent has never been paid the burden of proof that rent was agreed to must surely lie on the person who asserts it, and that in this case on the defendant in the suit in ejectment. (*Fremantle S. M. and Burn J. M.*) SUKHDEO SINGH v. MD ABDUL MAJID.

L. R. 4 A. 229 (Rev.)

Self-acquisition—Hindu Law—Joint family—Nucleus of ancestral property. See HINDU LAW JOINT FAMILY.

73 I. C. 1052

Specific performance—Suit for—Plea of *bonafide* purchase without notice—Transferee to prove. See SPECIFIC RELIEF ACT, S. 27 (B).

69 I. C. 470.

Suit for declaration of title—Order under S. 145 Cr. P. C.—Presumption.

A decision in proceedings under S. 145, Cr. P. Code, does not throw the onus of proving his title on the loser in those proceedings. The decision in proceedings under S. 145, Cr. P. Code, is not of such a nature as to give rise to a presumption in a Civil Court in favour of the winning party in those proceedings. (*Adami, J.*) MT. JANTRA KOER v. ALI JAN DARJI.

71 I. C. 478

1923 P. 401.

Trespass—Extent of.

Where an encroachment by defendant on plaintiff's property is admitted by the defendant, the plaintiff need not prove the extent of the encroachment but is entitled to claim that the encroachment however small shall be removed. (*Hallifax, A. J. C.*) SONBA v. DATTATRAYA.

6 N. L. J. 59 : 71 I. C. 831 : 1923 Nag. 192.

BURMA ANTI BOYCOTT ACT (V of 1922) Ss. 3 and 9—Offence under—Sanction—Nature of.

Before launching a prosecution under the Burma Boycott Act, S. 9 requires the sanction of the Government as under S. 196 Cr. P. Code. All the facts need not be stated in the sanction order.

*Quaere* whether it is not enough to state that the accused had committed an offence under a certain section?

**BURMA GAMBLING ACT, S. 12.**

The boycotting of a person by failing to invite him to a social function it due to political differences is an offence under the Act. (*May Oung, J.*) NGA AUNG HMAN v. EMPEROR.

2 Bur. L. J. 196.

Ss. 6 & 7—Ex-communication—Purpose of.

Where a village headman abused certain marks for making political speeches and they in return excommunicated him the object being partly religious and partly political they commit an offence under Burma Act V of 1922 and S. 7 is no protection. (*May Oung, J.*) U. TILOKA v. EMPEROR.

1 R. 629 : 2 Bur. L. J. 221.

BURMA EXCISE ACT, Ss. 16 (3) and 30 (a)—Possession of liquor—Bona fide private consumption—If protected.

The possession of a large quantity of liquor which would ordinarily be an offence under S. 30 (a), if it is intended for *bona fide* private consumption is protected under S. 16 (3) (*Macgregor, J.*) CHOO KHIN v. EMPEROR.

1923 Rang. 41 (1).

BURMA FERRIES ACT (II OF 1898) Ss 25 and 27—Scope of—Carrying goods within ferry limits.

The expression "No person shall convey for hire any goods, between points within, or within 2 miles from the limits of a public ferry." in S. 15 of the Burma Ferries Act means that no one could carry goods for hire between points within the ferry limits nor could he do so between points within 2 miles from the ferry limits. (*Duckworth, J.*) MAUNG THA GYAW v. EMPEROR.

1 R. 313 : 2 Bur. L. J. 125 ; 1923. Rang. 161.

BURMA FOREST ACT (IV of 1908)—Breach of rule—Use of hammer by servant of licensee—Contrary to rule—Liability of master.

Where the servant of a licensee uses a marking hammer contrary to the rules under the Burma Forest Act, the master himself is liable for the act. (*Heald, J.*) MAUNG TOE BWA v. EMPEROR.

2 Bur. L. J. 214.

R. 25—Erection of house—Unreserved timber—Sale of house—Offence.

Where the accused erected a house in 1920 with unreserved timber made over to him and subsequently sold the house two years later, he is not guilty of an offence under the Forest Act. (*Macgregor, J.*) NGA PO MYIT v. EMPEROR.

2 Bur. L. J. 12 : 1923 Rang. 143.

BURMA GAMBLING ACT, S. 3 SUB S. (2)—Ma-Chauk, game of.

The game of Ma-chauk 'or 'Sparrow' is one of those excepted under sub-section (2) of section 3f (*May Oung, J.*) AH SHEIN v. EMPEROR.

1 R. 303 : 1923 Rang. 214.

S. 12—Conviction under—Specific charge not framed—Effect of.

A general charge under S. 12 of the Burma Gambling Act is quite vague inasmuch as the section covers at least four distinct offences in relation to a common gaming house. The exact charge which the accused is called upon to meet must be explained to him. To justify a conviction

**BURMA GAMBLING ACT, S. 12.**

tion under S. 12 (c) there must be evidence of actual knowledge on the part of the accused. (*May Oung, J.*) *AH LIN v. EMPEROR*

2 Bur. L. J. 5 : 75 I. C. 71 : 24 Cr. L. J. 871 : 1923 Rang. 141

—S. 12—Offence under—Evidence necessary to prove.

Where the accused is not the owner of the house where the gambling is alleged to have taken place the mere receipt of a sum of money from one of the players or from the winner on a single occasion is not sufficient to prove an offence under S. 12 without evidence of other incriminating circumstances. (*Lentaigne, J.*) *NGA SAN DUN v. EMPEROR.* 2 Bur. L. J. 8 (2) 75 I. C. 357 : 24 Cr. L. J. 933 : 1923 Rang. 144

**BURMA HABITUAL OFFENDERS RESTRICTION ACT (II of 1919) S. 2—Applicability of—Limitation of restriction.**

Under the Burma Habitual Offenders Restriction Act the area of restriction is not fixed in all cases but depend on the order in each case. An order restricting a man to his house at night is unjustifiable and the narrow limits of the restriction should be his village. (*Duckworth, J.*) *NGA BA SEIN v. EMPEROR* 73 I. C. 175 : 24 Cr. L. J. 559 : 1923 Rang. 102 (2).

—Ss. 7 and 10—General repute—Evidence of police and headman.

In order to satisfy himself that an accused's general repute is that of an habitual offender of one of the types mentioned, a Magistrate should require more evidence than that of policemen and village authorities. This was a counsel of prudence, and should, no doubt be followed in most cases. But it is not a rule of law and a Magistrate must, in each case, weigh the evidence and decide as to its sufficiency. Where there is a good deal of evidence, not only from the accused's village but also from other places, there may well be sufficient material to justify preventive action. (*May Oung, J.*) *NGA PAN YIN v. EMPEROR:* 2 Bur. L. J. 153.

—S. 7 (a)—Execution of bond—Bond under S. 118 Cr. P. Code—Legality of.

Where an offender has executed a bond with sureties under S. 118 Cr. P. Code it is illegal to pass an order against him under S. 7 of the Burma Habitual Offenders Act. (*Macgregor, J.*) *PAN ZYAW v. EMPEROR* 1 Bur. L. J. 257 : 73 I. C. 975 (1) : 24 Cr. L. J. 735 (1) : 1923 Rang. 134.

—(II of 1919) S. 10—Evidence—Police man.

Under S. 10 (1) of Act (II) of 1919, a magistrate must satisfy himself that the accused had adequate means of earning his livelihood within the area of restriction. There is no rule prohibiting a court from acting as the evidence of policemen or village authorities. (*May Oung, J.*) *PAN YIN v. EMPEROR.* 1 R. 447

—S. 10—Order for execution of security bond—Legality of—Report to headman and to the police.

The Burma Habitual Offenders Restriction Act contains no provision for ordering an offender to

**BURMA MUNICIPAL ACT, S. 180.**

execute a security bond. If the offender is confined to another village than his own, it must be proved that he would be able to earn his livelihood at that village. Under the Act a double report goes to the headman and the police is unnecessary. (*Duckworth, J.*) *EMPEROR v. NGA KALA.* 73 I. C. 157 : 24 Cr. L. J. 541 : 1923 Rang. 68 (2).

**BURMA INSOLVENCY RULES, R. 189—Scope of**  
R. 187 framed under the Presidency Towns Insolvency Act relates both to moveable and immoveable property and is perfectly *intra vires*. (*Rutledge, J.*) *IN THE MATTER OF L. W. NASSE.* 1 R. 433.

**BURMA MILITARY POLICE ACT (XV of 1887) S. 6—Offences under, triable by Sessions Court,**  
Offences under S. 6 (b) of the Burma Military Police Act are triable exclusively by a Court of Session. (*Maung Kim, J.*) *EMPEROR v. RAMBAHADUR RAI.* 2 Bur. L. J. 21 : 1923 Rang. 139.

**BURMA MOTOR VEHICLE RULES, R. 26 (3)—**  
*Liability of owner.*

Where a motor car is driven with defective rear light at a time when the owner is absent, the latter is not liable for the acts and omissions of his chauffeur. (*May Oung, J.*) *MAHOMED SURTY v. EMPEROR.* 1 Rang. 600 : 2 Bur. L. J. 201.

**BURMA MUNICIPAL ACT (II OF 1898) S. 42 A—**  
*Permit to sell withheld illegally—Liability.*

A Municipal Committee after granting a license to sell, some time later asked the licensee to produce the stamp paper for the license. He defaulted and they prohibited him from selling. Held their action was not protected by S. 42 A of the Burma Municipal Act and they were liable for damages. (*Pe Hon, J.*) *SAN YEIK v. MUNICIPAL COMMITTEE, PEGU.* 2 Bur. L. J. 231.

—Ss. 51 and 63—Imposition of tax—Notification—Remedy of assessee.

Where notification of the imposition of a tax under the Burma Municipal Act has been published a Civil Court is debarred from enquiring whether the tax has been legally imposed. S. 51, Cl. 8 provides that the notification shall be conclusive evidence that the tax has been imposed in accordance with the provisions of the Act. S. 63 gives a right to the assessee to object to the assessment before a sub-committee and provided for an appeal from their decision to the Deputy Commissioner as the case may be. He can also claim a reference to the Chief Court on the question of his liability to or the principle assessment. (*Pratt, J.*) *CHAN HTOON AUNG v. THE AKYAB MUNICIPALITY.* 1 Bur. L. J. 145 : 74 I. C. 34 : 1923 Rang. 75 (1).

—S. 180—Wall—If a building under the Act.

The erection of a wall as a mere fence or boundary is not an offence under the Act. But if they were built so as to enable the occupier of the main house to use the enclosed area as part of his habitation it then becomes a 'building' within the meaning of the Act. 2 Q. B. D. 577 and 68 L. T. 129 ref. to. Any refusal to obey an order of the

**BURMA VILLAGE ACT, S. 12.**

Municipality to dismantle it would be an offence. (*Maung Kim, J.*) **KALOO KHAN v. RAHIMA.**

73 I. C. 972. 24 Cr. L. J. 732 :  
1923 Rang. 65 (2)

**BURMA VILLAGE ACT, S. 12—Thugyi—Order for reaping—Disobedience**

The reaping and measuring of paddy for the purpose of revenue assessment is a public duty within the meaning of S. 12 of the Burma Village Act and where a villager refuses to comply with a requisition of the headman to assist him in such work, he is guilty of an offence under the Act. (*Duckworth, J.*) **PAN BU v. EMPEROR.**

1 Bur. L. J. 150 : 1923 Rang. 81.

**S. 19—Disobedience of order of headman—Whether an offence.**

Refusing to obey an order given them by the headman to remove to another site, which had been provided for them is not an offence under S. 19. (*Mc Coll, A. J. C.*) **EMPEROR v. NGA SEIN.**

1923 Rang. 132.

**S. 28—Sanction when required—Duty of Court.**

A village headman is protected by Section 28 of the Village Act to this extent that he cannot be prosecuted for an act or omission punishable under Section 10 of the Act or for an abuse of his power similarly punishable, even though such act or omission or such abuse of power is punishable under the Indian Penal Code or some other law, unless the prosecution is instituted by order of or under authority from the Deputy Commissioner. The village headman has no power to cause hurt to or insult another person and there appears to be no reason why a Magistrate should not enquire into the charges brought against the headman under Sections 323 and 504 of the Indian Penal Code. 1 R. K. R. 336 followed. **NGA TUN LIN v. EMPEROR.** (1923) Rang. 27

**CALCUTTA HIGH COURT RULES. ORIGINAL SIDE. Ch. XXVI, R. 77—Attachment before judgment. Compromise of claim—Sheriff's charge if payable. See (1922) Dig. Col. 130. PICKFORD v. JANKI NATH ROY.**

70 I. C. 488 (2).

— Ch. 36, R. 6, 9, 32 and 72—*Solicitor—Payment of counsel's fees—Taxed costs not payable for fees—Right of solicitor to retain client's moneys.*

A solicitor is entitled to retain the moneys of his client only to the extent to which he is entitled to claim against the client in accordance with the rules of the High Court. The solicitor has no right at all in law to retain any of those sums after the Taxing Master has disallowed them without having made a successful application to the court either to review or on a reference or otherwise, to increase those sums. (*Pager, J.*) **JADAB CHANDRA MITTER v. ROMESH CHANDRA BOSE**

27 C. W. N. 537 : 1923 Cal. 603

— Ch. 36, R. 32—*Payment of counsel's fees as between attorney and client—No reference by Taxing Officer—Jurisdiction of Judge to hear and determine. See (1922) Dig. Col. 130. SAILENDRA MOHAN DUTT v. DHARANI MOHAN ROY.*

69 I. C. 823.

**CALCUTTA RENT ACT, S. 2.**

**CALCUTTA IMPROVEMENT ACT (V OF 1911), S. 54 Cl. 1—Improvement Scheme—Land required for purpose of effecting improvements—Recoupment—Land vested in Calcutta Corporation—Procedure.**

Lands situated in the Calcutta Municipality and vested in the Corporation of Calcutta were included in an improvement scheme by the Board of Trustees for the purpose of recoupment. On a question arising as to the powers of the Board, held that the Board was not entitled to acquire or deal with the lands under S. 54 Cl. 1 of the Act. (*Sanderson, C. J. and Richardson, J.*) **CORPORATION OF CALCUTTA v. THE CALCUTTA IMPROVEMENT TRUST.** 50 Cal. 531 : 75 I. C. 346.

**CALCUTTA MUNICIPAL ACT, Ss. 14 and 55B—Acquisition of land by municipality—Relief of congestion—Provision for pilgrims of municipal council. See (1922) Dig. Col. 131. AMULYA CHANDRA BANERJEA v. THE CORPORATION OF CALCUTTA.** 21 A. L. J. 27 : 37 C. L. J. 67 (P. C.)

— Ss. 408, 409 and 622—*Municipal requisition—Non compliance by owner—Occupier of a portion of the property rendering compliance impossible—Action under S. 409.*

It is unreasonable to construe S. 622 Cl. 3 of the Calcutta Municipal Act as meaning that an owner, who has not complied with a requisition for effecting improvements to any extent, is discharged from liability, merely, because the occupier of a portion of the land has rendered compliance impracticable only in part. Where though some of the tenants refused to afford facilities to the owner and thus rendered it impracticable for him to carry out completely all the improvements required by the Corporation, still the owner could have carried out some at least of the improvement, the owner is discharged from liability only to the extent that compliance is rendered impossible by the conduct of the occupier. Even though the general committee of the Corporation decides to take recourse to S. 409 of the Calcutta Municipal Act the owner is not forthwith absolved from the liability he has already incurred by reason of his failure to comply with the requisition under S. 401. If the requisite improvements are carried out by the general committee under S. 409, the default on the part of the owner vanishes but till the work is completed the default remains and with it the liability for prosecution. (*Mookerjee and Rankin, J.J.*) **CORPORATION OF CALCUTTA v. DEJOY KUMAR ADITY.**

50 Cal. 813 : 38 C. L. J. 360 : 27 C. W. N. 787.

**CALCUTTA POLICE ACT, S. 54 A—Essentials for conviction. See (1922) Dig. Col. 132. RASHEK LAL DAS v. EMPEROR.**

71 I. C. 503 (1) :  
24 Cr. L. J. 151 (1).

— S. 62 A—*Carrying Kirpan more than nine inches long—Offence.*

Under S. 62 A of the Calcutta Police Act, it is an offence to carry in Calcutta a Kirpan more than 9 inches long. (*C. C. Ghose and Cumming, J.J.*) **KRIPAL SINGH v. EMPEROR.** 50 C. L. J. 912

**CALCUTTA RENT ACT (III of 1920), S. 2 Cl. (a).—Premises, meaning of—Part of a hut.**

An application to the Rent Controller for fixing standard rent in respect of two rooms, portions

## CALCUTTA RENT ACT, S. 2.

of huts standing on baste land belonging to the superior landlord, was rejected on the ground that the rooms forming portions of huts did not fall within the definition of "Premises" within S. 2 C. (e) of the Calcutta Rent Act. *Held* by the High Court that the decision of the Rent Controller was correct. (*Hondroffe and Ghose, JJ.*) *RAM GOLAM KALWAR v. GUMTI SHAW*. 69 I.C. 976.

—Ss. 2 (f) (ii) and 15—*Portion of premises*—*Subletting*—*First letting*—*Standard rent how calculated*.

The object of including in the definition of "landlord", a tenant and in the definition of a "tenant" a sub-tenant is to extend the benefit of the Rent Act to sub-tenants. Standard means a rule or model and can only be one. The whole object of the Act is to prevent tenants being made to pay rents which the legislature considers excessive or unreasonable. Standard rent means the rent of which the premises were originally let. Consequently if a tenant sub-lets a portion of the premises, the standard rent of the portion so sub-let is to be determined according to S. 15 (3) of the Act and not under S. 2 (f) (ii) of the Calcutta Rent Act. Under S. 15 (3), the part sub-let is taken to have been first let when the entire premises were let out to the tenant. (*Chatterjee and Cuming, JJ.*) *ROBBINS v. ELIAS S. M. JACOB*. 27 C. W. N. 569: 1923 Cal. 553.

—Ss. 4 and 11—*Monthly tenant under owner of premises*—*Statutory tenant*—*Standard rent*—*Agreement to pay increased rent to owner*—*Lease for two years*—*Illegality of object*—*Contract Act S. 23*.

The defendant, a tenant, of a flat at a rent of rupees 65 a month, under the owner of the premises, was holding as a monthly tenant. The position of the defendant while the Calcutta Rent Act was in force, was that he was the statutory tenant of the flat liable to pay the standard rent defined in S. 2 cl. (f). The owner on 11-6-1921 wrote to the defendant refusing the defendant's tender of rent at the old rate and suggesting that the defendant should move the Rent Controller to fix the standard rent. In August the owner gave the defendant notice to quit by the end of September on the ground suggested by S. 11 Cl. 5 i.e., for arrears of rent. The defendant replied that he had deposited the rent with the Controller. On 26-1-1920 the owner granted to the plaintiff a lease of the flat for a term of 2 years at a monthly rent of rupees 100 for the first year and rupees 110 for the second year. The owner gave the defendant notice of the lease, requested him to attorn to the plaintiff as landlord till the end of October, and thereafter, in pursuance of a notice to quit already served upon him, to give vacant possession to the plaintiff. The defendant replied claiming the protection of the Rent Act and refusing to vacate. Subsequently however, he attorned to the plaintiff to the extent of depositing with the Controller rent at the old rate for payment to the plaintiff and of applying to the Controller to fix the standard rent as between the plaintiff and himself. The application was made in March 1921, and by an order, dated 30-5-1921, the Controller fixed the standard rent at rupees 85. After the order on the 31st May,

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the plaintiff's solicitors wrote to the defendant giving him a fresh notice to quit by the end of June 1921. It was asserted that the plaintiff required the premises for his own occupation. This notice was also ineffectual and in July 1921, the plaintiff filed his suit claiming vacant possession of the flat and mesne profits at the rate of rupees 100 per mensem. *Held* that the object of the lease by the owner in favour of the plaintiff was clearly to avoid the provisions of the Rent Act and to get a higher rent than was allowed by the Act and that the agreement of lease was void as being opposed to public policy and the provisions of the Rent Act. (*Sanderson, C. J. and Richardson, J.*) *SALEH ABRAHAM v. MANEKJI COWASJI*. 75 I.C. 521: 50 C. 491.

—S. 4 (3) (iv)—*Lease*—*or 3 years*—*Option to renew for like period*—*In the lease one for five years and upwards*. See (1922) DIG. COL. 132. *B. SANKU CHARAN SINHA v. RAJANI MOHAN CHATTERJI*. 49 Cal. 928.

—S. 8—*Procedure*. See (1923) DIG. COL. 132. *COHAN v. DIAS*. 70 I.C. 551.

—S. 10—*Proviso*—*Bona fide requirements of landlords*—*Standardisation of rent*—*Refusal to accept*—*Deposit of rent with Controller*. See (1922) DIG. COL. 132. *REKHAB CHAND DOOGAR v. D'CRUZ*. 69 I.C. 963: 1923 Cal. 223.

—S. 11—*Monthly tenant*—*Fixity of tenure*—*Decree for possession*. See (1922) DIG. COL. 133. *COHEN v. HOTTINGER*. 69 I.C. 988.

—S. 11 (5)—*Ejectment suit*—*Benefit of Act when claimable*—*Failure to pay in time*—*Effect*—*Agreement to extend time*.

When in a suit in ejectment, the benefit of the Rent Act is claimed, the defendant must show that he was paid arrears within 8 months of the Rent Act coming into force, and subsequently paid his rent regularly within the time fixed in the contract with his landlord, or in the absence of any such contract, by the 15th day of the following month, or in the event of the landlord refusing to accept rent, by depositing it with the Rent Controller within a fortnight of its becoming due.

Where there is an agreement to extend time for payment before the rent actually becomes due under the lease, then the time within which rent has to be paid under S. 11 (5) may be the extended date, but where default has already taken place subsequent acceptance of rent by the landlord does not take the matter out of S. 11 (5). (*Buckland, J.*) *JETHA BHULCHAND v. GRACE*. 70 I.C. 494 (2): 1923 Cal. 227.

—S. 15—*Application for standardisation of rent*—*Refusal*—*Interference*—*Government of India Act S. 107*.

The Rent Controller is a Court subordinate to the High Court which can revise orders under S. 15 of the Calcutta Rent Act in virtue of its powers of superintendence under S. 107 of the Government of India Act. Under S. 15 of the Rent Act it is obligatory on the Rent Controller to grant a certificate certifying the standard rent. Where the rooms let are certain, easily ascertainable and subject to no doubt, the order of the Rent Controller rejecting an application for fixing a

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standard rent is liable to be set aside (*Rankin, J.*) ALLEN BROS & CO. v. BANDO & CO.

49 Cal. 931; 70 I. C. 371; 1923 Cal. 169.

—S. 18—*Objection before Controller that subject matter not "premises"*—*Revision by Improvement Tribunal—Competency.*

In a rent standardising case the landlord objected to the Controller's jurisdiction on the ground that the subject matter of the proceedings could not come under the term premises—On the objection being over-ruled, he applied to the President of the Improvement Tribunal for revising the order—*Held*, the landlord was entitled to a decision on the question, and the fact that he objected to the jurisdiction of the Rent Controller did not disentitle him to his remedy under S. 18 of the Rent Act. (*Ghose and Panton, JJ.*) DAMANIA BROTHERS & CO. v. JASTON & CO.

27 C. W. N. 287; 73 I. C. 47; (1923) Cal. 180.

—S. 18—*Order of Rent Controller fixing standard rent—Jurisdiction to revise—President's powers.*

The Act contemplates fixing of the standard rent by the Controller even in cases not coming under S. 15; in other words in cases coming under S. 2 (i) (i). The order under S. 2 (i) (ii) of the Rent Controller is therefore liable to revision under S. 18 of the Act. (*Chatterjee and Panton, JJ.*) ASUTOSH CHATTERJEE v. UPENDRA CHANDRA AICH. 37 C. L. J. 101; 72 I. C. 221; 1923 Cal. 33.

—S. 20—*Summary enquiry—Procedure—Criminal Procedure Code, Ss 5 (2) and 29.*

The President of the Calcutta Improvement Tribunal is competent to hold the summary enquiry referred to in S. 20 of the Calcutta Rent Act under the provisions of Chapter 22 of the Criminal Procedure Code. (*Ghose and Cuming, JJ.*) ISHAN CHANDRA SARKAR v. MANMATHA NATH DUTTA. 37 C. L. J. 298; 71 I. C. 611; (1923) Cal. 339.

**CALCUTTA SUBURBAN POLICE ACT (1866), S. 18—Place of public resort.**

A stall on which soda water is sold not for consumption on the premises cannot be held to be a place of public resort within the meaning of S. 18 (*Newbould and Suhrawardy, JJ.*) HEMANTA KUMAR SEN v. EMPEROR.

(1923) Cal. 135 (1)

—(III of 1888) S. 47—*A Police diary—If privileged—Cr. P. C. Ss. 162, 172.*

In areas covered by the Calcutta Suburban Police Act, police officer investigating a case maintains a diary under S. 47 A of the Calcutta Suburban Police Act and hence no privilege attaches to it. (*C. C. Ghose and Cuming, JJ.*) SURESH CHANDRA GHOSE v. EMPEROR.

24 Cr. L. J. 757; 74 I. C. 261.

**CATTLE TRESPASS ACT (I of 1871), S. 22—Compensation—Award of, when proper.**

Where no compensation is claimed in the petition of complaint and no allegation is made as to the loss caused by the seizure of the cattle, the magistrate is not justified in awarding compensation under S. 22 of the Cattle Tresspass Act. (*Ross, J.*) BALINATH SAHAY v. EMPEROR.

1 Pat. L. E. (Cr) 84; 4 Pat. L. T. 231;

24 Cr. L. J. 311 (1); 72 I. C. 71 (1); 1923 P. 292; (1923) Pat. 96.

**C. P. LAND REVENUE ACT, S. 169.**

—S. 24—*Driving away cattle—Rescue—Meaning of.*

Driving cattle by shouts and cries constitutes rescuing them under S. 24 of the Cattle Trespass Act. Inducing an animal to move may even amount to using force (*Spencer, J.*) KAMMAKONDIAH *Inte* 17 L. W. 546; 32 M. L. T. (H.W.) 365; 1923 M. W. N. 437 (2); 72 I. C. 616; 24 Cr. L. J. 456; 1923 Mad. 608.

**CAUSE OF ACTION—Promissory note inadmissible—Decree on the basis of loan.**

Where in an action for money lent, the promisor evidencing the loan is inadmissible, other evidence can be let in and a decree given. (*Dalal, A. J. C.*) DWARKA v. IDU.

26 O. C. 361; 74 I. C. 813; 9 O. & A. L. R. 445.

—S. 24—*Suit on a bond before due date—If lies*

A suit on a bond before the date fixed for payment is not maintainable (*Foster, J.*) MT. BIBINAS BAN v. EKNAM NARAIN SINGH. 4 Pat. L. T. 606; 74 I. C. 938.

**C. P. LAND REVENUE ACT, S. 76—Levy of cess—Sanction of Board of Revenue. See (1922) DIG. COL. 130 RAKHYAPAL SINGH v. LAL BIR SURJODAY SINGH DEO. 69 I. C. 672.**

—S. 138—*Surrender or transfer—Test of—Transfer of possession by tenant—Validity of.*

It is a question of intention of the parties in each case to be deduced from the facts thereof, as to whether a given transaction is a surrender or transfer. A surrender can only be to a landlord. The lambardar is not the only person who can receive a surrender. The whole proprietary body can receive surrender or conceivably any other co-sharer not a lambardar may by authority, express or implied, from the other co-sharers, take a surrender for the common benefit. (*Joshi, H. M.*) GOPALSA v. BULA. 6 N. L. J. 73.

—S. 160—*Limitation for suit for agricultural profits—Mode of computation.*

The period allowed for a suit for the profits of the agricultural year which ended on 30th April 1917 by S. 160 of the C. P. Land Revenue Act, 1917, is complete only at the end of 1st May 1920. (*Hullifax, A. J. C.*) NARAYAN PATEL v. ABDUL GANI. 69 I. C. 527.

—S. 160 (2)—*Suit filed after—Limitation.*

The period of limitation for a suit filed after the coming into force of Act II of 1917 is that provided by the Limitation Act. (*Hullifax, A. J. C.*) SHANKARGIRI v. CHINNUJI.

6 N. L. J. 1; 71 I. C. 140; 1923 Nag. 164.

—S. 169 (1) (a)—*Suit under—Limitation.*

The order of a Revenue Officer declining to make a partition or to proceed therewith until the question of partition has been decided does not amount to an order to any of the parties to file a civil suit and does not confer on a civil court jurisdiction which it did not previously possess. A civil Court can enquire into the question as to whether the *Khudkhast* or *sir* lands are or are not the sole property of a person or whether they are joint property though it cannot decide whether there should be a partition or not; the question of title may have to be decided for other

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purposes than for the purposes of partition. A suit for ascertaining what the titles of the parties respectively are over the lands in the Mahal, is not barred by time merely because the Revenue Officer declined more than six years before the institution of the suit, to proceed with a partition until the question of title had been decided in a Civil Court. (*Batten, J. C.*) *DONGAR SINGH v. VISHWANATH SINGH*, 19 N. L. R. 11: 71 I. C. 205 : 1923 Nag. 86.

## S. 188—Partition—Appointment of Lambardar—Unit of area.

Where a mahal has been divided the unit for the appointment of the lambardar is the patti and not the mahal.

S. 188 (2) (A) of the Land Revenue Act embodies the case law on the subject as it existed prior to the enactment of that Act. In other words, that clause simply enacts a rule in regard to burden of proof. It does not clothe the lambardar with higher rights than those already possessed by him. It simply gives statutory recognition to his status as the accredited agent of the proprietary body in the absence of the evidence in regard to revocation of his authority generally or with respect to a particular transaction. (*Hallifax, A. J. C.*) *RAMAKRISHNA PURI v. TANBA*, 6 N. L. J. 85 : 71 I. C. 777 : 19 N. L. R. 69 : 1923 Nag. 153.

## S. 188 (2) (a)—Consent of one landlord—Effect.

When the entire Proprietary body is in law the landlord, the consent of one does not bind the rest, though he may if he has received consideration be bound by his own consent. (*Hallifax, A. J. C.*) *LACHMANSINGH v. BALWANTSINGH*, 6 N. L. J. 231.

## (1917), S. 188 (2) (a)—Construction.

Before 1917 the custom of appointing the lambardar as the agent of the whole of the proprietary body was so general that it was held that he must be deemed to have been so appointed unless and until the contrary was proved, and the enactment in S. 188 (2) (a) of the Act of 1917 can only have been intended to give the legislative sanction and confirmation to this view, which after all is only an inference of fact drawn in each particular case from the known facts of that case and the judge's knowledge of the common course of human conduct and public and private business. 13 C. P. L. R. 45 : 8 N. L. R. 29 Disc. (*Hallifax, A. J. C.*) *LACHMAN v. THAKUR BALWANT SINGH*, 1923 Nag. 286.

## S. 188 (2) (b)—Consent of every co-sharer in every case not necessary.

Where under the *wajib ul arz* of the village the Lambardar was to manage the village with the consent of the co-sharers.

Held, that the Lambardar need not obtain the consent of every individual co-sharer, especially in petty cases such as allowing a cow to graze in the village. (*Baker, J. C.*) *PARASRAM v. KANHAIYA*, 1923 Nag. 336.

## S. 188 (2) (c) and S. 160—Suit within six months.

## C. P. MUNICIPAL ACT, S. 2.

A suit within six months of the end of the year by co-sharers against lambardar mentioned in S. 188 (2) (c) is not premature in view of S. 160. (*Prideaux, A. J. C.*) *SARJE RAO v. HARAKCHAND*, 6 N. L. J. 234 : 1923 Nag. 287.

## S. 188 (2) (c)—Trading partnership—Tenants in common of a village—Suit for profits.

Where divided members of a Hindu family being tenants-in-common put their profits into a common chest and meet expenses from the chest and this arrangement subsequently fell through and a lambardar, a member of the family, managed the village, Held that a suit lay for village profits against the lambardar without bringing a general suit for accounts. (*Batten, J. C.*) *MAKUNDAAM v. SHRIKRISHNA*, 19 N. L. R. 24 : 73 I. C. 142 : 1923 Nag. 197.

## S. 212—Ryotwari lands in possession of one heir—Right of other heirs to share therein.

Where Ryotwari lands are in the possession of one heir, and they are entered in his name in the Rev. papers, the right of other heirs to a share therein is not lost by such entry. They can sue for a share in the produce or for partition. 8 C. P. L. R. 11 Dist. (*Baker, O. J. C.*) *RAHMAT BI v. BHURI BI*, 6 N. L. J. 161 : 73 I. C. 959 : 1923 Nag. 307.

## S. 212—Ryotwari land—Rights of holder.

S. 212 of the Land Revenue Code makes it clear that the right of a Raryat to hold Ryotwari land devolves as if it were land. (*Baker, O. J. C.*) *RAHMAT BI v. BHURI BI*, 6 N. L. J. 161 : 73 I. C. 959.

## S. 219—Deputy Commissioner can eject but cannot decide rights.

The right to exclude a trespasser on communal land permanently is not a matter which the Deputy Commissioner can determine under section 219; he can only eject him summarily and the section itself expressly saves the jurisdiction of the Civil Court to decide the question of the right of permanent exclusion. (*Hallifax, A. J. C.*) *SAKHARAM v. RAMCHANDRA*, 1923 Nag. 326.

## C. P. MUNICIPAL ACT (XVI OF 1903) Ss. 2 (f) and 44—Tax—Rent for municipal building if a tax—Mode of Recovery of tax.

The essential quality of a tax and of those similar imposts mentioned in S. 2 (f) of the C. P. Municipal Act seems to be that the amounts or rates of payment are fixed by the levying authority without reference to the payer; in regard to some of them there is option of making no payment if no benefit is taken but in none of them has the payer any option as to the amount to be paid. That essential quality is absent in a case where the amount to be paid was fixed by agreement between the two parties.

A tax recoverable under S. 46 of the Act is a tax imposed under S. 35; that is to say, a tax imposed with the previous sanction of the Local Government or in special cases with that of the Governor-General in Council as well, "in the manner required by S. 39." That section requires a proposition of the tax at a special meeting, publication of details of its incidence, consideration at another special meeting of any



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objections made, sanction of the Local Government after consideration of those objections and notification in the official Gazette of the date of the imposition of the tax. Whether, therefore, the payment to be exacted from the applicant was a "market due" or not, and it certainly was a "due" or debt for using a market or exposing goods for sale in a place belonging to the Municipal Committee, it was certainly not a "market due" or tax of the kind mentioned in S. 35 of the Municipal Act, as it was never imposed in the manner prescribed by that section. It cannot therefore be recovered by the summary procedure provided by S. 44. (*Hallifax, A. J. C.*) YESH WANT RAO PANDE v. SECRETARY, MUNICIPAL COMMITTEE. 19 N. L. R. 122 : 73 I. C. 52 : 24 Cr. L. J. 516 : 1923 Nag. 264.

## —Ss 66 and 139—Encroachment—Conviction—Imposition of daily fine.

The accused was convicted under S. 139 read with S. 66 (1) of the C. P. Municipal Act and sentenced to pay a fine of Rs. 5 in addition to Rs. 1 per day from 14th August 1922, onwards, in case he did not remove the encroachment or obtain the sanction of the Municipal Committee to its continuance. *Held* that the order imposing a daily fine in the future could not stand. No person can be sentenced to punishment for a thing which he has not done but may possibly do in the future or even is likely to do in the future. (*Hallifax, A. J. C.*) BABU RAO v. MUNICIPAL COMMITTEE NAGPORE, 72 I. C. 78 : 24 Cr. L. J. 318.

## C.P. TENANCY ACT (XI OF 1898) S. 35—Surrender by Hindu widow—Binding on reversioners.

A surrender by a Hindu widow if not impeachable for fraud or on other like ground, is binding on the widow's husband's reversioners. (*Prideaux, A. C. J.*) MUKUND v. DIWAKAR, 73 I. C. 126.

## —Ss. 45, 46 and 49—Sir land—Alienation of—Effect of.

The sir right is made up of two parts, one the proprietary, and the other the occupancy and it can accrue sympathetically by union of these two parts in the same person. But it must be in the same person. Where a proprietor alienates his ownership of land, the sir right in the land is a constituent part of his ownership of the sir land. (*Hallifax, A. J. C.*) SHEORAM v. TISARAM, 19 N. L. R. 26 : 71 I. C. 129 : 1923 Nag. 93.

## —S. 46—Transfer—Gift in favour of daughter

S. 46 of the Tenancy Act of 1898 does not make it obligatory that the transfer should be in favour of the nearest existing heir of the transferor at the time it is made. (*Hallifax, A. J. C.*) MT. KRISHNA BAI v. DEBI SINGH, 71 I. C. 409 : 1923 Nag. 195.

## —S. 47—Exchange not affected.

About 1903 the defendant started to cultivate an absolute occupancy holding belonging to another and allowed him to cultivate an occupancy holding of his own in exchange, each finding the land of the other more conveniently situated than his own. The record remained unchanged and each paid rent for the land he cultivated but in the name of the other till in 1917-18 the Settlement

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Officer recorded each of them as the occupancy tenant of the land he was actually cultivating. *Held* if the arrangement of 1903 was an out and out exchange he lost his right to set it aside many years before he filed his suit. If it was only an arrangement by each tenant for the cultivation of land by the other, which it undoubtedly was, he has no right whatever to interfere with it. (*Hallifax, A. J. C.*) CHIMNA PATIL v. INDRA RAJ SINGH, 1923 Nag. 144.

## —S. 63—Remission of rent.

The respondent claimed the right to hold his tenancy held free of rent on the ground that in 1874 the then landlord agreed to allow his father to hold the field free of rent and executed an agreement to that effect. In the patnas of both the settlements *i.e.* 1897 and 1913 a note was made to the effect that the landlord would pay the rent. *Held* that the Settlement Officer in 1913 has not decided as he is supposed to have decided, that the terms of the original agreement would be binding on the successors of the parties, and S. 63 of the Tenancy Act, 1898, plainly enacts that no agreement for reduction or remission of rent can prevail for more than one settlement. 15 C. P. L. R. 9 Rel. (*Batten, J. C.*) MAHILAL v. BINDRABAN, 1923 Nag. 247.

## C. P. TENANCY ACT, (I of 1920)—Ejectment—Who is entitled to

Nobody but a landlord can eject a tenant for arrears of rent. Any other person who obtains a decree for arrears of rent cannot execute the decree by the special process or ejecting him. (*Hallifax, A. J. C.*) GANPAT TELI v. DAJI, 1923 Nag. 35.

## —Malguzari share in village—Testamentary disposition—Sanction of Revenue authority.

Occupancy rights in sir land can be devised by will along with the malguzari share to which they appertain without the sanction of the Revenue Authority. 62 I. C. 246 referred to. (*Hallifax, A. J. C.*) GATI v. GOVINDA, 71 I. C. 207 : 1923 Nag. 141.

## —Ss. 6 and 10—Absolute occupancy holding—Transfer under the old Act—Rights of landlord.

Where there was a transfer of an absolute occupancy holding while the Act of 1898 was in force the rights of the landlord to sue for ejectment or for pre-emption are not taken away by the new C. P. Ten. Act. (*Prideaux, A. J. C.*) VINAYAK v. MAHEBULLA KHAN, 1923 Nag. 33.

## —Ss. 13 and 105—Surrender of tenancy—Effect on sub-tenancy—Jurisdiction of Civil Court.

Where a tenant surrenders his holding the sub-tenancy also is determined and a suit to eject the sub-tenant thereafter is one between a landlord and a trespasser. 8 N. L. R., 22 dist. (*Batten, J. C.*) GOPALA v. SAKHARAM, 6 N. L. J. 224 : 73 I. C. 15 : 1923 Nag. 261.

## —S. 35 (4)—Scope.

An ordinary tenant is deemed to leave the holding uncultivated and the rent of it unpaid after a transfer (after which he leaves the village),

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even if it is cultivated by the transferee who is not a sub-tenant or the malguzar or anybody else and the rent is paid in full, and there is clearly an implied surrender. (*Hallifax, A. J. C.*) **LAKSHMI PRASAD v. DADU.** 1923 Nag. 4

—S. 45 (5)—Lease in respect of *sir* for 5 years—Renewal—Sub-tenancy—Effect of Act of 1920. See (1922) DIG. COL. 139 **SETH LAKSHMI CHAND v. BAJIRAO,** 69 I. C. 870.

—S. 46—Partition of holding—Landlord's consent—Effect of Surrender. See (1922) DIG. COL. 139 **SON SINGH v. THAKURRAM.** 69 I. C. 359.

—S. 46 (3)—Trees in occupancy holding—Mortgage. See (1922) DIG. COL. 1075. **TUKARAM v. NARBA.** 70 I. C. 34.

—S. 49 (1)—Not retrospective.

The latter portion of sub-S. (1) of S. 49 of the C. P. Tenancy Act (I of 1920) cannot possibly have a retrospective effect. (*Batten, J. C.*) **HINDU SINGH v. MANGAL.** 6 N. L. J. 227: 19 N. L. R. 110: 72 I. C. 438: 1923 Nag. 227.

—Ss. 50 and 70—Sale contrary to—Rights of transferee—Dispossession—Compensation

Where a Sale of a holding is prohibited under S. 71 of the C. P. Tenancy Act, the alienee in possession can claim compensation from the plaintiffs (seeking to set aside the sale) before they are given possession. 6 N. L. R. 12 foll. If however the alienee had not obtained possession and he sought to enforce the sale, he could not recover the consideration paid. 6 A. L. J. 55: Ref. (*Prideaux, A. J. C.*) **DYONDIBA v. PANDURANG.** 1923 Nag. 111

—S. 97—Trees—If can be attached.

The prohibition of the attachment of trees apart from the land on which they stand under S. 97 C. P. Tenancy Act has no application on where the trees and the land belong to different persons (*Baker, O. J. C.*) **GULSHER KHAN v. RAMSWA RUP.** 19 N. L. R. 150.

—Ss. 100 and 105—Village service tenant—Suit for possession—Jurisdiction of Civil Court

A suit for possession of his holding by a village service tenant asserting that he had been ejected by the landlord on 5-1-1920 is not maintainable in the Civil Court by reason of Ss. 100 and 105 of the C. P. Tenancy Act. (*Hallifax, A. J. C.*) **BALARAM v. ATMARAM** 71 I. C. 48: 1923 Nag. 51.

**CHARITABLE ENDOWMENTS ACT, S. 14—Charity—Managing Committee—Claim against—Suit against treasurer or ex officio secretary.**

The property of a hospital was vested in the Treasurer of Charitable Endowments under S. 4 of the Charitable Endowments Act. The administration of the trust property vested in the hands of a Committee. In a suit against the Ex-officio Secretary for a claim against the Committee. Held, that the suit could not be filed against the Secretary alone as representing the Committee. (*Daniels, J. C.*) **AJODHIA NATH v. THE CITY MAGISTRATE OF LUCKNOW.** 26 O. C. 333.

**CHOTA NAGPUR TENANCY ACT, S. 46.**

**CHARITABLE AND RELIGIOUS TRUSTS ACT (14 of 1920) S. 10 and 11—Object of—Deposit of security—Order for deposit of specific sum of money.**

Under S. 10 of Act 14 of 1920 the defendant has the option either to deposit money or to furnish security. The Court can order him to do one of these two things but cannot specify which he is to do. The security furnished under S. 10 of Act XIV of 1920, however relates to the expenditure actually incurred or likely to be incurred by the plaintiff which is quite a different matter from the costs of the suit. The Court cannot direct payment of this expenditure otherwise than in accordance with that section, and when security has been furnished the court is incompetent to order execution against the surety. (*Brasher, J.*) **MAHANT KIRPAL SINGH v. NARINIAN SINGH.** 69 I. C. 658.

**CHAUKIDARI CHAKKAN LANDS—Resumption—Effect on patni rights.** See LIM. ACT, ART. 144: 1923 Cal. 734.

**CHOTA NAGPUR ENCUMBERED ESTATES ACT (VI of 1876) Ss. 2, 3 and 21—Declaration—Effect of—Pending suit**

S. 21 B of the Chota Nagpur Encumbered Estates Act cannot restrict the provisions of S. 3. It refers to suits other than proceedings in regard to the debts or liabilities referred to S. 2 A. (*Coutts and Macpherson, JJ.*) **BANSIDHAR DHAR v. TIKAIT HARNARAYAN SINGH.** 1923 P. 85.

**CHOTA NAGPUR TENANCY ACT (VI OF 1907) S. 5—Construction of lease—Tenure holder—Execution Sale—Pattah—Raiyat.**

Where a pattah grants something more than the mere right to cultivate, in fact, where it grants all the rights save and except the right to receive the rent payable to the superior landlord, the grantee comes within the definition of tenure holder under S. 5 of the Chota Nagpur Ten. Act. Therefore there is no bar to the sale of his interest in execution of a decree (*Mullick and Jwala Prasad, JJ.*) **BAIKUNTHA GORAIN v. GANGA PRASAD TRIVEDI.** 70 I. C. 976.

—S. 14—Grant—Resumption—Sub-tenures—Effect on.

Where a jagir is resumed in Chota Nagpur all the sub-tenures created by the previous jagirdar are annulled and become void. 27 C. 156 foll. But land whereon a mine has been sunk is expressly exempted from annulment. A tenure holder cannot create a sub-tenure to exceed in duration the subsistence of his own tenure. The delivery of symbolical possession in respect of a large parganah consisting of several villages of a large area of *bakasht* and *serai* lands, has the same binding force against the judgment-debtors and his representatives (*v. e.*) the under tenure holders whose encumbrances stand annulled under S. 14 of the Act. (*Adam, J.*) **MAHARAJA PRATAP UDAI NATH SAHI DEO v. BHAIJAN SUNDERBANS KOER.** 71 I. C. 999: 24 Cr. L. J. 279: 1923 P. 76.

—Ss. 46 and 47—Applicability of—Mortgage before the extension of the Act to Manbhum

A mortgage bond of 4-10-09 executed in the District of Manbhum does not attract the provisions of Ss. 46 and 47 of the Chota-Nagpur

## CHOTA NAGPUR TENANCY ACT, S. 46.

Tenancy Act inasmuch as the Act had been extended to the District of Manbhum in December 1909. The mere fact that an instalment of the mortgage money is payable after 1920 in pursuance of a compromise decree entered into after 1920 does not attract the provisions of Ss. 46 and 47 of the Act. (*Mullick and Kulwant Sahay, JJ.*)

ISHAN CHANDRA KUNDU v. NILRATAN,

4 Pat. L. T. 311 : 1 Pat. L. R. 217 :  
(1923) Pat. 184 : 2 Pat. 538 : 72 I. C. 1049 :  
1923 P. 375.

—S. 46—*Zurpeshgi lease—Surrender to Landlord—Validity—B. T. Act. S. 86 (a).*

The provisions contained in S. 72 of the Chota Nagpur Tenancy Act are similar to those contained in S. 86 of the Bengal Tenancy Act with this difference that the provisions contained in clause (6) of the Bengal Tenancy Act do not find place in S. 72 of the Chota Nagpur Tenancy Act.

A mortgage, as distinguished from a sale, is an incumbrance, and where the mortgage as in the present case was secured by a registered instrument, if the Bengal Tenancy Act applied a surrender would have been invalid, unless it was made with the consent of the landlord and the mortgagee. That clause has been omitted from the Chota Nagpur Tenancy Act and the reason probably is that the legislature did not consider it desirable in the peculiar circumstances of the tenancy of the Chota Nagpur to recognise the right of transfer in the tenants with respect to their holdings. This intention is also to be gathered from the restrictions imposed upon the tenants under Chapter VIII of the Chota Nagpur Tenancy Act, namely, S. 46. A *raiyyat* is not permitted to transfer his holding or a portion thereof by a mortgage or lease for a longer period than five years to sell or make a gift of his holding by any contract or agreement. Be that as it may, the absence of a provision similar to clause (6) of S. 86 of the Bengal Tenancy Act from S. 72 of the Chota Nagpur Tenancy Act leaves no power of surrender conferred by the section unhampered by the existence of any incumbrance over the property. It, therefore, logically follows that in spite of a prior sale or mortgage by a *raiyyat* he is free to exercise his right of surrender of the holding in favour of the landlord, for under clause (2) of S. 46 no transfer by a *raiyyat* of his right in his holding or any portion thereof is binding on the landlord unless it is made with his consent in writing. A fraudulent surrender confers no right on the landlord (*Jwala Prasad and Ross, JJ.*) RAM ORAON v. DOMAN KALAL. 2 Pat. 898 : 4 Pat. L. T. 562 : 75 I. C. 209.

—S. 83—*Record of rights—Presumption of correctness—Rebuttal—Proceedings leading to final record—Admissibility.*

The presumption of correctness about the entries in a Record of Rights arises only with the finally published record of rights, but to rebut the presumption the proceedings which resulted in the final record such as a draft record on what took place at the attestation stage are admissible in evidence. (*Miller, C. J. and Kulwant Sahay, JJ.*) CHAND RAY v. BHAGWATI CHARAN GOSWAMI.

2 Pat. 814.

## CHOTA NAGPUR TENANCY ACT, S. 213.

—Ss. 87 and 224 (2)—*Second appeal—Decision of Judicial Commissioner—Decision under S. 87 whether a decree*

Under S. 224 (2) there is no second appeal to the High Court from the decision of the Judicial Commissioner passed in an appeal from a decision under S. 87 of the Chota Nagpur Tenancy Act. A decision under S. 87 is not a decree and no appeal lies to the High Court under the C. P. Code 5 P. L. J. 697 ; 16 C. W. N. 295 foll. 40 I. C. 891 not foll. (*Das and Ross, JJ.*) FOUJDAR SAHU v. NEMA BHOGTA, 1923 P. 135.

—Ss. 87 and 258—*Decree of Revenue Court—Finality of.*

Though S. 258 of the Chota Nagpur Tenancy Act has the object of securing to some extent finality for any order or decree of any Deputy Commissioner or Revenue Officer in any suit or proceeding under, *inter alia*, S. 87, the section does not say, as it might have done that no Court shall try any issue already decided by such a decree so as to bar a defendant in a suit brought against him from raising the issue. (*Miller, C. J. and Jwala Prasad, J.*) MAHARAJA PRATAP UDAINATH SAHI DEO v. GANESH NARAIN SAHAL. 70 I. C. 232.

—S. 139—*Suit to eject non-occupancy Rights holding over—Civil Courts—Jurisdiction.*

Under S. 139 of the Ch. Nag. Ten. Act a suit to eject non-occupancy rights holding over after the expiry of a lease is not cognisable by any Civil Court but only by the Deputy Commissioner (*Miller, C. J. and Foster, J.*) MT. JAGESHWAR KOER v. TILAKDHARI SINGH. 2 Pat. 746.

—S. 177—*Applicability—Suit for rent—Plea of payment to third party. See (1922) DIG. COL 144. BALKI LAL v. SURENDRA NATH ROY.*

69 I. C. 858.

—S. 177—*Suit for rent—Plea of payment to third person—Effect of*

A right to receive rent can only be claimed by or on behalf of the person entitled to receive it and not by a person who under an obligation to pay it. Where therefore in a rent suit, the tenant pleads payment to a third person, and such third person does not intervene S. 177 of the Chota Nagpur Tenancy Act, does not operate, 57 I. C. 28, foll. (*Coutts and Ross, JJ.*) GHURA MAJHI v. PROBODH CHANDRA MOZUMDAR.

1923 P. 55.

—S. 213—*Execution of rent decree—Exemption of portion of property from liability to sale—Legality of—Right to set aside sale.*

Where in execution of a decree for arrears of rent the holding of a tenant is put for sale, the Court has no power to order that a portion of the property shall be exempt from sale. Where therefore such an order was made and in pursuance of it a sale is held and the property is purchased by the decree-holder it is open to the judgment debtor to bring a suit for setting aside the sale and his remedy is not confined to an application under S. 213 of the Chota Nagpur Tenancy Act, (*Coutts and Das, JJ.*) KUMAR RAMYAD SINGH v. CHHEPIA BARHI. 1 Pat. 750 : 4 Pat. L. T. 439 :

71 I. C. 345. 1923 P. 64.

## CHOTA NAGPUR TENANCY ACT, S. 213.

—Ss. 213, 265 and 280—Rent sale—Application to set aside—Right to apply—Death of party—Application for substitution—Limitation. See (1922) DIG COL. 145. LAL NILMONY NATH SAH-DEO v. MAHARAJ. PROTAP UDAI NATH SAHI DIO. 1 Pat. L. R. 55. 4 Pat. L. T. 367 : 1923 P. 29.

—S. 270—Scope of—Powers of Commissioner over subordinate officers.

S. 270 provides for giving certain powers of control both to the Commissioner and to the Deputy Commissioner over acts performed by subordinates whilst exercising the powers of their superiors.

If it can be shown that the Deputy Collector whilst exercising the powers delegated to him of the Deputy Commissioner has failed to exercise a jurisdiction which he might have exercised or has usurped a jurisdiction which it was not within his competency to exercise then the Deputy Commissioner would have power to order him either to exercise that jurisdiction or to refrain from exercising it as the case may be. The same of course would apply in the case of the Commissioner and the Board dealing with acts performed by the Deputy Commissioner (Dawson-Miller, C. J. and Das, J.) TIKAIT GANESH NARAYAN SAHI v. (HANDU MISTRI 1923 P. 83

C. P. CODE (V of 1908) Ss. 2 (2) and 47—Mortgage decree—Execution—Payment of Court fees—Appeal it lies. See (1922) DIG COL. 146. RAM BUHAVAN PRASAD SINGH v. NATHO RAM. 70 I. C. 483.

—S. 2 (2)—Order of dismissal for default. An order of dismissal of an appeal for default does not amount to a decree. (Das and Kulwant Sahay, JJ.) SURAJDEO NARAIN SINGH v. PARTAP RAJ. 4 Pat. L. T. 405. 2 Pat. 739 : (1923) Pat. 213 : 75 I. C. 284 : 1923 P. 514.

—S. 2 (2)—Order declaring that a party is not liable for mesne profits.

An order of court finally deciding that a particular defendant was not liable for mesne profits is a decree and is appealable. 35 A. 159 : 20 C. L. J. 476, 480 Ref. (Newbould, J.) NAIMUDDIN SARKAR v. IMANI MONDAL. 1923 Cal. 308.

—S. 2 (2) and O. 1 R. 10—Order striking out names of debts—Not appealable. See (1922) DIG. COL. 147 SHANMUGA NADAN v. ARUNACHALAM CHETTIAR. 69 I. C. 961

—S. 2 (2)—Partnership suit—Order referring suit to commissioner for determining shares, taking accounts, etc. If appealable. See PARTNERSHIP. 73 I. C. 903 (2).

—S. 2 (2)—Preliminary decree—Appeal—Order deciding issue and remanding suit for disposal.

An order deciding one issue and remanding a suit for the disposal of another issue amounts to a preliminary decree under the C. P. Code and is appealable (Fremanille, S. M.) JIT AHIR v. MISRI NAIK. L. R. 4 A. 124. (Rev.)

## C. P. CODE (1908), S. 2

—Ss. 2 (2) and 97—Preliminary decree—Finding as to status of agriculturist—Appeal—Drawing up of decree.

A finding on a preliminary issue as to the status of a person under the Dekkhan Agriculturists' Relief Act should be regarded as a preliminary decree, when that finding at once necessarily involves the result that accounts should be taken under the Dekkhan Agriculturists' Relief Act. The right of appeal under S. 97 of the Civil Procedure Code only arises when a preliminary decree is drawn up. It is also there pointed out that it is the duty of the Court and not of the parties, to see that a decree is actually drawn up in the suit, when this should properly be done.

The drawing up of a decree, or the omission to do so, must be taken as conclusive on the question whether the Court has in fact passed or not passed a preliminary decree, and that this is the only proper test to apply in considering whether the provisions of Sec. 97 are, or are not, applicable. (Pratt and Fawcett, JJ.) VAMANA-CHARYA RAMACHANDRA v. GOVIND MADHAVACHARYA 25 Bom. L. R. 826. 1924 Bom. 33.

—S. 2 (2)—Suit for accounts—Preliminary decree—If there can be more than one—Appeal.

Where in a suit for accounts, the court after passing a preliminary decree for accounts, passed a further order fixing the mode of taking accounts and the period for which it should be done, the latter is also a preliminary decree and hence an appeal lies therefrom. The legislature contemplated ordinarily only one preliminary decree in a case but there is nothing illegal in passing more than one in appropriate cases. Case Law Reviewed (Mookerjee and Rankin, JJ.) RAJA PEARY MOHAN MOOKERJEE v. MANOHAR MOOKERJEE 27 C. W. N. 989 : 38 C. L. J. 255 : 74 I. C. 373.

—S. 2 (3)—decree-holder—Specific performance—Decree for—Right of defendant to execute.

A decree for specific performance is capable of being executed by the defendants as well as by the plaintiff. If this were not so, it will follow that if a plaintiff who has obtained a decree for specific performance, refuses to take the sale-deed and pay the consideration money, the debt is left with no remedy whatever, while, owing to the decree passed against him he would still be debarred in any way from dealing with the suit property. (Macleod, C. J. and Cochrane, J.) BAI KARIMABIBI DAUDBHAI v. ABDUR RAHMAN SAVAD BANU. 1923 Bom. 26

—Ss. 2 (11) and 47—Question relating to execution. Legal representative—Liability of—Power of Court to decide objection

Where on an application to substitute the brother of the deceased judgment debtor as his legal representative, he pleads that he is not liable to satisfy the decree as being an undivided co-parcener of the deceased, the objection must be decided by the executing Court before an order substituting him as legal representative is made. If the Court leaves the point whether the brother was liable for the decree open and undecided and

## C. P. CODE (1908), S. 2

makes an order of substitution it would be acting illegally. (*Jwala Prasad and Ross, JJ*) PATAIT DINANATH SAHI v. PATAIT MALHIJI BAID.

1923 P. 149

—S. 2 (11)—Person in possession of estate—Execution against

Where a person is in possession of the estate of a deceased person after the latter's death, he is the legal representative within S. 2 (11) C. P. Code and execution taken against him is quite legal. (*Ghose, J.*) KUSUM BANDHU CHAKRAVARTHY v. RAMDAYAL BHATTACHARJEE. 69 I. C. 179.

—S. 2, 11—Legal representative—Decree against wrong person—When binding upon estate,

The properties in suit belonged absolutely to the testatrix who by her will dated 23-3-1872, appointed her sons J and N as trustees and directed them to maintain the relations of the testatrix and gave them during their lifetime the income from the estate after meeting all the charges. On the death of J and N their sons were to be equally entitled to, and divide the properties. They had power to mortgage the estate for necessary purposes. J having died issueless probate of the will was granted to N who in 1889 mortgaged the estate for necessity N died intestate in 1891 and letters of administration of the estate were granted to his daughter. The mortgagee instituted a suit on his mortgage and obtained a decree, in 1892 impleading the daughter of N as representing the estate. In execution of the decree the property was sold and purchased by the defendants. In a suit by the daughter's son of the testatrix, held that J and N having taken only a life estate in the properties of the testatrix, there was an intestacy on their death without male issue. Consequently on the death of N the plaintiff became the heir to the properties and decree passed against the daughter of N did not bind the estate in his hands. (*Teunon and Greaves, JJ*) GURUDAS KUNDU CHOWDHURY v. KAMAL KUMAR DUTT.

37 C. L. J. 90 : 70 I. C. 886

—S. 2, Cl. 12—Mesne profits—Measure of

In calculating mesne profits the real question is what is the loss sustained by the plaintiff on account of the infringement of his right by the defendant for which he is to be compensated. In other words what is the benefit which the plaintiff would have derived from the possession of his land during the period of his dispossession by the defendant.

This benefit may be according to the circumstances either the letting in value or the cultivation profits of the land. If it is a case where cultivation profits are to be awarded they have to be ascertained according to the definition in the Code. The principle upon which the question whether letting value or cultivation profits are to be awarded depends is as follows :—

The loss of the party wrongfully kept out of possession must generally be measured by the actual usufruct of the land during that time on occupation of the same character as that of the party wrongfully kept out of possession at the

## C. P. CODE (1908), S. 11.

date of his ouster or of the last legal occupant whom the plaintiff claims to succeed to, if the plaintiff himself never entered into possession. (*Kotwal, A. J. C.*) CHHAGANLAL v. SARDAR, 69 I. C. 560 : 1923 Nag. 64 (1).

—Ss. 7, 94, 95—Small Cause Court—Arrest and attachment before judgment—Immoveable property,

Under S. 7 C. P. C., the provisions of Ss. 94 and 95 are not extended to Small Cause Courts so far as they relate to injunctions and interlocutory orders. But S. 94 provides for the passing of orders of arrest and attachment before judgment and S. 7 could not be interpreted as meaning that a Small Cause Court could not pass any order of the nature described in S. 94. A Small Cause Court can pass an order of attachment before judgment of immoveable property and can itself dispose of all claims relating thereto. (*Chandrasekhara Aiyar, C. J. and Ramaswamy Iyengar, J.*) CHINNANNIAH SETTY v. KODANARAMIAH.

1 Mys. L. J. 58.

—S. 9—Suit for partition of temple offering—Maintainability in Civil Court.

Where the property in suit consists of a share in the offering at a certain temple, a suit by the plaintiff with regard to the share of the offering that she should be allowed to take a turn at the worship in the temple so that her full share in the offerings might be secured to her is cognizable by the Civil Court. (*Mears, C. J. and Banerjee, J.*) KUNJ BEHARI LAL v. MT. NARAINI.

45 A. 437 : 71 I. C. 1026 : 1923 A. 425.

—S. 10—Stay of suit—Common issues—Same parties. See (1922) Dig. Col. 149. KOTA SREERAMULU v. KOTA SREERAMULU. 70 I. C. 682.

—S. 10—Stay of suits—Connected suits—Appeal.

S. 10 of the C. P. Code does not apply unless the previous suit is before a Court which is competent to grant the relief claimed in the subsequent suit. A landlord instituted two suits for cesses against the tenants and obtained a decree which was appealed against by the tenants. Pending the appeal the landlord brought a suit for rent against the tenants for a subsequent period and the tenants applied for stay of the suit pending the decision of the appeal. Held that this was not a case to which S. 10 of the C. P. Code applied. (*Rankin, J.*) CHOWDHURY JAMINI NATH MULICK v. MIDNAPORE ZEMINDARI CO. 27 C. W. N. 772 : 75 I. C. 231 : 1923 Cal. 716.

—S. 11—Adverse finding—Decree in favour of party—Effect.

Where a decree is one of dismissal in favour of the defendant, but there is an adverse finding against him on one point, he cannot appeal and there is no question of *res judicata*. Cases where a decree is based on two grounds either of which is sufficient to support the decree stand on a different footing. (*Chatterjee and Pearson, JJ.*) RAJENDRA KISHORE CHOWDHURY v. KUMUD BAN MAHATA. 1923 Cal. 297.

—S. 11—Applicability—Execution proceedings.

C. P. CODE (1908), S. 11.

The principle underlying S. 11 C. P. Code applies to execution proceedings as much as to suit. (*Dus and Kulwant Sahay, JJ*) *RAM LAL MULLICK v. DEODHARI LAL*. 2 Pat. 771: 74 I. C. 781 : 5 Pat. L. T. 7.

—S. 11—*Applicability—Persons who hold under a party to suit—Transaction prior to suit*

S. 11 C. P. C. does not apply to persons who hold under a party to a suit in virtue of a transaction made prior to the decision of that suit (*Pipon J. C*) *GHULAM HAIDAR v. MANAGER, COMMITTEE SAMADH BABA PHULA SINGH*. 73 I. C. 711.

—S. 11—*Between the same parties.*

So far as plaintiffs were concerned it was held in a previous suit that they had agreed to the alienation which had been for their benefit and could not question it, that they could under no circumstances inherit any of the estate left by the widow and that should they survive her another reversioner would be entitled to take that portion that had been alienated and that portion which had not been sold. Plaintiff brought a subsequent suit to the effect that this sale should not affect his reversionary rights. This was dismissed in 1913. Plaintiffs with his two younger brothers again brought a suit for a portion of the land which was not alienated after the death of the widow; held the question is clearly *res judicata* as between them and the widow and her successors. (*Martineau and Harrison, JJ*). *MAULA BAKSH v. MT. JIWI*. 1923 Lah. 556.

—S. 11—*Competent Court.*

Under ordinary circumstances, the decision of an Assistant Collector of the Second Class in the United Provinces would not be *res judicata* in a suit triable only by an Assistant Collector, First Class (*Daniels, J.*) *AMIN UD-DIN v. ABDUL SHAKOOR*. 73 I. C. 460 : 1923 A. 556.

—S. 11—*Competent Court—Administration proceedings.* See (1922) Dig. Col. 149. *GOPAL LAL SETT v. PURNA CHANDRA BASAK*. 27 C. W. N. 174 : 37 C. L. J. 469.

—S. 11—*Competent Court—Civil and Revenue Courts.*

If after a decision of a suit by a Revenue Court the losing party comes to the Civil Court for the same relief which would have the effect of setting aside the decree of the Revenue Court the civil suit would not be maintainable and would stand barred by the principles of *res judicata*. (20 A.L.J. 606 : 18 A.L.J. 1050 : 17 A.L.J. 60 : 16 A.L.J. 933 Ref.) *Rafique, J.* *MT. CHITTO v. GANGA SAHAI*, 1923 A. 527.

—S. 11—*Competent Court—Civil and Revenue Court—Ejectment—Sub-tenancy—Decision of Revenue Court—Res judicata.* See (1924) Dig. Col. 120. *RAM DAS v. DUBBI KOERI*. 44 A. 724.

—S. 11—*Competent Court—Decision of Revenue Court in continuation proceedings that particular lands form part of estate—How far binding on Civil Courts.* See (1921) Dig. Col. 136. *RAMADINA DAS GOSAYINI v. BOISHAMO MUNDALO*. 69 I. C. 938.

C. P. CODE (1908), S. 11.

—S. 11—*Competent Court—Decision of Revenue Court—Existence of relationship between landlord and tenant*

The present suit was brought by the plaintiffs to eject the defendant from the holding in suit, the plaintiffs' case being that the tenants who held the land under them had no transferable interest in the same and had abandoned the holding after selling it to the defendant and that the latter, therefore had acquired under his purchase no right to the holding but was merely a trespasser. The defence was that the defendant was a tenant and could not be ejected as a trespasser. Another thing was the defendant relied upon a decision in a proceeding under S. 106 of the B. T. Act in his favour. The defendant was entered in the Record of Rights as tenant of the lands after purchasing the holding. Plaintiffs thereupon brought a suit under S. 106 of the B. T. Act for the correction of the entry, on the ground that the defendant was not a tenant. The Revenue Officer, under S. 106, decided that the defendant was a tenant and that the entry in the Record of Rights was correct. Held that the question whether the defendant was tenant or not was directly raised and decided in the proceedings under S. 106 of the B. T. Act and that it was *res judicata* in the present case, (*Chatterjee and Panton, JJ.*) *ROY, JATINDRA NATH CHOUDHURY v. AZIZAR RAHMAN SHANA*. 71 I. C. 307.

—S. 11—*Competent Court—Decision of Revenue Court—Subject-matter different—Adjudication on title—Res judicata.*

In a prior suit between the parties as regards a particular plot of land the Revenue Court had decided against the plaintiff. In a subsequent suit in the Civil Court brought by the plaintiff for recovery not only of that plot of land but also of other plots to which his title was identical held that the decision of the Revenue Court was *res judicata*. (*Mears, C. J. and Banerji, J.*) *BARU MAL v. SUNDER LAL*.

L. B. 4 A. 165 (Rev.) : 72 I. C. 155 : 21 A. L. J. 330 : 1924 A. 10.

—S. 11—*Competent Court—Jurisdiction want of, in former case.*

The original mortgagors from whom plaintiff purchased the property subject to mortgage had sued the original mortgagees for redemption in 1896. That case had been tried by a Munsif, second class, who holding that the interest was a charge on the property decreed redemption on payment of Rs. 873. This decree had been varied on appeal by the Divisional Court, but the Trial Court's decree was restored by the Chief Court. Plaintiff in appeal against the decree of the Trial Court contended that the decision of the former suit by the Munsif who had power up to Rs. 500 could not be *res judicata* or estop him from urging that according to the terms of the mortgage deed itself, the interest was not a charge on the property as held by the Trial Court. Held, the Munsif of the second class, in the former case had no jurisdiction in law to try the case. Therefore, the former suit does not operate as a bar to the consideration of the question relating to interest. 6 C. L. J. 621 : 14 C. L. J. 220 and 7 I. C. 781 Dist. 54 P. R. 1912 Fol.

C. P. CODE (1908), s. 11.

(Broadway and Abdul Qadir, JJ.) MAYA DAS v. JINDA RAM. 73 I. C. 874 : 1923 Lah. 141.

—S. 11—Competent Court—Meaning of. See (1922) DIG. COL. 150. KAMMU v. MT. FATHIMAN. 44 A. 712.

—S. 11—Competent Court—Rent Court—Question of tenancy.

The decision of a Rent Court on a question of tenancy in a previous suit for rent is not *res judicata* in a subsequent suit in the Civil Courts for a declaration of title. (Lindsay and Sulaiman JJ.) TOTA v. JAGGU. 21 A. L. J. 476. L. R. 4 A. 428.

—S. 11—Competent Court—Small Cause Court—Decision of—When binding.

The decision of a Small Cause Court which is not open to appeal is not binding on a superior court trying a subsequent litigation between the same parties. (Fremantle, S. M.) HARKI-HAN BHAGAT v. RAM SARAN DAS. L. R. 4 A. 149 (Rev.)

—S. 11—Compromise—Effect of—How far decision on compromise *res judicata*.In a suit to contest a notice of ejectment the plaintiff claimed *shankalap* rights and subsequently filed an application stating that he had given up some land and received a perpetual lease for the rest. The case was then struck on in the absence of the defendants in a subsequent suit to contest notice of ejectment. Held Per BURN S. M. (Fremantle J. M. dissenting) that the prior suit and its decision finally disposed of the claim to proprietary rights against the plaintiff and he could raise it in a subsequent suit to contest a fresh notice of ejectment. (Fremantle, S. M. and Burn, J. M.) RAGHUNATH SINGH v. SITA RAM. L. R. 4 A. 113 (Rev.).—S. 11—Connected suits—Appeal against one—Bar by *res judicata*.The doctrine of *res judicata* applies to all the stages of a suit till it is finally terminated and the doctrine is not confined to the Court of first instance. It applies equally to the procedure on a first as well as second appeal. The expression former suit means a previously decided suit and the same rule applies to appeals. It is not the priority in the commencement of one action that renders the judgment obtained therein a bar to the recovery of a second judgment in another, but because the first judgment, when given whether in the action commenced first or last, it extinguishes the original cause of action and gives to the plaintiff in lieu thereof one of the higher nature. Where there were two suits in the primary court, decided by a common judgment and an appeal is preferred only in the first suit, while none is preferred from the decree in the second suit, the decree made in the latter becomes final and operates as *res judicata*. Cases on the point reviewed. (Mookerjee and Chotzner, JJ.) ISUP ALI v. GOUR CHANDRA DEB. 37 C. L. J. 184. 74 I. C. 591 : 1923 Cal. 496.

—S. 11—Connected suits—Decree—Appeal in one case.

Plaintiff instituted two suits against respondents, one for a share of his deceased brother's property and the other for a share in the charity

C. P. CODE (1908), s. 11.

fund set apart at the time of partition between brothers which was not disposed of. Both the suits were dismissed on the ground of estoppel in virtue of a deed of relinquishment executed by the plaintiff in favour of his brothers. Plaintiff appealed only in the case in which he claimed a share in the property left by his deceased brother. It was objected that as he did not appeal from the case in which he claimed a share in the charity fund, the question of estoppel was *res judicata*. Held this objection is untenable, as the decision in the other case that the plaintiff was estopped by the deed of release from claiming a share in the charity fund does not affect the question whether he is estopped from claiming a share in the estate of one of his brothers, who died subsequently to the execution of that deed. (Mauriceau and Campbell, JJ.) SETH YUSAF ALI MAMUNJI v. SETH ALI BHOY. 1923 Lah. 8.—S. 11—Constructive *res judicata*—Alternative defence—Omission to put forward—Effect of.

If the effect of the decision in a former suit is necessarily inconsistent with the defence that ought to have been raised but has not been raised that defence must under the section be deemed to have been finally decided against the person who ought to have raised it."

In the present case, it was open to the plaintiffs in their defence in the former suit to claim in the alternative, that they had a vested right in half the property in suit. They were content, however, to plead partition whereby they became owners of the whole. In the result their defence failed and it was held that the property belonged to the plff. Held the decision was necessarily inconsistent with the alternative defence that might and ought to have been raised.

A party who has lost a suit in one Court may not by the simple expedient of adding to the claim re-agitate the same question in a fresh suit instituted in a higher Court. Obviously, the Legislature could not have contemplated such an absurdity. (May Oung, J.) MAUNG NO v. MAUNG PO THEIN. 1 Rang 363 : 2 Bur. L. J. 109 : 1923 Rang 239.

—S. 11—Court of competent jurisdiction—Decision by Court having no pecuniary jurisdiction—Not *res judicata*.There is no question of *res judicata* where the Court which tried the former suit could not, by reason of its limited pecuniary jurisdiction have tried the present suit. 29 M. 65 followed. (Simpson, A. J. C.) UDARAJ SINGH v. RAM UNIT TEWARI. 100 I. J. 376.

—S. 11—Court of competent jurisdiction—Small Cause Court.

The decision of a District Munsif in a suit for rent acting with Small Cause Court powers is unappealable and such a decision cannot bind other Courts of superior status. (Fremantle, S. M.) HAR KISHAN BHAGAT v. RAM SARAN DAS. L. R. 4 A. 285 (Rev.).

—S. 11—Cross appeals—Appeal from decree in one—Nothing unfavourable in the other—Effect of not appealing.

C. P. CODE (1903), S. 11.

Where it appears to an appellate Court that there are two decrees arising out of two suits heard together or raising the same question between the same parties or arising out of two appeals to a subordinate appellate court and only one of such decrees is brought in appeal because there is nothing prejudicial to the appellant in the other decree which is not raised and cannot be set right in the appeal which he has brought, succeeds, the right of appeal is not barred by the rule of *res judicata*. Where an appeal against one of them would be sufficient, he is under no obligation to appeal against the other. The ultimate rights of the parties must be adjusted and regulated according to the final decision of the last court of appeal. (*Mears, C. J. Banerji, Piggot, Walsh and Ryves, J.J.*) GHANSHAM SINGH v. BHOLA SINGH, 43A 506: 21 A. L. J. 465: L. K. 4 A. 265 74 I. C. 411: 1923 A. 490 (2) (F. B.)

—S. 11—Decision not appealed from—Effect of—Reversal in another proceeding.

Where a decision is not appealed from but it is in effect reversed by the order made by the High Court in an appeal from another proceeding in the same suit, it does not operate as *res judicata*. (*Stuart and Ryves, J.J.*) KESHRI v. BHAWANI RAI, 1923 All 436

—S. 11—Decision in a previous suit.

When the *taluqdars* had brought their suit for resumption of *muafi* they had made plaintiffs and defendants 2 and 3 parties to it. Defendant No. 1 however had put in an application claiming as he claimed in this suit to be partner with plaintiffs and defendants 2 and 3. He was made a party but ultimately the decree was given only against plaintiffs and defendants 2 and 3. As regards the defendant No. 1 it was said that his name was not entered in the papers where he was recorded as a sub-tenant only. The question whether he was a partner was pronounced to be one for a Civil Court and he was discharged from the suit.

*Held*, in plaintiff's suit, there is no *res judicata* here. What was decided by the Revenue Court was that the *taluqdars* were entitled to get the relief they sought from the plaintiffs whom they themselves had named, and who were the only ones entered in the revenue papers. There was a decision that Def. No. 1 had no independent rights in these plots, but the Court refused to decide whether or not he had any partnership rights (*Simpson, A. J. C.*) KHALIL v. MAHOMED ISMAIL, 74 I. C. 195: 1923 Oudh 101.

—S. 11—Dependent—Decrees—Rule of *res judicata*.

As a result of a sale, two pre-emption suits were filed as between the same parties, the plaintiff in each being the defendant in the other. The suits were tried together and disposed of by a single judgment but separate decrees to the same effect were drawn up according to which the two plaintiffs were to have right of pre-emption in a certain order of preference on depositing a certain amount. The pre-emptor placed first in the order of preference deposited the amount and appealed from the decree in his suit disputing the amount of consideration. *Held* as the decree in the other suit stood unchallenged, it would be

C. P. CODE (1903), S. 11

*res judicata*. (*Dalal, J. C.*) THAKURAIN LACHMI KUR v. UMRAO SINGH, 9 C. & A. L. B. 1096.

—S. 11—Directly and substantially in issue.

The real point at issue in a previous suit was whether the mortgage was for necessity or not. It was found as a fact that the mortgage was for necessity and therefore, there was no necessity to arrive at any decision upon the question whether M was the lawfully adopted son of A. *Held*, it is doubtful whether it can be said that the question of adoption was directly and substantially in issue in that suit within the meaning of S. 11 C. P. C. (*Scott Smith and Forde, J.J.*) MEHAN SINGH v. KEHAR SINGH, 75 I. C. 317: 1923 Lah. 523.

—S. 11—Directly and substantially in issue—Application to set aside *ex parte* decree—Non-service of summons—Separate suit—If lies,

Where a party seeks to set aside an *ex parte* decree on the ground of non-service of summons, but the Court disbelieves him and dismisses the application, a suit to set aside the decree on the same ground is barred by *res judicata*. (*Blasby, J.*) MUSTHAN v. BABU MOHENDRA NATH SINGH, 1 Rang. 500.

—S. 11—Directly and substantially in issue—Decision as to rate of rent in one year—Effect of.

Where in a case under S. 105 B. T. Act the only point decided was what additional rent was to be allowed for the excess area, it does not constitute *res judicata* as to the rate of rent. A rent decree in a prior suit may not be *res judicata* in the sense that it finally decided the rate of rent between the parties. But it is *res judicata* that for the years for which that suit was brought the rent was the amount then found. (*Newbould, J.*) BROJENDRA KISHORE ROY CHOWDHURY v. SHEIKH SOMAR ALI, 1923 Cal. 282 (2).

—S. 11—Directly and substantially in issue—*Ex parte* decree—Application to set aside—Non-service of summons—Finding as to service, —Subsequent suit to set aside.

When an application was put in to set aside an *ex parte* decree on the ground that summons was not served, but it was dismissed on the ground of service of summons a subsequent suit to set aside the decree on the same ground will be based. But if some other ground of fraud apart from it is alleged, it is maintainable. (*Mulick and Bucknill, J.J.*) MAHANATH KAMRUP GOSHAIN v. MAHABIR SHAH, 2 Pat. 833: 74 I. C. 825.

—S. 11—Directly in issue—Pro-note—Set off.

Where a pro-note was the subject-matter of the former suit and no set off was formally claimed in the previous suit and the defendants' liability for the sums now in suit could only have been asserted and tried if there had been a formal set off.

*Held*, since the pleas in the first suit were not explicitly recorded, it cannot be said with certainty that liability for the particular sums now in dispute was directly in issue in the other suit. (*Campbell, J.*) BAIJ NATH v. THE FIRM RADHA RAM SHAM LAL, 1923 Lah. 146.



C. P. CODE (1908), S. 11.

—S. 11—*Directly in issue—Unnecessary finding.*

Where the decision as to ownership was not the basis or any part of the basis of the decree, and the final decision of the whole case, that is the decree, would have been exactly the same if the decision on the point had been exactly the contrary the matter was not "directly and substantially in issue" in the former proceedings and therefore the question of ownership of the property does not operate as *res judicata* in these proceedings. (*Halsjan, A. J. C.*) GOVINDA v. LAXMAN. 1923 Nag. 139 (1).

—S. 11—*Directly and substantially in issue—Decision on validity of sale deed*

Where the question whether a particular sale deed was a valid document arose directly and substantially in the previous suit and the prior suit could not be determined without a decision of the issue, the decision operates as *res judicata* in a subsequent suit even though the property involved in the subsequent suit is different from the one which was the subject of the prior suit. 13 B. 25; 7 I. C. 388 Re. (*Banerji and Gokul Prasad, JJ.*) KEDAR NATH SINGH v. SHEO SHANKER. 45 A. 515; 21 A. L. J. 421; L. R. 4 A 512. 1923 A. 613 (2).

—S. 11—*Directly and substantially in issue—Obiter dictum not necessary for the decision of the case.*

Where in a prior suit the court had merely to decide the factum of a person's death at the date of suit having regard to the presumption under S. 108 of the Evidence Act but it went further and expressed an opinion that the person was dead at a particular date relying erroneously on the supposed presumption to that effect found in S. 108, Evidence Act, the decision as to the date of death is not passed on an issue directly and substantially in question and does not constitute *res judicata*. (*Walsh and Ryves, JJ.*) REKHAB DAS v. MT. SHEOBAL. 45 A. 466 21 A. L. J. 393; L. R. 4 A. 532; 74 I. C. 656; 1923 A. 495.

—S. 11—"Directly and substantially in issue"—*Unnecessary finding.*

A finding not necessary to the determination of the suit is not one against which a party could have appealed and thus the question is not a matter directly and substantially in issue which was heard and finally decided. (*Campbell, J.*) SOHAN SINGH v. JAWALA SINGH. 73 I. C. 854. 1923 Lah. 248.

—S. 11—*Directly and substantially in issue—Decision depending on one issue—Other issue not res judicata.*

Plaintiffs sued defendants for an injunction restraining them from building on the disputed land alleging it to be the common property of the parties. The plea of the defendants was that the land was exclusively their own. A subsequent suit was instituted by defts. against plffs. in which defts. *inter alia* claimed an injunction against plffs restraining them from allowing water to flow on the disputed land to which the plaintiffs answered that they were joint owners of the land with plaintiffs and that they had a right of easement. The plffs, suit was dismissed on the

C. P. CODE (1908), S. 11.

finding that the defts. were sole owners of the land in dispute. In the suit filed by defts. the court found in favour of the easement alleged by the plffs and dismissed that suit. Plffs, appealed against the decree dismissing their suit and there was no appeal from the decree in the other suit. *Held* that the consideration of the issue as to ownership of the land was not barred by *res judicata*, since that question ceased to be substantially in issue in the second suit by reason of the finding on the question of the easement right 33 A. 51 Dist. (*Mears, C. J. and Piggott, J.*) PEARY LAL v. JADO RAI. 1923 A. 15.

—S. 11—*Directly and substantially in issue—Adjudication.* See (1922) Dig. COL. 153. SURADHANI DUTTA v. SITOO SHEIKH.

27 C. W. N. 280; 38 C. L. J. 17; 71 I. C. 378.

—S. 11—*Directly and substantially in issue—Suit by one to avoid execution sale of joint family property—Prior suit—Dismissal of—Effect of.*

A suit by a Hindu son to avoid a sale in execution of a decree against his father on the ground that the debt was tainted with immorality is barred by a similar previous suit on the ground that the property was joint family property. (*Gokul Prasad and Stuart, JJ.*) BADRI PRASAD v. MOHAN SINGH. 1923 A. 231.

—S. 11—*Directly and substantially in issue—Suit for possession—Previous suit for declaration.* See (1922) Dig. COL. 153, RAMJAS v. MT. SASTRAJ. 70 I. C. 635.

—S. 11—*Dismissal of prior application as barred by limitation whether res judicata*

Decision of a point on the ground of limitation only and not on the merits does not operate as *res judicata*. (*Martineau, J.*) SHANCHI KHAN v. KARAM CHAND. 73 I. C. 705; 1923 Lah. 150 (2)

—S. 11—*Ejectment-suit—Finding against occupancy rights—Fresh suit—Plea of acquisition of occupancy right—Not barred.*

Where in a prior suit in ejectment it is found that the tenant has not been in possession of the land for a period sufficient to entitle him to occupancy rights, the finding does not bar the plea that the tenant has since acquired occupancy rights at the time of a subsequent suit for ejectment. (*Burn, S. M.*) DORI LAL v. JASONDHI KHAN. L. R. 4 A. 91 (Rev.) 9 O. and A. L. R. 312.

—S. 11—*Erroneous decision—Effect of—Construction of grant.*

In a prior litigation to which the plaintiff was a party it was decided that the question whether the properties in suit were wakf properties must be held in the affirmative by reason of *res-judicata* owing to a decision in a still prior suit. It was however over-looked that the plaintiff was not a party to that prior suit. *Held* that notwithstanding the mistake the decision in the prior suit operated as *res judicata* and that the plaintiff could not raise the question of the wakf character of the suit property again. (*Phillips and Devadoss, JJ.*) JAGGA ROW BAHADUR GARU v. GONHER BIBI. 17 L. W. 521; 1923 M. W. N. 347; 72 I. C. 789; 1923 M. 545.

C. P. CODE (1908), S. 11.

— S. 11—*Erroneous prior decision—Subsequent change in the law—Effect.*

A question once decided against a party cannot now be allowed to be re-agitated merely because a Special Bench of the High Court has enunciated a rule different from what was recognised in previous case. (*Mookerjee and Pantou, JJ.*) *ARINASH CHANDRA PAL v. KHETRA MOHAN DALOI* 1923 Cal. 629.

— S. 11—*Execution applications—Decision in when res judicata—Successive applications against same person—Maintainability.*

There is nothing to prevent a succession of applications directed against persons who are ascertained to be, or believed to be partners in the particular venture out of which the decree has arisen. The limitation however that is imposed on all these applications, is that if there has been a previous application in which there has been a definite decision affecting a particular piece of property or particular person, and from that decision nothing has been done by way of appeal or institution of suit, if neither of these methods were available that decision is a final decision between the parties and if in any subsequent proceedings, the point again becomes material, the parties are bound by that previous decision, and the matter cannot be re-opened. To that extent, and that extent only, is there limitation on the successive applications in execution. (*Mears, C. J. and Piggott, J.*) *KAPUR OHAND v. KANHAIYA LAL*, 45 A. 735 : L. R. 4 A. 441 : 21 A. L. J. 641 : 74 I. C. 513 : 1924 A. 34.

— S. 11.—*Execution proceedings—Constructive res judicata—Omission to object in prior execution proceedings—Effect of.*

Where in a previous execution application the judgment-debtor did not take objection to executability of the decree and execution was ordered it is not open to him to object that the decree is inexecutable when a subsequent application for execution is made. The fact that the subsequent application for execution relates to different items of property does not take the case out of the operation of the rule of *res judicata*. (*Spencer and Venkatasubba Rao, JJ.*) *PALANCHERI GOVINDA MENON v. KRISHNA MANNADIAR* 45 M. L. J. 71 : 72 I. C. 397 (2). 17 L. W. 566 : (1923) M. W. N. 299 : 1923 Mad. 649.

— S. 11—*Execution proceedings—Earlier order not deciding.*

An order in prior execution proceedings which does not decide the point raised in a later application does not operate as *res judicata*. (*Spencer and Devadoss, J.*) *KANDASAMY CHETTIAR v. MARUDA PILLAY* 18 L. W. 652 : 33 M. L. T. 64 (H. C.) : (1923) M. W. N. 835.

— S. 11—*Execution proceedings—Objection petition dismissed for non-prosecution—Effect.*

Where an objection petition in an execution proceeding is dismissed for non-prosecution, there is no adjudication on the merits and hence it cannot be *res judicata*. (*Greaves and Ghose, JJ.*) *BAHIR DAS PAL v. GIRISH CHANDRA PAL* 1923 Cal. 287.

C. P. CODE (1908), S. 11.

— S. 11—*Execution proceedings—Order that application is not time barred—Res judicata.*

Where an execution application was rejected on the ground that it was not in accordance with law and the decree holder acquiesced in this order and did not appeal held that the order was final and could not be questioned in further proceedings. Though orders in execution proceedings do not come directly within the language of what is now S. 11 of the Civil Procedure Code yet such orders if not appealed from, are binding on the parties in subsequent proceedings on principles analogous to those of *res judicata* strictly so called.

When a competent Court has decided, even though wrongly, that an execution application was not time barred, that order could not be questioned in subsequent execution proceedings (*Batten, J. C.*) *JAGANNATH v. BFHARI LAL*.

72 I. C. 473 : (1923) Nag. 236.

— S. 11.—*Execution proceedings—Order made at one stage—Binding on parties.*

Where a court executing a decree passes an order after notice to the parties, that decision is, unless set aside on appeal binding upon the parties. (*Miller, C. J. and Jwala Prasad, J.*) *MAHADEO PRASAD SAHU v. GAJADHAR SAHAL*.

1 Pat. L. R. 145 : 73 I. C. 359.

— S. 11—*Execution proceedings—Order in—When res judicata—Notice to parties.*

Where an order for execution of a decree is passed after due notice to the judgment-debtor, but eventually the application is dismissed for default of the decree-holder, it is not open to the judgment-debtor in a subsequent application for execution to plead that the former execution was time barred. (*Jwala Prasad and Bucknill, JJ.*) *GOURCHANDRA ROY v. JANARDHAN PRASAD THAKUR*. 4 Pat. L. T. 204 : 1923 P. 180.

— S. 11—*Execution proceedings—Prior decision—When operates as res judicata—Issue of law.*

S. 11—of the C. P. Code applies to suits and an execution case is not a suit; but it is firmly established that the principle of law underlying S. 11 applies to proceedings in execution of decrees. The section draws no distinction between an issue of fact and an issue of law; and an issue of law operates as *res judicata* in the same way as an issue of fact. Consequently a decision of a question of law in an execution case is *res judicata* in a subsequent application for execution of the same decree even though the view of law enunciated in the prior execution case has been since disapproved by a full bench.

S. 11 of the Code of Civil Procedure takes no note of the fact whether the cause of action is the same or is different. The only matter for investigation is whether the matter directly and substantially in issue has been directly in issue in a former suit between the same parties or between parties under whom they or any of them claim; and it is upon this investigation that the question of *res judicata* must, in each case be decided. (*Das and Kulwant Sahay, JJ.*) *RAM LAL MALIK v. DEODHARI, RAI*. 2 Pat. 771 : 74 I. C. 781.

## C. P. CODE (1908), S. 11.

—S. 11—Execution proceedings—Prior order—Effect of—Judgment-debtor not a party to prior proceedings not affected.

A judgment-debtor who was not a party to a previous application for execution of a decree or to any order made upon it is not precluded from showing that the said application was barred by limitation and therefore it was not in accordance with law. (*Cuming and Panton, JJ.*) *SITANATH DAS v. RANI KANAK PROBHA DEBI.*

1923 Cal. 322 (2)

—S. 11—Execution proceedings—Recognition of assignment and transmission of decree—Omission to object to execution—Effect of.

Where a decree was assigned and an application was made to the Court to recognise the assignment and transmit the decree for execution to another Court, the omission of judgment-debtor to object at that stage does not preclude him from objecting to the execution of the decree in the manner proposed by the decree-holder at a later stage of the execution proceedings. (*Spencer and Venkatasubba Rao, JJ.*) *NATESA CHETTIAR v. ANNAMALAI CHETTIAR.*

17 L. W. 319 : 32 M. L. T. (H. C.) 157 : 73 I. C. 213 : 1923 Mad. 487 (1).

—S. 11—Execution proceedings—Order in when res judicata—Case struck off—Effect of.

If an order has been made or an application for execution, which directly or by implication determines the rights of the parties to the proceeding, the fact that the decree-holder does not choose to proceed with the execution and the case is struck off does not entitle any party to re-open the question upon which there has been a previous adjudication. 17 C. W. N. 113 foll. 6 A. 269 : 8 C. 5 Ref. (*Batten, J. C.*) *MUSSAMMAT PURA v. BEHARI LAL.*

1923 Nag. 1.

—S. 11—Execution proceedings.

The provisions of S. 11 do not apply to execution proceedings (*Brown, A. J. C.*) *MAUNG SO v. DEVIGYAN.*

70 I. C. 530 : 1923 Rang. 119 (2).

—S. 11—Ex parte order—Patwari's report basis.

An ex parte order that a certain person has expropriated rights and fixing the rent at a certain figure on the basis of a patwari's report is not res judicata in a subsequent suit for declaration of tenure (*Fremantle, S. M. and Burn, J. M.*) *MT. REOTI v. TIKA RAM.*

L. R. 4. All. 396 (Rev.).

—S. 11—First suit for title—Second for fixing boundaries.

A prior suit determining a question of title regarding a certain land does not bar a subsequent suit between the same parties involving a question as to its boundaries (*Haimsey and Ghose, JJ.*) *ANANTRAM BHATTACHARJEE v. HEM CHANDRA KAR.*

50 Cal. 475 : 72 I. C. 1041 : (1923) Cal. 379.

—S. 11—Heard and decided—Suit—Counter-claim—Appeal preferred in suit only—Effect of See (1922) DIG. COL. 156 *HARI RAM v. INDRAJ.*

44 A. 730 : 69 I. C. 167 : 9 O. &amp; A. L. R. 123.

## C. P. CODE (1908), S. 11.

—S. 11—Heard and finally decided—Judicial order—Made in one stage of a suit binding. See (1922) DIG. COL. 141 *RAJA SASIKANTA ACHARYA v. SARAT CHANDRA RAI.*

70 I. C. 6.

—S. 11—Heard and finally decided—Cross suits—Same question in issue—Decree in both suits—Appeal against one decree only—Effect. See (1922) DIG. COL. 138. *MAHOMED JAN v. DULICHAND*

74 I. C. 583.

—S. 11—Heard and finally decided—Decision in proceedings for letters of administration.

In a previous proceeding for letters of administration the present parties were rival claimants. Their evidence was taken at length as in a regular suit and the claim of the respondent was decided against her she being held to be not the legitimate daughter of the deceased.

Held, the decision in those proceedings barred the present suit for declaration by the respondent that she is the heir of the deceased. (*Priatt and Carr, JJ.*) *MAUNG HMAT v. MA HTAY.*

1 Rang. 258 : 1923 Rang. 257.

—S. 11—Heard and finally decided—Incidental findings—When res judicata. See (1922) DIG. COL. 141 *KALANDAR v. KALANDAR*

69 I. C. 570.

—S. 21—Heard and finally decided—Rent suit—Area of holding—Record of Rights—Entry in.

In a prior suit for rent, the area of one holding was decided to be a certain number of bighas. Held in the absence of any allegation as to encroachment, increment, fraud or error, this finding will be res judicata in a subsequent suit for rent, though it is alleged and proved that a later Record of Rights has an entry different from what was found before as regards the area. (*Mullick and Bucknill, JJ.*) *KADHIKA RAMAN v. SATNARAIN KOERI.*

74 I. C. 961.

—S. 11—Heard and finally decided—Suit by tenant to set aside a distraint on the ground that tender of part is not proper—Decision as regards priority of the tender—Res judicata in subsequent suit for rent. See MAD. EST. LAND ACT, SS. 73 AND 77.

45 M. L. J. 199.

—S. 11—Issues of law—Applicability of.

A decision on an issue of law is as much res judicata as on an issue of fact where a prior execution proceeding was dismissed on the ground that a non-transferable occupancy holding could not be sold in execution of a money-decree, but later this view of the law was overruled by a Full Bench, a subsequent execution application to sell the same holding would be barred by res judicata. (*Das and Kulwant Sahay, JJ.*) *RAM LAL MALIK v. DEODHARI RAI.*

2 Pat. 771 : 74 I. C. 781.

—S. 11—Landlord and tenant—Relationship between—Decision in suit to contest ejectment.

In a suit to contest a notice of ejectment the plaintiff was found to be in possession of the land under certain permanent leases. In a subsequent suit for ejectment. Held, that the decision operated as res judicata (*Fremantle, S. M.*) *MAHANT RAM DAS v. JANGI SINGH.*

L. R. 4 A. 281. (Rev.)

## C. P. CODE (1908), S. 11.

—S 11—*Litigating under the same title*  
—*Erroneous view of law—Pre-emption suit.*

In a previous suit a decision was given in favour of plaintiff pre-emptor, though a descendant of a remote ancestor of vendor, that he was entitled to inherit vendor's property. When the vendor again sold another property, plaintiff and another pre-emptor filed suits. The suit of the latter was decreed and upheld in appeal and in view of the decision the trial Court dismissed plaintiff's suit and the appellate Court decided on merits that the previous judgment was not of binding effect in determining plaintiff's status as a pre-emptor as it held the decision was wrong. Held, on the one hand plaintiff and vendor *pro forma* defendant in the first case and on the other plaintiff and the present vendees in this suit, both suits being pre-empt on suits, cannot be said to be parties litigating under the same title. As the vendees did not claim under the vendor, plaintiff did not and could not challenge vendee's right to own and possess the land in suit and his claim would therefore amount to asking the vendees to re-transfer in his favour the land in suit in virtue of the decision in the previous suit. The previous decision was based on the wrong view of law that a person descended from a remote ancestor of the vendor of altogether unknown degree is a person entitled to inherit the vendor's property. 34 P. W. R. 1921 Dist (Campbell, J.) AHMAD-KHAN v. JAWAHIR SINGH. 1923 Lah 16

—Ss. 11 and 47—*Mortgage suit—Decree not executed—Subsequent suit for redemption—Maintainability of.*

If a mortgagor brings a redemption suit and obtains a decree nisi, which entitles him on payment of a certain sum by a certain time to get back the property, and nothing further is done, and no attempt is made to get back possession, and no order is made barring the mortgagor's right to redeem, then a second suit can be brought for redemption and the same would not be barred either by S. 11 or S. 47 of the Civil Procedure Code. There is nothing in the Dekhan Agriculturists' Relief Act to prevent the operation of the above. If the first redemption decree is passed in a suit under the Act, the question whether the decree is a decree nisi or a decree which puts an end to the mortgage will be one depending on the facts of the case. 43 B 334 foll (Macleod, C. J. and Crump, J.) RAMCHANDRA LAXMAN v. BALBHIM DABAIL. 72 I C. 315 : 25 Bom. L. R. 211.

—S. 11—*Mortgage suit—Suit by puisne mortgagee impleading prior mortgagee but denying priority—Omission of prior mortgagee to appear and contest suit—Decree and sale in execution—Purchase by puisne mortgagee—Subsequent suit by prior mortgagee.*

In a suit by a puisne mortgagee for sale in enforcement of his own mortgage he impleaded the prior mortgagee as a party defendant along with the mortgagors. The puisne mortgagee claimed priority over the prior mortgagee on the ground that his own mortgage was executed to satisfy an earlier mortgage. The prior mortgagee filed a written statement challenging the plaintiff's claim but did not support his case by adducing evidence. Under the decree all the defendants

## C. P. CODE (1908), S. 11.

were directed to pay the decretal amount within four months and in default the sale of the property mortgaged was ordered. Subsequently the mortgaged property was sold and purchased by the prior mortgagee in execution. In a subsequent suit instituted by the prior mortgagee on his own mortgage impleading the purchaser of the property and alleging that he was a merely puisne mortgagee held that the prior mortgagee having failed to prove his priority in the previous suit where the question was raised his present suit was barred by *res judicata* 24 A 429 ; 39 C. 527 ; 47 C. 662 ; 1 Pat. L. T. 629 followed. (Das and Kulwant Sahay, JJ.) LAL BIHARI SINGH v. GURPRASAD SINGH. 1923 Pat. 118 : 1 Pat. L. R. 238.

—S. 11—*Not exhaustive—Issue if can be res judicata.*

S. 11 C. P. Code is not exhaustive of all cases where a matter is *res judicata*.

A decision on a particular issue in a case can operate as *res judicata* (Wazir Hasan, A. J. C.) GAURI MISRA v. MOHAN. 90. and A. L. R. 1061.

—S. 11—*Parties—Co-defendants—Res judicata—Decision when operates as.* See (1922) DIG COL. 159, KONGA RAMASWAMI IYER v. PONNUSWAMI 70 I C. 769.—S. 11—*Parties—Co-defendants—Res judicata—Partition suit*

Where an adjudication between the defendants is necessary to give the appropriate relief to the plaintiff, the adjudication will be *res judicata* between the defendants as well as between the plaintiff and defendants. But for this effect to arise, there must be a conflict of interests between the defendants and a judgment defining the real rights and obligations of the defendants *inter se*. Without necessity, a judgment will not be *res judicata* amongst debts, nor will it be *res judicata* amongst them by mere inference from the fact that they have been collectively defeated in resisting a claim to a share made against them as a group. The test is whether there was a necessity to decide the point, whether as a matter of fact it was ever raised between co-defendants and whether it was decided 11 Bom. 216 followed. Where in a partition suit none of the parties claimed or resisted partition except the plaintiff, any questions regarding partition which might thereafter arise between the defendants in that suit remain open to be decided. (Macleod, C. J. and Crump, J.) GANGARAM v. VASUDEO. 47 Bom 534 : 25 Bom. L. R. 268 : 73 I. C. 912 : 1923 Bom 203.

—S. 11—*Parties—Co-defendants—Decision between, when res judicata.*

As regards parties arrayed on the same side e. g., as co-defendants, an adjudication between them which is necessary to give the appropriate relief to the plaintiff is *res judicata* as between them, as well as between the plaintiff and the defendants, provided there is a conflict of interests between the defendants giving rise to a distinct issue between them and a judgment defining the real rights and obligations of the defendants. In order that a finding in a case be *res judicata* between co-defendants three things

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are necessary, (1) there should be a conflict of interest between co-defendants, (2) that it should be necessary to adjudicate upon the conflict in order to give appropriate relief to the plaintiff, and (3) that the judgment should in fact determine the rights and liabilities of the defendants *inter se*. (*Abdul Raof and Moti Sagar, JJ*)  
**SUKH DIAL v. MT. BHOPI.** 71 I. C. 481.  
 1923 Lah. 186

—S. 11—Parties—Co-plaintiffs—Decision when *res judicata*.

In the absence of a conflict of interest between persons ranged as co-plaintiffs in a suit, the suit have made in the alternative, the claim which he made in the present suit and that by reason of decision in the suit would not bind their successors as *res judicata*. (*Miller, C. J. and Jwala Prasad, J.*) **MAHARAJA PRATAP UDAI NATH SAHI DEO v. GANESH NARAIN SAHI.** 70 I. C. 232

—S. 11—Parties and their representatives—Prior suit by mortgagee for possession—Title of mortgagor found—Subsequent suit for redemption.

In a suit for possession by the mortgagee the title of the mortgagor was disputed by a third party but found against. In a later suit for redemption, the son of the third party again disputed the title. *Held*, the decision in the prior suit was *res judicata*. (*Macleod, C. J. and Crump J.*) **BAPUJI RAO RAOJI RAO v. RAQUNATH RAO.** 74 I. C. 285.

—S. 11—Parties and representatives—Litigating under the same title—Decision against defendant in individual capacity does not bar suit in representative capacity.

Where in the former suit the defendants were impleaded in their representative capacity but were proceeded against in their individual rights, the decision in the suit does not operate as *res judicata* in a subsequent suit against the defendants as representing the community. (*Boadway and Abdul Qader, JJ.*) **SITARAM v. GHANNO.** 69 I. C. 528.

—S. 11—Parties and representatives—Suit against joint Hindu family—All the members bound by the judgment. See (1922) DIG. COL. 161. **RAM RATTAN v. HURSUKH ROY.** 69 I. C. 783

—S. 11—Parties and representatives—decree in suit by Hindu widow—Reversioners when barred—Reversioners impleaded in first court but not in appeal where judgment in favour of the widow was reversed—Effect of. See (1922) DIG. COL. 161 **NACHIKALAI v. AIYAKANNU.** 70 I. C. 387.

—S. 11—Parties—Suit between rival claimants to tenancy—If binds all zemindars.

Where on the death of a tenant, there was a suit between rival claimants as to the tenancy and in the same some only of the zemindars objected, a decision in favour of one of the claimants will not bind the whole body of zemindars. (*Fremantle S. M. and Burn, J.M.*) **KARAMAT ALI KHAN v. SH MD. IBRAHIM.** L. B. 4 All. 311 (Rev.)

—S. 11—Partition suit—Prior suit for partition under a will and partition deed—Dismissal.

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A prior suit for partition by metes and bounds and possession of property on the strength of a partition effected by the father of a joint Hindu family and a will made by him was dismissed on the ground that the partition was unfair and the plaintiff was refused leave to amend the plaint by claiming a general partition of joint family properties. Subsequently the plaintiff sued for partition as a member of a joint Hindu family. *Held* that the subsequent suit was not barred by *res judicata*. The first suit was founded on a distinct and separate cause of action *viz.* the partition deed and the plaintiff was under no obligation to sue in the alternative for partition as joint family property. (*Macleod, C. J. Crump, J.*) **MAHADEVAPPA v. KASHI RAO.** 25 Bom. L. B. 797 : 1923 Bom. 467.

—S. 11—Possession, nature of, declared in a *fremio is suit*—*Res judicata*

A judgment in a prior suit operates as *res judicata* in a subsequent suit between the same parties or their representatives in interest if it decides what was the character of the possession of any person who was a party to that suit *e.g.* whether it was then adverse or permissive possession or whether it was separate or joint possession. (*Spencer and Venkatasubha Rao JJ*) **SINGARAVELU MUDALIAR v. CHOKKA MUDALIAR.** 46 Mad. 525 : 70 I. C. 994 : 1923 Mad. 88 (2).

—S. 11—Principle of, when applicable competent court.

An Assistant Collector, Second Class who had no power to try an ejectment suit passed a decree for rent in favour of A; but later on an Assistant Collector, First Class, who had power to try an ejectment suit, dismissed A's suit for ejectment; *held* that the decision of the Assistant Collector Second Class was no bar to the decision of the Assistant Collector First Class. 32 All. 1 Dist. (*Stuart, J.*) **RAM DIN v. HAR DAYAL,** 1923 A 368.

—S. 11—Redemption—Second suit not barred.

When a plaintiff has obtained a decree for redemption of mortgage by payment into Court of a certain sum within a certain time and when no steps have been taken by the plaintiff towards making such payment and the period fixed elapsed without any payment being made, still a second suit to redeem on payment of the self same sum is not barred by the rule of *res judicata*.

The right of redemption could not be extinguished by the preliminary decree and could only be extinguished by a final decree. (*Campbell, J.*) **SUNKA v. JARUN.** 1923 Lah. 680.

—S. 11—Rent suit—Decision when *res judicata*.

The decision in a rent suit is conclusive upon one point and one point alone, namely, that the defendants were not the tenants of the plaintiff during the years for which rent was then claimed. (*Moskerjee and Chotwani, JJ.*) **SYAM LALL NASUA v. BRINDABAN CHANDRA.** 72 I. C. 655.

—S. 11—Suit for declaration dismissed on merits—Plaintiff out of possession

A plaintiff out of possession sued for declaration that he be declared an occupancy tenant; his

## C. P. CODE (1918), s. 11.

suit was dismissed on the ground that he did not substantiate his position as occupancy tenant. He filed another suit for possession against the defendants. *Held* that his suit was barred by *res judicata*, and that he could not be allowed to contend in the second suit that the Court should not have gone into the merits in the former suit, as in that suit he would have failed only on the ground that he sued for mere declaration, when he ought to have sued for possession as well (*Rajque, J.*) *KASHI KAI v. M. KALI KUKRI.*

1923 A. 554

## S. 11—Withdrawal permitted in appeal—Effect on decision of trial court.

Where in appeal, permission is granted to withdraw a suit with liberty to file a fresh suit, the order of the trial court on the merits *ipso facto* falls to the ground and hence cannot operate as *res judicata*. (*Ryves, J.*) *LEWANT GARRAJ SINGH v. SRI BHAKUJ MAHAKAR.*

74 I. C. 894.

## S. 11—Wrong decision in a rent suit.

In a suit for the recovery of arrears of rent on the basis of a *kabuliat* the *kabuliat* stipulated that arrears of rent should bear interest at the rate of 7½ per cent. per annum. Both courts below enforced this stipulation and decreed the plaintiff's claim. As it appeared that the respondent had twice before obtained decrees for the arrears of rent on basis of this *kabuliat* with interest at the rate stipulated in 1911 and in 1915,

*Held*, that the liability of the defendant-appellant to pay interest on arrears of rent at the rate provided for in the *kabuliat* is *res judicata* between the parties. 39 Cal 818 and 32 Cal. 49 dist. (*Cuming and Panton, JJ.*) *HAMID ALI v. MAHOMED NUKERJAMA MEAH.*

1923 Cal. 361.

## S. 11—Explan. II—Right of appeal—Competency of Court—Award—Finality. See (1922) DIG. COL. 163, GURU CHARAN SARKAR v. Uma CHARAN SARKAR.

70 I. C. 985.

## S. 11 Ex. IV and V—Applicability—Execution proceedings, See (1922) DIG. COL. 163. PRITHI MAHTON v. JAMSHAD KHAN. 1 Pat. 593.

S. 11—Ex. IV—Constructive *res judicata*—Matter which might and ought to have been raised in suit—If can be pleaded in execution.

Matters which are substantially and directly in issue in the suit or which might and ought to have been made a ground of attack or defence in the suit cannot be allowed to be raised in execution proceedings, (*Campbell, J.*) *MIR KHAN v. SHARFU.*

5 L. L. J. 163 : 74 I. C. 577 : 1923 Lah. 660.

S. 11—Ex. IV—Constructive *Res judicata*—Omission to plead available ground of defence.

Where a prior suit for declaration had been decreed in the presence of the defendant who did not urge either of the pleas which he now put forward and which if proved would have been sufficient to defeat the prior suit, the decision in the prior suit operates as *res judicata* and the defendant could not raise again the pleas which he had omitted to put forward on the prior occasion.

## C. P. CODE (1918), s. 11.

*Le Rossignol and Harrison, JJ.* NABI BAKSH v. MUHAMMED SALAM ULLAH. 5 Lah. L. J. 251 : 72 I. C. 91.

S. 11—Ex. IV—Constructive *res judicata*—Suit for possession—Different grounds of title.

If a plaintiff sets up a title as a proprietor and if he has two alternate capacities upon which to rest such a title he must disclose both these two capacities provided that they might and ought to have been made grounds of attack. The question as to whether a plaintiff can or cannot bring a second suit depends upon whether (1) he could have based his former suit upon the same cause of action and (2) whether he ought to have so based it. In the first case he can escape from the operation of S. 11 and from O. 2, R. 2, if he can show that he was, when he instituted the first suit, actually unaware of his second cause of action. In the second case he can similarly escape from the operation of those sections if he can show that he could not unite his two causes of action in a single suit without inconsistency and confusion. *Held* that the court had to determine three points (a) whether the plaintiff in the first suit did actually put forward his alleged claim as a heir as a basis for his suit (b) whether, if he did not, he was unaware at the time that he could also claim as an heir and (c) whether, although he knew of this second cause of action as an heir he was nevertheless unable to combine it with his cause of action as a vendee without inconsistency and confusion. (*Pipon, J. C.*) *AKHI v. HAZRAGUL.*

71 I. C. 1009.

S. 11, Ex. IV—Constructive *res judicata*—Suit for recovery of land—Subsequent suit on different title—Bar.

The point for determination in the case was whether the present suit was *res judicata* by reason of a former suit. Both the suits were instituted in the same Court between the same parties and the subject-matter was the same. In the former suit the plaintiff claimed title to three pieces of land as having been given to him by his father who at the time of that suit was dead. It was held that the gift was not valid. In the present suit he sued as the *aurasa* son of his father and mother, claiming a half share in the same three pieces of land. *Held*, that the plaintiff should in the former suit have made in the alternative, the claim which he made in the present suit and that by reason of his omission to do so the present suit was barred by *res judicata* (*Muang Aun, J.*) *MAUNG BA THAW v. MA HMIT.*

2 Bur. L. J. 34 : 72 I. C. 14 : (1923) Rang. 122.

## S. 11 (Exp. IV)—Execution proceedings—Failure to attend at the settlement of sale proclamation—Effect—Liability of Property to attachment—If can be agitated.

Where in spite of notice to the judgment-debtor he did not attend at the settlement of a sale proclamation under O. 21, R. 66, he cannot by reason of such non-attendance be considered to be estopped by the principle of *res judicata* from contending thereafter that the property was not liable to attachment, (*Schwabe, C. J. and Oldfield,*

C. P. CODE (1903), S. 11.

and Ramesam, JJ.) CHIDAMBARAM CHETTY v. KANDASAMI GOUDAN. 46 Mad. 768 :

45 M. L. J. 346 : (1923) M. W. N. 571 : 74 I. C. 155 : 18 L. W. 757 : 1924 Mad. 1 (F.B.)

—S. 11 Expl. IV—*Heard and decided*—*Counter claim—Plea in—Omission to claim standard rent—Subsequent suit—Plea under Bombay Rent Act, S. 2—Bar.*

In a suit filed on the Original Side of the High Court against the defendant for rents collected by him on behalf of the plaintiffs, the defendant set up a counter-claim in which he prayed for a declaration that he was a monthly tenant of pllt. at Rs. 185 per mensem and for an injunction restraining the plaintiffs from preventing the defendant's sub-tenants from paying rent to him. The High Court dismissed the plaintiff's suit and granted the declaration and injunction prayed for by the defendant. Plaintiffs subsequently filed a suit claiming arrears of rent at the rate of Rs. 185 per mensem and the defendant pleaded that he was liable to pay only the standard rent of Rs. 150 per mensem under the Bombay Rent Act.

*Held*, that the defendant having waived the benefit of the Rent Act in the previous counter claim and given up his right and obtained a declaration on that footing was barred by *res judicata* from setting up the plea under the Rent Act (Shah, A. C. J. and Crump, J.) FATMABAI v. FRAMROZ. 70 I. C. 103 : 1923 Bom. 145.

—S. 11 Expl. IV—*Mortgage suit—Plea of paramount title not set up—Effect.*

Where the defendant in a mortgage suit had a double capacity i.e., purchaser of equity of redemption and also settlement holder of a non-transferable occupancy holding, but he failed to set up the defence that the mortgage would not be enforced against the property in his hands, he will afterwards be barred by *res judicata*. A question of paramount title can be investigated in a mortgage suit in certain cases (Mookerjee and Chatterjee, JJ.) SKRIMANTA SEAL v. BINDUBASINI DAS, 38 C. L. J. 183.

—S. 11—Ex. IV—*Mortgage suit—Prior mortgagee impleaded as party—Omission to set up and prove priority—Effect—Subsequent suit—Bar.* See C. P. CODE, O. 34, R. 1.

4 Pat. L. T. 108.

—S. 11, Expl. IV—*Omission to put forward a plea—Constructive res judicata.*

In an ejectment suit the tenant claimed that he had acquired occupancy rights by more than 12 years' cultivation but did not plead that though, ejected once he had been re-admitted immediately. *Held* that the decision operated as *res judicata* on the question of re-admission and the tenant could not in a subsequent suit raise the question again. (Fremantle, S. M. and Burn, J. M.) HAN MD. ISMAIL v. BABURAM.

L. R. 4 A. 240 (Rev.)

—S. 11 (Expl. IV)—*Omission to take plea—Subject matter not the same—Effect.*

Where in a suit for rent by the purchaser at an auction sale of an undivided share in a house against another sharer the other sharer's absence of a transferable interest was not pleaded, the

C. P. CODE (1903), S. 11.

point will be *res judicata* in a subsequent suit for possession. The fact that the actual subject matter in the two suits is not the same, does not affect the question. (Campbell, J.) THAKUR DAS v. BRIJ LAL. 73 I. C. 457.

—S. 11—Ex. IV and O. 2, R. 2—*Partition—First suit for partition of some items of family properties—Whether a subsequent suit for other items maintainable—Properties lying in different jurisdictions.*

Where one suit for partition of some of the joint family properties was brought and disposed of, another suit for partition of the remaining properties does not lie even though the properties comprised in the later suit are within the jurisdiction of a District Munsif other than the one in whose Court the prior suit was brought. There is nothing in Ss. 16 and 17 of the Code of Civil Procedure to give a person power to bring two suits in two Courts for the partition of properties under different jurisdictions, so as to contravene the principle involved in S. 11 Expl. 4 and O. 2, R. 2 of the Code. A suit for partition of joint family property is a comprehensive ascertainment of the assets, including immoveable properties, belonging to the family and the liabilities to be satisfied out of those assets; and it is settled law that only one suit for partition would lie. (Oldfield and Venkatasubba, Rao, JJ.) BANKARA BASAVANA GOWD v. BANKARA DOLDA LINGAPPA. (1923) M. W. N. 294 :

72 I. C. 430 : 44 M. L. J. 652 : 17 L. W. 740 : 1923 Mad. 584.

—S. 11—Explanation IV—*Suit for possession—Title by purchase asserted and negatived—Subsequent suit on title by heirship—Bar of.*

When plaintiff sued to recover possession property from a trespasser on the ground that he was owner by joint purchase with two others, and obtained a decree for his share, and subsequently brought a suit against the same defendant for possession of the remaining portion of the property claiming as heir to a deceased person, a title which he could have put forward in the alternative in the earlier suit but did not, the subsequent suit is barred by *res judicata*. 11 Beng. L. R. 158, 50 Cal. 1 Relied on, 41 I. A. 142 distinguished. (Krishnan and Ramesam, JJ.) THONA SINA NAINA MUHAMMAD KOWTHER v. ABDUL RAHMAN KOWTHER. 46 Mad. 135 :

17 L. W. 188 : 32 M. L. T. (H. C.) 82 : 72 I. C. 207 : 1923 Mad. 257.

—S. 11—Ex. IV—*Test.*

The test, whereby to determine whether it ought to have been matter of attack is this : are the matters so dissimilar that their union might lead to confusion? Where the plaintiff might have, in the former suit, put in the claim, that he made in the subsequent suit as an alternative, claim, and if he did so, there would have been no confusion, and all questions relating to his title in the property would have completely and finally determined. *Held*, he ought to have made the claim that he made in the subsequent suit as a ground of attack in the former suit, and for this reason, the subsequent suit must be held to be *res judicata*. Where plaintiff claims title to certain property, in proving his title to that pro-

C. P. CODE (1908), s. 11.

party he ought to put forward all means of attack in his armoury. S. 11 omits all references to the cause of action. A plaintiff's cause of action is a very different thing from his title; the one being something done contrary to a person's interest which obliges him to seek the aid of the Court, the other the proof that that something affords him a valid ground for relief. (1892) 1 L. R. 20 C. 79 (1900) 1 L. R. 25 Bom. 189 F. (*Maung Kin, J*) MAUNG BA THAW v MA HIN AND OTHERS. 1 Bur. L. J. 34.

72 I. C. 14 : 1923 Rang. 122

———S. 11 Ex. IV—Two mortgages—Suit on later mortgage—It bars subsequent suit on former one. See C. P. CODE, O. 34, R. 1. 69 I. C. 897.

———S. 11 Ex. V—Previously instituted suit—Connected cases—Disposal by single judgment—Omission to appeal from some cases—Effect of.

Where a number of ejectment suits relating to different holdings were disposed of by a single judgment and some of the issues were common to all the cases, the omission to appeal from some of the cases is no bar to an appeal against the rest. (*Pearson, J. M*) PRAYAG SINGH v. RAM SARUP SINGH. L. R. 4 A. 33 (Rev.)

———S. 11, Expln. VI—Binding nature of suit.

Where a suit is instituted in the interests of the whole estate and for the benefit of all persons who might come to inherit it, the decree in the absence of collusion or fraud has the effect of *res judicata* in a subsequent suit (*Sulaiman, J.*) CHHAJU v. GOKUL. 75 I. C. 593 : 1923 All. 338

———S. 11 Expln. VI—Hindu widow—Decision against—When binding on reversioners.

Whether the widow represented the inheritance in a litigation against her may be gathered from the nature of the defence put forward and the issues raised, tried and decided in the former suit. The mere allegation that she did or did not, would be of little value. Was the suit based upon a mere personal cause of action by or against the widow? Was it a ground personal to the female heir that was taken in a previous suit? Was it a claim by or against the widow personally or the inheritance which she represented? To decide these questions the Court must examine the averments the issues and the findings in the previous suit. If the contentions raised are those connected with the inheritance and the trial was with reference to them the widow must be held to be representing the estate, if not the litigation must be deemed personal to her and not binding upon the reversioners. (*Spencer and Venkata. subba Rao, JJ.*) POTHUKUCHI RAJAGOPALAN v. V. RAMAMOORTHY. 18 L. W. 491 : 73 I. C. 284

———S. 11—Expln. VI—Public right—Issue decided in prior litigation—*Res judicata*.

Where the ownership of a deal was in dispute between the trustees of a mosque and the Municipality and was decided against the former, they cannot in a subsequent suit by the public set up their rights to it. (*Walsh and Ryves JJ.*) RAM CHAND v. MAULA BAKSH. 21 A. L. J. 882 :

L. R. 4 A. 553.

C. P. CODE (1908), s. 13.

———S. 11 Ex. VI—Representative suit—Malabar Tarwad—Suit by karnavan—Dismissal—Subsequent suit by junior members as Uralan—*Bai*.

The karnavan of a tarwad brought a suit for the recovery of certain property on the ground that the tarwad was entitled to them as the heir of the last owner. The court dismissed the suit on the ground that the last owner of the property followed the Makkathayam Law and that the plaintiff was not proper heir under that law. In a subsequent suit by the junior members of the tarwad for recovery of the property held by the last owner as Uralan held that the decision in the prior suit that the last owner followed Makkathayam Law and that therefore the plaintiff's tarwad was not the heir was *res judicata* and the present suit was therefore unsustainable. (*Schwabe, C. J. and Wallace, J.*) KOONAMVALLI UNNARA v. K. P. KUNHI RAMAN. 44 M. L. J. 443 : 17 L. W. 322 : 32 M. L. T. (H. C.) 146 : 72 I. C. 582 : 1923 Mad. 514.

———S. 11 Expln. VI—Representative suit—Malabar tarwad—Decision against—Decision of appellate Court operates as *res judicata*.

A decree in suit in which the karnavan of a tarwad is joined as a defendant in his representative capacity and which he honestly defends is binding on the other members of the family though not actually made parties. In considering the plea of *res judicata* it is the judgment of the appellate court that has to be looked to. 20 M. 129. 3 C. 145 : 9 L. W. 84 Ref. (*Spencer and Devadoss, JJ.*) ABUVAKKAR v. KUNHIKUTTIYAL.

74 I. C. 27 : 1923 Mad. 153.

———S. 11 Expln. VI—Representative suit—Rights claimed individually and in common with others—Decision when *res judicata*—Compromise decree.

Where a prior suit was brought by four persons claiming to be trustees of a temple for recovery of certain lands belonging to the temple and the suit was compromised by two of the trustees and the compromise was found to be *bona fide*, Held that a subsequent suit by other persons for recovery of the same temple lands was barred by *res judicata*. It is not necessary to attract the operation of S. 11 Expln. VI C. P. Code that the former suit should have been instituted with the leave of the Court under O. 1, R. 8, C. P. C. (*Ayling and Odgers, JJ.*) CHENRAYA GOUNDAN v. ATHAPPA GOUNDAN.

18 L. W. 177 : (1923) M. W. N. 545 : 75 I. C. 336.

———S. 13—Foreign judgment—Suit on—Plea of want of jurisdiction—Merits if open.

When a suit is brought in British India on a foreign judgment and it is pleaded that the foreign court had no jurisdiction but it is found the defendants appeared and contested in the claim the plea is open.

The general rule in such case is that one court which entertains a suit on a foreign judgment cannot institute an enquiry into the merits of the original action or the propriety of the decision. (*Piggott and Stuart, JJ.*) GANGA PRASAD v. GANESHI LAL. 21 A. L. J. 890 : 4 A. 604.



C. P. CODE (1908), S. 16.

—S. 16—*Proviso*—'defendant'—*What it includes*.

The word 'defendant' in the proviso to S. 16, C. P. C., means all the defendants where there are more than one defendant in the suit 21 W.R. 303 1011. (*Chatterjee and Panton, JJ*) MAHO MED YASIN v. BIMOLA PRASAD MUKHERJEE.

73 I. C. 405.

—Ss 16 (b) and 20 (c)—*Suit for declaration that a will is a forgery—Determination of right to immoveable property—Cause of action Jurisdiction*.

A suit by a Hindu reversioner for a declaration that a will set up by the widow of the last male owner was a forgery and for its cancellation can be instituted under S. 20 (c) C. P. Code in a court having jurisdiction over any one of the places where any part of the properties dealt with by the will is situate. Such a suit is not one falling within S. 16 (d) of the C. P. Code. In a suit to set aside a will the plaintiff's allegation of interest and the threat to his rights are parts of his cause of action and where the properties are situate within different jurisdictions part of the cause of action arises under each jurisdiction. (*Krishnan and Venkatasubba Rao, JJ*) NITTALA ACHAYYA v. NITTALA YELLAMMA.

72 I. C. 920 : 1923 Mad 103.

—Ss. 17 and 20—*Cause of action—Sale of goods—Agreement to pay price and render account—Forum*. See (1922) DIG. COL. 166. LAL SINGH v. THE FIRM OF HAJI KADIR BAKHSI.

69 I. C. 424.

—S. 17—*Ex parte decree—Setting aside—Security—Power of Court to determine nature and extent of*.

It is open to the Court in setting aside an *ex parte* decree to direct whether the security should be paid in cash or in property and if it gives direction one way or the other a reasonable time has to be allowed for carrying out that direction (*Kanhaya Lal, J. C.*) SITA RAM v. LALTA,

9 O. &amp; A. L. B. 67 : 73 I. C. 219.

—S. 20—*Carrying on business at a place*.

Where the defendants had no permanent office at Amritsar but there was only a travelling agent residing at that place who secured orders for them and forwarded them to the Head Office at Calcutta, but he had no power to enter into any contract or to receive any on behalf of the defendants. Held that the defendants cannot be said to be carrying on business at Amritsar. (*Moti Sagar, J.*) FIRM OF HIRA NAND MURLIDHAR v. FIRM OF GURMUKH RAI.

73 I. C. 205 : 1923 Lah. 427.

—Ss. 20 and 21—*Cause of action—Suit for rent—Jurisdiction—Residence of defendant—Waiver of objection—B. T. Act, S. 14—Execution sale—Legality of*.

Reading Ss. 20 and 21 of the C. P. Code together with S. 144 of the B. T. Act a suit for rent may be instituted in the court within the local limits of the jurisdiction of which lies the property in respect of which a suit for possession may have been brought. This however does not exhaust all the provisions of S. 20, C. P. Code, Cls. (a) and (b), of

C. P. CODE (1908), S. 20.

S. 20 C. P. Code allow a landlord to institute a suit for rent where the tenant resides. This must obviously be limited to cases where the landlord seeks a decree for money. Where, however, the landlord seeks a decree for rent as also ejectment under S. 66 of the B. T. Act the suit must be treated as one for the recovery of immoveable property within the meaning of S. 16 (4) C. P. Code and can consequently be instituted in the Court within the local limits of whose jurisdiction the property is situate. A suit for the recovery of rents of lands situate in one District may be brought in another district where the defendant is residing, although in such suits the plaintiff's title to the land in respect of which the rent is sought to be recovered may incidentally come in question.

Where a court has no jurisdiction over immoveable property it cannot validly sell it in execution of a decree except in the one case provided by O. 21, R. 3, C. P. Code. Where a court sells immoveable property entirely outside its jurisdiction, the sale is a nullity. It is an elementary principle of law that if a court has no jurisdiction over the subject matter its judgments and orders are mere nullities and may not only be set aside at any time by the court in which they are rendered but declared void by every court in which they are presented. If a Court has no jurisdiction, its judgment is not merely voidable but void and it is wholly unimportant how precisely certain and technically correct its proceedings and decisions may have been; if it has no power to hear and determine the cause, its authority is wholly usurped and its judgments and orders are the exercise of arbitrary powers under the forms but without the sanction of law. These principles apply not only to original courts but also to Courts of Appeal. Accordingly where an appellate court does not possess jurisdiction to review the action of the court below, jurisdiction cannot be conferred upon it by consent of the parties; and any waiver on their part cannot make up for the lack or defect of jurisdiction. 38 C. 639; 9 All. 191; 11 M. 26 Ref.

The provisions of S. 21 C. P. Code are an exception to the well established rule that where the Court has no inherent jurisdiction over the subject matter of a suit its decree is a nullity even though the parties may have consented to the jurisdiction of the court. This exception cannot be so interpreted as to have a wider application than what is justified by its terms. When the Judge has no inherent jurisdiction over the subject matter of a suit, the parties cannot, by their mutual consent, convert it into a proper judicial process, although they may constitute the Judge their arbitrator and be bound by his decision on the merits when these are submitted to him. This however can be accomplished only when the parties have expressly consented to such a procedure. (*Mookerjee and Chozner, JJ*) KUNJA MOHAN CHAKRAVARTHY v. MANINDRA CHANDRA ROY CHOWDHURY.

27 C. W. N. 542 : 1923 Cal. 619.

—S. 20—*Jurisdiction—False allegations—Abuse of the process of court*.

Where in order to bring a suit within the jurisdiction of a court of a particular locality, the

## C. P. CODE (1908), S. 20.

plaintiff makes false statements knowing them to be false that is a fraud on the court and the court would have no jurisdiction to entertain the suit *Meas, C. J. and Banerjee, J.*) ABDUL GHAFUR v NURUDDIN AHMAD. 45 A. 193 : 71 I. C. 411 1923 A. 137 (2).

## —Ss. 20, 115—Question of jurisdiction.

No hard and fast rule as to revision can be laid down in cases of decisions as to jurisdiction under S. 20 and each must be decided on its own merits. Ordinarily, interference in revision is inadvisable in such cases and should only be exercised in exceptional cases to remedy an injustice. Where the defendant is by law entitled to have the case tried at Patna, it will be a grave injustice to him to insist on its trial in Jagraon in the Punjab which will put him to a very great expense merely because the trial Court has erroneously held that the Jagraon Court has jurisdiction. (*Moti Sagar, J.*) THE FIRM SITA RAM RAM DHAN v. THE FIRM BENARSI DAS PURAN CHAND. 1923 Lah. 565

## —S. 20—Suit for price of goods or for recovery of money—Jurisdiction.

Ordinarily, if goods are purchased or money is borrowed, the payment for the goods or repayment of the money must be presumed to have been agreed to be made at the place of residence of the seller or the lender as the case may be. (*Banerji, J.*) BANGALI MAL v. GANGA RAM. 71 I. C. 431 : 1923 A. 465 (1).

## —S. 20 (c)—Cause of action—Collusive and fraudulent decree—Suit to set aside decree—Jurisdiction of Court

Plaintiff obtained a decree against a person and attached his properties at Amritsar. The defendant who professed to have a decree of the Ferozepur court against the same person got it transferred to Amritsar and applied for rateable distribution along with plaintiff. Thereupon the plaintiff sued for a declaration that the decree obtained by the defendant was fraudulent and collusive. Held that the Amritsar court had jurisdiction to try the suit. 25 A. 48 ; 37 A. 189 ; 39 A. 607 Rel. (*Abdul Raouf*) BALLA MAL v. JAGAN NATH. 72 I. C. 392

## —S. 20 (c)—Cause of action—Facts constituting breach of contract, it, part of the cause of action in suit for damages for breach—Jurisdiction. See (1921) DIG. COL. 148. RAIPUR MANUFACTURING CO. LTD. v. JOOLAGANTI VENKATASUBBA RAO. 70 I. C. 284.

## —S. 20 (c)—Contract for sale of goods—Breach—Damages—Place of suit.

The plaintiff was a resident of Yeotmal. The defendants carried on business in Bombay as commission agents. The plaintiff sent some bales of cotton to the defendants for sale in Bombay. He alleged that the defendants did not sell the bales on the day which they were instructed to sell them, that they described them as of a quality inferior to the real quality and that they thus failed to realise their proper value. He sued for damages occasioned by the defendants' conduct in the Court of the Subordinate Judge, Yeotmal. Held that suit was properly framed

## C. P. CODE (1908), S. 21.

(*Kotwal, A. J. C.*) CHAGAN LAL v. ABOOBAKAR. ABDUR RAHMAN & Co. BOMBAY.

Nag. 167 : 72 I. C. 465 (1923).

—S. 20 (c)—Decree—Setting aside—Cause of action. See (1922) DIG. COL. 168 THE INDIAN PROVIDENT CO., LTD. v. GOVINDA CHANDRA DAS. 27 C. W. N. 359 1923 Cal 425.

## —S. 20 (c)—Insurance policy—Suit on—Cause of action—Place of occurrence of damage.

For the purpose of S. 20 C. P. Code, the words "cause of action" so far as suits on contract are concerned include the making of the contract and the performance or completion of performance of the contract and the payment of money under the contract. In cases based on a policy of insurance, they do not include the loss or damage of the property insured which is merely a cause of the Cause of action.

The English definition of 'Cause of action' is not to be applied in all cases to India—Case law and the difference in legislative enactments pointed out. (*Heald and Lentaigue, JJ.*) JUPITER GENERAL INSURANCE COMPANY v. ABDUL AZIZ. 1 Rang. 231 : 1924 Rang. 2.

## —S. 20, CL (c)—Jurisdiction—Breach of contract for sale of goods—Place of delivery—Suit instituted in.

The plaintiff—firm residing in Gujranwalla arranged with defendant firm residing in Calcutta to purchase certain goods and send them to Gujranwalla; the plaintiff—firm was to send the money to Calcutta to the defendant. The plaintiff remitted Rs. 800 to the defendant and the latter consigned the goods to itself in Gujranwalla sending the railway receipt by value payable note for the balance of the price. The plaintiff refused to take delivery of the railway receipt through the value payable note and it was returned to the defendant. Subsequently it turned out that the goods were lost and the plaintiff sent the balance of the purchase price and asked for the delivery of goods. The defendants could not comply with the plaintiff's request. In a suit for damages instituted by the plaintiff at the Gujranwalla Court held that the goods had to be delivered under the contract at Gujranwalla, that the non-delivery formed a part of the cause of action and that the plaintiff's suit was maintainable in the Gujranwalla Court. 39 M. 195 ; 77 P. R. 1909 ; 65 I. C. 282 ; 43 A. 334 referred to. (*Scott-Smith, J.*) FIRM OF JAGANNATH DIWAN CHAND v. JAGANNATH MOTI LAL. 71 I. C. 38.

## —S. 21 and O. 41, R. 23—Remand by appellate Court—Jurisdiction to try.

The jurisdiction of the Court trying a remanded case depends entirely on the order of remand.

Where, therefore, the High Court remanded a case for trial by the Munsif's Court of Madura Town, held, that the Court of Madura Taluk, which was a different Court altogether had no jurisdiction to deal with it or pass any orders in it. Neither S. 21, C. P. C. in terms nor any principle underlying it is applicable to the case. (*Krishnan, J.*) UTHUMAN AMMAL v. NAINA MAHOMED ROWTHER. 44 M. L. J. 238 :

17 L. W. 355 : (1923) M. W. N. 194 :

32 M. L. T. (H. C.) 276 : 72 I. C. 314 :

1923 Mad. 351.

## C. P. CODE (1908), S. 22.

—Ss 22 and 23—*Balance of convenience.*

Where the dealings all took place at Karachi, the persons from whom goods were brought and to whom goods were sold, by the petitioners were at Karachi, and all the accounts relating to the dealings in question were at Karachi, *Held* the balance of convenience was greatly in favour of the case being tried at Karachi (*Martineau, J.*)  
BANARSI DAS v. KISHI LAL.  
72 I. C. 592  
1923 Lah. 383.

—Ss. 22, 23 and 24—*Transfer of case—Grounds for—Transfer to Original side of the High Court.*

The right of a plaintiff to institute a suit in a court in which the law permits him to sue should not be interfered with by the High Court in the exercise of its extraordinary jurisdiction unless the suit is brought in bad faith for the purpose of working injustice to which the defendant would not be subjected if the suit were brought in another competent court. The mere fact that it would be more convenient to the defendant to have the suit tried in another forum is no ground for the transfer. Ss. 22 and 23 C. P. Code do not provide for the transfer of a case from a court subordinate to one High Court to the Original side of another High Court. 12 C. W. N. 446 dist. 1 Pat. L. T. 389 Ref. 27 M. L. J. 645 approved 44 A. 278 Ref. (*Campbell, J.*) PRAGH SOORJI & CO. BOMBAY v. KALL MAL SHOKI MAL & CO  
69 I. C. 772.

—SS. 22, 23—*Transfer of case—Principle guiding.*

The plaintiff has always a right to choose his forum with this right. The jurisdiction conferred by S 22 and 23 C. P. C. is of an exceptional character and should be exercised very cautiously and only when a clear cause has been shown. The mere fact that it would add to the defendant's convenience to have a transfer is no ground for transferring a case (*Shadi Lal, C. J.*)  
PANDIT ROOP CHAND v. GOKAL CHAND.  
73 I. C. 860.

—Ss. 22 and 23—*Transfer of suit—Choice of forum.*

It is only when a suit may be brought in one or other of two courts, both of which have jurisdiction that an application can be made under Ss. 22 and 23 of the C. P. C. Where the jurisdiction of one Court is denied an application for transfer under these sections cannot lie. 12 A. L. J. 985 followed. (*Abdul Qadir, J.*) THE NATIONAL ENGINEERING CO. v. THE RATTAN ENGINEERING CO.  
71 I. C. 268. 1923 Lah. 288 (2).

—Ss. 22, 23, *Transfer—Grounds for.*

A transfer of a case ought generally to be made only on strong grounds.

Where it was established that almost all the evidence would be available only at the place to which a transfer is applied for, the convenience and interest of both parties would be secured by ordering a transfer. Such applications should be made as early as possible. (*Abdul Raoof, J.*)  
RAMJI DAS v. THE FIRM BRIJ LAL JAGAN NATH.  
69 I. C. 239.

—S. 23 (3)—*Transfer of suit—Chief Court—Original Side—Application to be made to which Court.*

## C. P. CODE (1908), S. 24.

For administrative purposes the Original side of the Chief Court of Burma is not subordinate to the Appellate Side but for the purposes of appeal it is subordinate. Consequently an application for the transfer of a suit from the original side of the Chief Court may be made to the appellate side. (*Robinson, C. J. and Duckworth, J.*) RAMANATHAN CHETTY v. RAMANATHAN CHETTY.  
1923 Rang. 22.

—S. 24—*High Court's powers—Evidence concluded in one Court.*

In a suit concerning land dispute, a court which really had no territorial jurisdiction went into the case elaborately, made local inspections and recorded evidence fully, when the defect was found out. Then the plaint was returned to be presented to the proper Court. *Held*, it was a proper case in which under S. 24, the High Court should send it for disposal to the first Court itself. (*Piggott and Walsh, JJ.*) NAND RAM v. HIRA DEI.  
21 A. L. J. 86 : L. R. 4 A. 311 : 73 I. C. 495 (2) :  
1923 A. 249.

—S. 24—*Transfer of case—Adverse decision on a point of law in a connected suit. See (1923) DIG. COL. 170. FIRM OF JAI NARAIN BABULAL v. THE FIRM OF NARAIN DAS JAINI MAL,*  
69 I. C. 585.—S. 24—*Transfer of case—Grounds for—Balance of convenience.*

A plaintiff has an undoubted right to bring his suit in any court which has jurisdiction but there is no particular sanctity to be attached to this right. If the defendants can show a clear balance of advantage in the way of convenience and expense they are entitled to have the case transferred (*Ashworth and Simpson, A. J. C.*) THAKUR NARINDRA BIKRAM JIT SINGH v. SHEO RATAN THAKUR.  
69 I. C. 717 : 1923 Oudh. 30.

—S. 24—*Transfer of case—Notice to opposite party—Necessity for.*

There can be no question that a District Judge should give notice to the other side when dealing with a transfer case on the application of one of the parties and not *suo motu*. His failure to do so is certainly an irregularity. (*Ashworth, A. J. C.*) KARIM BAKHSH v. ABDUL HUQ.  
26 O. C. 62 :  
74 I. C. 249. 1923 Oudh. 240.

—S. 24 *Transfer of suit—Reasonable apprehension.*

Reasonable apprehension on the part of a litigant should receive consideration when a transfer is applied for but at the same time the apprehension must be such as a reasonable man might reasonably be expected to have (*Broadway, J.*) KHWAJA AHAD SHAH v. MT. AYSHAN BEGUM.  
1923 Lah. 564.

—S. 24—*Transfer without notice ex parte decree.*

It is always usual to issue notices to the parties informing them that a case has been transferred from one court to another and in the absence of such a notice a party may well plead that he did not know in what court he had to appear. (*Moti Sagar, J.*) GANGA RAM v. GUJARMAL.  
1923 Lah. 444.

## C. P. CODE (1908), S. 24.

—S. 24 (4)—*Small Cause Court—Transfer of suit to regular jurisdiction—Appeal*

Where a suit instituted in a Small Cause Court is transferred for trial by the District Judge to a Court not invested with such powers, there is no appeal from the decision of such court. The suit remains a small cause one in spite of the transfer. 38 M. 25; 27 C. L. J. 461; 31 B. 314 F. B. Foll. (*Coutts and Adams, JJ.*) BHAGWAN DAS v. KESHVAR LAL. 1 Pat. 696  
69 I. C. 681 (2); 4 Pat. L. T. 259; 1 Pat. L. R. 186; 1923 P. 49.

—S. 26—*Plaint—Presentation—Mode of—Delivery of plaint at private residence of Judge.* See (1922) DIG. COL. 170 MADHORAU v. MANOHAR LAL. 19 N. L. R. 23

—S. 27—*Suit duly instituted—Meaning of—Dismissal of suit for non-payment of deficit court fee—Review without notice to other side.* (1922) DIG. COL. 170 SURENDRA PRASAD LAHIRI CHOUDHURI v. AFTABUDDIN AHMED. 69 I. C. 43

—S. 34—*Post diem interest—Damages—Measure*

Where there is no express stipulation for the payment of interest after the due date, the mortgagee is entitled to damages on account of the failure of the debtor to pay the debt at the stipulated time. The measure of damages would *prima facie* be the same as the rate of interest stipulated for by the parties. There is no rule of law making the contract rate necessarily the measure of damages, and the Court has discretion to reduce the rate if it is found to be unusual. (17 All 511. P. C. 3 Lab. 200. F. B. Ref.) (*Scott Smith and Ffroe, JJ.*) BUDHU RAM v. NIAMAT RAI. 75 I. C. 375; 1923 Lan. 632

—S. 34 (2)—*Decree silent as to interest—Effect.*

Where a decree is silent with respect to interest, the court should be deemed to have refused it. (*Spencer and Devaloss, JJ.*) AMBI v. PUDIA KOVILAGATH SRIDEVI. 45 M. L. J. 687  
(1923) M. W. N. 753; 18 L. W. 686;  
33 M. L. T. 101 (H. C.) 75 I. C. 566

—S. 35—*Costs—Discretion.*

Where the court below gave reasons for awarding costs in a particular manner and it is not shown that the principle adopted is wrong the discretion exercised by the court below should not be interfered with in appeal. (*Marten and Pratt, JJ.*) SHRIDHAR LAYMAN v. JANARDHAN. 72 I. C. 993; 1923 Bom. 37.

—S. 35—*Costs—Discretion as to—Interference with discretion of—Trial Court on appeal—Power of Second Appellate Court to interfere.*

A Court deciding a case has a discretion vested in it to award costs and where the discretion has been judicially exercised it is improper for an Appellate Court to interfere with the exercise of that discretion. Where however an appellate Court has interfered with an order as to costs passed by the first Court, the legality of the order of the 1st Appellate court can be questioned on Second Appeal. So far as apportionment of costs is concerned there is no distinction between pleas

## C. P. CODE (1908) S. 39.

based on facts and pleas based on law. An omission to provide for costs may be corrected either by review or by appeal. (*Ishworth, J. C.*) RAM KISHAN DAS v. JAGANNATH PRA-SAD.

25 O. C. 335; 73 I. C. 222; 10 O. L. J. 20;  
1923 Outh 155.

—S. 35—*Costs—Discretionary matter—Interference on appeal.*

Where a reasonable discretion has been exercised in the matter of costs the High Court will be slow to interfere. (*Daniels A. J. C.*) RAJENDRA NARAYAN v. GHAFUOR KHAN. 9 O. & A. L. R. 77;  
73 I. C. 307.

—S. 35—*Costs—Partition suit.*

The general rule is that in partition suits parties should have their own costs except with regard to the institution fee which should be borne proportionately by all the parties. (*Mackay, C. J. and Crump, J.*) HASTURIBAI MANIBAI v. BAI MAHALAXMI. 1923 Bom 464.

—Ss. 37 and 150—*Execution—Jurisdiction—Money-decree—Transfer of area where judgment-debtor lived from one court to another*

Where subsequent to the passing of a money decree the area in which the judgment-debtor lived was transferred from the jurisdiction of the court which passed the decree to that of another Court, it is open to the latter court to execute the decree. 42 M. 821; 37 M. 462 Ref. (*Oldfield and Venkatasubba Rao JJ.*) MUTHUKARUPPA CHETTY v. PAIYA KAVUNDAN.

45 M. L. J. 210 1923 M. W. N. 406;  
18 L. W. 17; 73 I. C. 936 (2); 1924 Mad 32.

—Ss. 38 and 39—*Application for execution—Step in-aid—Application to Court from which decree has been transferred for execution—Not valid.* See LIM. ACT ART. 182 2 Pat. 247

—S. 38—*Tender—Conditions* See (1922) DIG. COL. 376. NARAIN DAS v. ABINASH CHANDAR,  
27 C. W. N. 299; 69 I. C. 273;  
21 A. L. J. 201; 37 C. L. J. 457;  
44 M. L. J. 723 (P. C.).

—S. 39—*Application for transfer and execution—Difference between—Fresh application for execution when necessary* See C. P. CODE O. 21 Rr. 6. 11 (1923) Pat. 280.

—S. 39—*Decree of village Munsif's Court transferred or withdrawn to District Munsif's Court for execution—Power of District Munsif's Court to transfer decree for execution—Madras Act I of 1889, Ss 66 and 67*

A District Munsif, receiving by transfer a decree of a village Court under S 66 of Madras Act I of 1889 or, withdrawing execution of a decree to his own file under S 67 has no jurisdiction to transfer it for execution to either District Munsif's Court under S 3 of the Code of Civil Procedure. (*Oldfield and Devaloss, JJ.*) KANDOTH SANKARAN NAIR v. ATCHUTHAN.

46 Mad. 734; 32 M. L. T. (H. C.) 403;  
18 L. W. 19; 73 I. C. 792; 44 M. L. J. 643

—S. 39—*Transfer of decree—Court to which decree is transferred—Competency of jurisdiction* See (1922) DIG. COL. 172. AMRIT LAL v. MURLIDHAR. 1 Pat. 651.

## C. P. CODE (1908), S. 39.

—S. 39 (2)—*Presumption under.*

There is no presumption that when a decree is transmitted for execution to another court, it intended the decree to be executed even against properties situated within the jurisdiction of the transmitting court. (*Spencer and Devaswoss, JJ*) MAHARAJA OF JEYPORE v. RAJA LAKSHMI NARAYAN SAMMA GARU. 18 L. W. 747.

—S. 41—*Applicability—What amounts to information.*

S. 41 C. P. Code does not prescribe any particular way in which the court to which a decree is sent for execution should inform the court as regards the result of the same. Where a court has both small cause powers and original jurisdiction and a decree passed under the former is executed under the latter and an entry of satisfaction is made in the Small Cause Register, the section has been complied with.

Per *Crump, J.*:—S. 41 contemplates two different courts and cannot be applied strictly to such a case. (*Macleod, C. J. and Crump, J.*) MANIRAM PEERCHAND MARWADI v. VITHU RAMJI PATIL PANDE. 1923 Bom. 371

—S. 41—*Execution of decree—Decree sent to another court for execution—Certificate*

It does not follow that because one application for execution fails in a Court to which the decree has been sent for execution, that Court is bound to send a certificate to the Court in which the decree was passed. The judgment creditor might still be anxious to execute his decree in the former court, and it is only when the Court to which the decree is sent has executed it or has failed to execute it that the Court is bound to send a certificate under S. 41. It was intended that there should be complete failure such as would result in no benefit to the judgment creditor for one reason or another and not merely a partial failure. (*Macleod, C. J. and Crump, J.*) VITHU DAULATA PATIL v. GANESH 25 Bom. L. R. 453 : 74 I. C. 149 : 1923 Bom. 396

—S. 43 1. (a) and O. 41, R. 23—Remand under inherent power—No appeal from order. See (1922) DIG. COL. 339 SHEIK MAHOMED MARIKAYAR v. RANGASAMI NAIDU. 69 I. C. 826.

—S. 47—*Appeal against order staying execution.*

All orders staying execution of decrees are questions arising between the parties to the suit in which the decree was passed, and relating to the execution thereof, and, as such, appealable. (*Scott Smith, J.*) FITZ HOLMES v. WARYAM SINGH 75 I. C. 419 : 1923 Lah. 514.

—S. 47—*Appeal—Costs of commission—Execution—Nature of order C. P. Code S. 151.*

Proceedings in execution of an order concerning costs of a commission are under S. 151 C. P. Code and do not fall under S. 47 C. P. C. As such there is no appeal. (*Kanhaiya Lal, J.*) GOPAL DAS v. GAURI SHANKER PRASAD. 74 I. C. 186.

—S. 47—*Appeal—Issuing warrant for arrest.*

An order issuing a warrant for arrest is one falling under S. 47, C. P. C. and is appealable

## C. P. CODE (1908), S. 47.

as a decree. (*Scott Smith, J.*) MEHR CHAND v. RAM LAL. 73 I. C. 768.

—S. 47 and O. 21 Br 15 and 16—*Appeal—Joint-decree—Transfer by one of the decree-holders—Adjustment—Effect of*

Disputes among co-decree-holders as to the right of one to execute a joint decree to the exclusion of the other are not questions arising between parties to a suit. Disputes between judgment-debtors *inter se* as to the possession of the property after satisfaction of a decree would not come under S. 47. To come within the category of S. 47 they must be questions arising between persons opposed in interest in the suit and not between a party to a suit and his own representative. 25 Bom. 631 : 31 M. L. J. 44 referred to. Persons may be parties opposed to each other without necessarily being arrayed as plaintiff and defendant respectively in the suit. No appeal is provided against an order under O. 21, R. 15 or R. 16 C. P. C. 23 Bom. 623 Referred to.

It is only such orders as determine questions arising between parties to the suit or their representatives that become appealable as decrees passed under S. 47 C. P. C. 17 Mad. 394 : 1918 M. W. N. 507 referred to. A question whether a decree has been discharged is one relating to the execution, discharge or satisfaction of the decree and to allow one of several joint decree holders who have already received payment to come in and apply for execution after the other decree-holders have certified discharge of the debt would open the door to fraud and defeat the object of O. 21, R. 15. A joint decree was transferred after adjustment to the other decree holders to one of the decree holders. The transfer was recognised after notice to the decree-holders who had satisfied the decree, but there was nothing in the notice sent to them that there was any question raised as regards the validity of the transfer. On a subsequent application for execution of the decree by the transferee held that it was open to the other decree-holders to object to the execution on the ground that the decree had been paid off by themselves and that the transferee took the decree with the knowledge thereof. (*Spencer and O'Leary, JJ*) BUDARAJU HANUMANTHA ROW v. ALLAMNENI KRISHNAMMA. 70 I. C. 329 : 32 M. L. T. (H. C.) 118 (2).

—S. 47 and O. 21, R. 58—*Appeal—Objection petition of judgment debtor—Dismissal of—Order not appealable* See (1922) DIG. COL. 173. SHAIKH NAZIR HUSAIN v. MAHOMED EJAZ HUSAIN. 1 Pat. 637.

—Ss. 47 and 73—*Appeal—Order dismissing application for rateable distribution—Nature of.*

Where the Court below dismisses an application for rateable distribution on the ground that it has not been validly presented before the money was paid out to other creditors, the order is not appealable and the remedy of the aggrieved party is by suit. (*Oldfield and Venkatasubha Rao, JJ.*) SOMASUNDARAM CHETTIAR v. SUNDARESA RAO. 32 M. L. T. 155 (H. C.)

—S. 47 and O. 43, R. 1—*Appeal—Order dismissing execution application for default.*

An order dismissing an application for execution for default of the decree-holder is not

C. P. CODE (1908), S. 47

appealable (*Jwala Prasad and Bucknill, JJ*)  
GOUR CHANDRA ROY v. JANARDAN PRASAD  
THAKUR, 4 Pat. L. T. 204 : 1923 P. 180.

—S. 47—*Appeal—Pre-emption decree—Question of payment in time.*

The question whether payment was made in time of the money required to be deposited under a pre-empt on decree is one affecting the discharge or satisfaction of a decree and as such falls under S. 47 C. P. C. (*Kanhaya Lal J. C.*) NILKHANATH v. MAHABIR SINGH. 26 O. C. 315 : 74 I. C. 558 : 9 O. & A. L. R. 207.

—S. 47—*Appeal—Restoring possession to judgment-debtor—Conditional decree—Execution granted under misapprehension.*

A conditional decree cannot necessarily be treated as a preliminary decree and the order, restoring possession to the judgment-debtor on the ground that the possession was given to the decree-holder under a misapprehension that the decree-holder had satisfied the condition which he had not, is of the nature of a final decree. The order, however, is an order passed in the execution department from which an appeal could be preferred under the provisions of S. 47, C. P. C. (*Daniels, J. C.*) DORI LAL v. MT. JAMAGA. 72 I. C. 879 : 1923 Oudh 16.

—S. 47, and O. 21, R. 66—*Appeal—Sale proclamation—Notification of encumbrances—Objection by judgment-debtor.*

On the application of the decree holder encumbrances existing on the property attached were notified in the sale proclamation. The judgment-debtor applied under S. 47 for an order that the properties could not be sold subject to encumbrances. The objection was allowed and the decree-holders appealed. On a question arising as to whether the order of the court was appealable held that the application of the judgment-debtor did not raise any question as to the terms on which the sale proclamation should be settled but it raised the question whether the Court could sell the property subject to the encumbrances and that the question was one relating to the execution of the decree and that the order was therefore appealable. (*Das and Adams, JJ.*) WILLIAM MALING GRANT v. SURAJ MAL MARWARI. 72 I. C. 860 : 1 Pat. L. R. 53 : (1923) Pat. 76 : 1923 P. 134.

—Ss. 47 and 144—*Applicability of—Execution sale—Property alleged to have been wrongfully sold in execution—Restitution.*

Where the judgment debtors apply for restitution of property purchased by the auction purchaser at an execution sale on the ground that the decree holders had sold certain property not covered by the decree, Held that the application was not maintainable under S. 47, C. P. C. (*Stuart and Kanhaya Lal, JJ.*) MUNNA LAL v. THE COLLECTOR OF SHAHJAHANPUR. 45 All. 96 : 74 I. C. 995 : 1923 A. 470.

—S. 47—*Applicability—Failure to issue notice under O. 21, R. 22—Execution sale sought to be set aside—Sec and appeal.* if hes. See C. P. CODE O. 21, R. 90. (1923) Pat. 283

—S. 47—*Applicability—Questions between judgment debtors—Sale proclamation—Order in which properties to be sold—If within section—Appeal.*

C. P. CODE, (1908) S. 47.

A decision of an executing court as to the order in which properties were to be sold in execution, even though it is a question between judgment debtor's only, is one relating to execution, discharge or satisfaction and as such appealable under S. 47 C. P. Code. The section is not limited in its application to questions arising only to parties who are opposed to each other in the suit. (*Oldfield and Davadoss, J.*) VEDAVYASA AIYAR v. THE MADURA HINDU LABHA NIDHI CO., LTD. 18 L. W. 311 : (1923) M. W. N. 662 : 45 M. L. J. 478.

—S. 47—*Attachment of assets of deceased judgment debtor execution—Claim by reversioner allowed in suit of decree-holder—Maintainability.* see C. P. CODE, O. 21, R. 63. 71 I. C. 1012.

—S. 47—*Bar of suit—Execution proceedings against minor—No affidavit as required by O. 32, R. 3—Failure of guardian to appear—Suit to declare sale a nullity—Limitation.* See (1922) DIG. COL. 174 ALAM DIN v. ALLAH DAD. 5 Lah. L. J. 44.

—S. 47 and O. 21, R. 90—*Bar of suit by auction purchaser for possession—Defence that sale was invalid—No bar.* See (1922) DIG. COL. 150 MUNISHI CHINA DANDUSI v. MUNISHI PEDDA THATIAH. 70 I. C. 303.

—S. 47—*Bar of suit—Objection if can be raised by way of defence.* See (1922) DIG. COL. 175, SURADHANI DUTTA v. SITOO SHEIKH. 27 C. W. N. 280 : 33 C. L. J. 17 : 71 I. C. 378.

—S. 47—*Bar of suit—Plea of sale of property beyond decree.*

Where the purchaser of part of the mortgaged property was a party to the mortgage suit and could have pleaded in execution that the mortgagor had mortgaged property to which he had no title, a separate suit by him for a declaration, that the decree-holder auction purchaser is not entitled to that part does not lie. (*Stuart, J.*) KAI BAHADUR PANDIT SADANAND PANDEY v. SHEIKH JUFAIL AHMAD. 1923 All. 115.

—S. 47—*Bar of suit—Sale—Agreement by one decree holder to pay others—Failure to do so—Fraud—Suit to set aside sale.*

One of several decree holders agreed to pay the others as a consideration for a sale of land to him their share of the decree debt but failed. The others executed the decree and sold the judgment-debtor's property. Held an application to set aside the sale will not lie under S. 47, but a suit would be maintainable. (*Gokul Prasad, J.*) NARAIN SINGH v. ZALIM SINGH. 74 I. C. 351 (2) : 1923 A. 573.

—S. 47—*Bar of suit—Suit against auction purchaser for property sold—Judgment-debtor having no interest.*

Where property is sold in execution of a decree, but the judgment debtor has no interest in the property sold, a suit will lie against the auction purchaser for the recovery of the same. (*Kanhaya Lal, J.*) BALWANT SINGH v. MT. LAIGA BEGAM. L. B. 4 A. 526 : 75 I. C. 238.

—S. 47 and O. 21, Rr. 90 and 92—*Execution sale—Absence of attachment—Suit to set aside—Limitation.*

## C. P. CODE (1908), S. 47.

An objection as to the defect or absence of the necessary attachment before an execution sale involves a substantial question as to the absence of proper notice to the judgment-debtor as to the property attached which does not come within O. 21, R. 90 C. P. Code but comes within S. 47. Consequently where an application is made to set aside an execution sale on the ground of want of attachment, a second appeal lies. An application to set aside an execution sale on the ground of the absence of a proper attachment is governed by Art. 166 of the Limitation Act. The absence of attachment though an irregularity does not render the sale a nullity. (*Lentaigne, J.*) *MA PWA v MAHOMED TAMB* 1 Rang 533

—S. 47 and O. 21, R. 90—Execution sale—Setting aside—Fraud—Plea of purchaser without notice.

Judicial sales fraudulently procured will not give a good title to a purchaser who does not take in good faith and without notice. The fact that the Court has been successfully deceived is one which, upon the issue as to the purchaser's good faith, must be of a very different value in different circumstances. In all cases the burden of proving that he acted in good faith and without notice of the fraud is in the first instance upon the purchaser. This is an essential feature of the equitable rule. The rule is not that there is a special favour or every one until he is shown to have been dishonest or a volunteer, but that equity where it can will favour those who show that in innocence they have given value. *Per Mookerjee, J.* The protection given to the bona fide purchaser had its origin exclusively in equity and is based entirely upon the conception that a Court of equity acts solely upon the conscience of litigant parties, by compelling the defendant to do what, and only what, *in foro conscientiae*, he is bound to do. If the relation between the two contestants standing before the Court are such that, in equity and good conscience, the plaintiff ought to obtain the aid which he asks, and the defendant ought to do or suffer what is demanded of him, then the Court will interfere and grant the relief, if the relations are not of this character then the Court will withhold its hand and will leave the parties where they stand. The protection given to the bona fide purchaser, therefore, simply means that from the relations subsisting between the two parties, specially that which is involved in the innocent position of the purchaser, equity refuses to interfere and to aid the plaintiff in what he is seeking to obtain, because it would be unconscientious and inequitable to do so; the Court will not, in such an event, aid either party against the other. The doctrine of bona fide purchase is thus not a rule of property. It does not determine the question of title between parties. It is in most cases available only by way of defence. It is a shield in the hands of a defendant, to protect him against the claim of his adversary. It means that equity will refuse to interfere to aid the plaintiff in his suit, because under the circumstances of the case, it would be unreasonable that the plaintiff should have what he seeks to obtain. It enforces no right, but simply refuses to interfere in the plaintiff's behalf.

## C. P. CODE, (1908) S. 47.

An execution sale which has been brought about by the fraud of the decree-holder is liable to be set aside on that ground by application to the executing Court, even though it is not proved that the auction-purchaser, a stranger, has participated in or been cognisant of the fraud. Subject to the conditions prescribed by O. 21, R. 90 C. P. Code an execution sale may be set aside on the ground of fraud precisely in the same manner as on the ground of irregularity and exercise of this power by the Court is not excluded in cases where the purchaser falls within the category of bona fide purchaser for value without notice 6 C. W. N. 383, 4 C. W. N. 538, 26 C. 539 referred to. (*Mookerjee and Rankin, JJ.*) *BINESWAR GHOSH v. PANDICOURI GHOSH* 37 C. L. J. 145 : 27 C. W. N. 587 : 74 I. C. 975 : 1923 Cal. 538.

—S. 47 and O. 21, R. 90—Execution sale—Setting aside—Property included in decree by mistake and sold in execution—Suit for recovery of—Maintenance.

Where property outside the suit had been included by a mistake in the decree and was sold in execution and 2 years after the sale and its confirmation the plaintiff sued for the recovery of the property or its value, held, that the suit could not lie until the court sale was set aside, if not being a nullity and that the plaintiff not having set aside the sale within the period prescribed by Art. 166 of the Limitation Act the suit was barred. (*Macleod, C. J. and Goyajee, J.*) *NAGABHATT v. NAGAPPA.* 1923 Bom. 62.

—Ss. 47 and 144—Execution Sale—Auction purchaser—Decree declared to be invalid—Right to apply for refund of purchase money.

An auction-purchaser of property sold in execution of a decree is not bound to look beyond the decree. When, therefore, he purchases property in execution of a decree which subsequently turns out to be invalid, he is entitled to recover it from the defendants who are in equity bound to refund it. An application for refund of the sale price can be made by the auction-purchaser under S. 47 of the Civil Procedure Code. 40 M. 299 : 43 M. 107 ; 4 Bom. 411 ; 44 A. 266 referred to. (*Lindsay Ryves and Daniels, JJ.*) *BINDESHRI PRASAD TEWARI v. BADAL SINGH.* 21 A. L. J. 228 : 45 A. 369 : 74 I. C. 873 : 1923 A. 394.

—S. 47 and O. 21, Rr 92 and 103—Execution sale—Decree holder selling his own properties by mistake—Confirmation of sale—Remedy of decree holder. See (1922) Dig. Col. 175 *RAMASWAMI KONAN v. KOLANDAIVELU ILLAI.* 70 I. C. 569.

—S. 47—Parties—Meaning of—Legal representative of judgment debtor impleaded objection to attachment as trustee—Appeal it lies. See C. P. Code O. 21, R. 60. L. R. 4 All. 447.

—S. 47—Parties and representatives—Auction purchaser—Not a representative of judgment-debtor.

An auction purchaser is not a representative of the judgment-debtor and he cannot apply under S. 47, C. P. Code to set aside an execution sale. 34

## C. P. CODE (1908), S. 47.

M. 417; 42 B. 411 Ref. (*Prideaux, A. J. C.*)  
BALWANT v. RATAN LAL. 1923 Nag. 161 (2).

———S. 47—*Parties and representatives—suit against a person setting up title of a third person—Subsequent suit impleading that person—Prior decision if a bar.*

A sued B for a declaration that he was entitled to receive rent at a certain rate from him and that B was a tenant under C and bound to pay rent to A as part of the settlement between them. In a prior rent suit by A against B the latter had set up that he held the land not under A but under C who was not a party to that suit. The prior suit had been dismissed. *Held* that the decision in the prior suit was no bar to the trial of the issue as to B's liability for rent. 26 C. 428 1011. (*Greaves and Ghose, JJ.*) GOPINATH v. BHAAHARI DAS.

1923 Cal. 327 (2).

———S. 47—*Parties and representatives—Representation of judgment debtor.*

A purchaser at a revenue sale of the interest of the judgment-debtor after a decree for sale on a mortgage had been passed against him is a representative of the judgment-debtor and as such entitled to apply to set aside the sale under O. 21, R. 99, of the C. P. Code. (*Das and Adami, JJ.*) DHAROHAR SINGH v. RAM PRASAD NARAYAN SAHAI 1 Pat. L. R. 139; 72 I. C. 862.

———S. 47 and O. 21, R. 101—*Parties and Representatives—Auction-purchaser in execution sale—Stranger purchaser.*

An auction-purchaser at a sale in court auction in execution of a decree is a stranger to the suit. He is not a representative of any of the parties to the suit. Any question arising between him and the parties to the suit or their representatives must be determined by a separate suit. The question as to the legality of the sale raised by the judgment debtor is one between the parties to the suit (*i.e.*) between the decree-holder and the judgment-debtor. Even though the auction purchaser is interested in the result of the case, the judgment-debtor cannot bring a suit to set aside the sale 34 B. 540 1011. (*Macleod, C. J. and Crump, J.*) BAIMANI v. KANCHODLAL.

25 Bom. L. R. 147; 72 I. C. 256.

1923 Bom. 214.

———S. 47—*Pre-emption Decree—Question of title to standing crops not one under S. 47.*

Where a pre-emption decree was silent as to standing crops *Held* that the question whether the crops passed with the land cannot be said to have arisen in execution, discharge or satisfaction of the decree. (*Kotwal, A. J. C.*) BAPU v. VITHOBA.

1923 Nag. 327.

———S. 47—*Questions relating to execution—Decree for possession of share in Ijmal Mahal—Partition—Enquiry into shares. See (1924) DIG. COL. 178.* RAI BAIJNATH GOENKA v. RAVANESH WAR PRASAD SINGH. 9 O. & A. L. R. 93; 69 I. C. 180 (F. C.).

———S. 47—*Question relating to execution discharge or satisfaction of the decree—Decree or possession—Waste by judgment-debtor after decree.*

## C. P. CODE (1908), S. 47.

Plaintiff obtained a decree for possession of the property in dispute in the suit. An appeal was filed by the defendant who remained in possession. The appeal was eventually dismissed and the plaintiff thereafter discovered that the defendants while in possession of the property pending the appeal, committed waste by cutting trees. The plaintiff decree holder thereupon applied in execution for ascertaining the damages alleged to have been committed by the respondents. *Held* that the question raised was one relating to the execution, discharge or satisfaction of the decree and that it must be determined in execution and not by separate suit. (*Macleod, C. J. and Crump, J.*) HARI SHRIDHAR v. SAKHARAM. 25 Bom. L. R. 449; 73 I. C. 443; 1923 Bom. 391.

———S. 47—*Question relating to execution—Joint family property mortgaged by father—suit against father—Decree—Execution sale—Purchase of property by decree-holder—Suit by decree-holder's brother for possession against judgment debtor and his sons—Maintainability.*

A mortgagee of certain property belonging to a joint Hindu family instituted a suit against the father only to enforce the mortgage. The mortgagee obtained a decree and at a court sale in execution of the decree himself purchased the property. The decreeholder purchaser died before obtaining possession of the property and his surviving brother sued for recovery of possession of the property impleading the judgment-debtor and his sons as parties. The defendants pleaded that a separate suit was barred under S. 47 C. P. Code. *Held* that the suit was maintainable and that so far as the sons were concerned they were not parties to the prior suit and could not be proceeded against in execution proceedings. 35 B. 452 dist. (*Macleod, C. J. and Crump, J.*) DADA JINAPPA v. YESU SAKHABA. 25 Bom. L. R. 494; 73 I. C. 402; 1923 Bom. 450.

———S. 47—and O. 21, R. 2—*Question relating to execution—Non-certIFICATE—Enquiry—Fraud—Effect of. See (1922) DIG. COL. 179.* P. R. P. L. CHETTY FIRM v. G. LON POW. 70 I. C. 869 (2).

———S. 47 and O. 21, R. 2—*Question relating to—Execution and satisfaction of decree—Application for certifying payment—Order on—If appealable. See (1922) DIG. COL. 178.* JADUNANDAN SINGH v. SHEONANDAN PRASAD SINGH. 1 Pat. 644.

———S. 47—*Question relating to execution—Exonerated defendant—Objection to attachment in execution—Appeal.*

The first defendant in a suit against whom no decree had been passed filed an application under S. 47 C. P. C. claiming that certain properties in his hands should not be attached in execution. There was no application by the decree-holder for attachment of the property. *Held* that the application was premature. It was only when his property was actually attached that the first defendant could prefer a claim petition and in such a case S. 47 C. P. Code would be applicable to him. The enquiry should be full as to the trial of a suit and not confined to affidavits.



C. P. CODE (1908), S. 47.

(Macleod, C. J. and Crump, J.) CHUNI LAL ASHA-  
RAM v. KASHIBAI. 25 Bom. L. R. 440 :  
73 I. C. 419 : 1923 Bom 361.

—S. 47—Question relating to execution—  
Order for delivery of possession to auction pur-  
chaser.

It may be disputed whether an order for deliv-  
ery of possession to an auction purchaser is an  
order relating to the execution, discharge or satis-  
faction of a decree for so far as the decree holder  
is concerned his decree is satisfied, and whether  
the auction purchaser gets the property or not is  
a matter with which he is not concerned.

*Per Cumming, J.*—The delivery of possession is  
not a part of the satisfaction of the decree. So far  
as the decree holder is concerned the decree is  
satisfied when the property is sold and the money  
paid to decree-holder. Obviously he is not con-  
cerned with the property being delivered to the  
purchaser. The question of the delivery of  
possession to the auction-purchaser is not one re-  
lating to the execution of the decree or between the  
parties to the suit or their representatives. It is  
immaterial that the auction-purchaser is also the  
decree-holder. As an auction purchaser he is in  
an entirely different capacity. (Woodroffe and  
Cumming, JJ.) LAKHI PRIA GUHA v. NANDA KUMAR  
BASU. 1923 Cal. 640.

—S. 47—Question relating to execution of  
decree—Suit for accounts—Compromise—Not  
embodied in decree.

In a suit for accounts the parties entered into a  
compromise under which they agreed to a  
preliminary decree in accordance with the terms  
of the compromise. Under the compromise one  
of the parties was given a share of the profits of  
a certain contract, the profits to be determined by  
competent accountants. It was also provided that  
any dispute relating to the share was to be refer-  
red to arbitration. On a question arising between  
the parties to the suit as to the share of profits,  
*Held* that the proceedings did not relate to the  
execution of a decree within S. 47, C. P. Code and  
the decree in the suit did not relate to the amount  
now in dispute. (Broadway and Abdul Qadir  
JJ.) HAJI BAKHSI ILAHI v. ABDUL RAHMAN.

71 I. C. 817.

—S. 47—Question relating to execution—  
Scheme suit—Direction in decree for filling up  
vacancies—Order if appealable.

On an appeal against an order passed by the  
Subordinate Judge's Court, Chingleput, on a peti-  
tion presented to it under Cl. 10 of a scheme  
sanctioned by a decree for the management of a  
Hindu temple it was found that the petition was  
presented on the assumption that a vacancy had  
occurred among the trustees under the scheme  
and that, as it had not been filled by either of the  
two agencies primarily responsible for filling it the  
Lower Court must in accordance with the scheme  
do so. The lower court held after enquiry that, the  
point disputed before it, a vacancy had occurred  
and directed that it should be filled in the manner  
provided by the rules framed by the High Court.  
*Held*, that though the Court was in this matter  
acting judicially, it was still, necessary to see  
whether its order was one, against which under

C. P. CODE (1908), S. 48.

the ordinary law an appeal will lie, and that, de-  
pendent on whether its order was a decree within  
the meaning of S. 2 (2) of the Code of Civil Pro-  
cedure, or more particularly whether it was the  
determination under S. 47 of a question re-  
lating to the execution of a decree. *Held*  
that it did not satisfy the above requirements and  
there was no appeal against the order. (Oldfield  
and Venkatasubba Rao, JJ.) RANGANADHA THA-  
THACHARI v. KRISHNASWAMI THATHACHARI.

18 L. W. 237 : 75 I. C. 189 :  
(1923) M. W. N. 664.

—Ss. 47 and 145—Surety—No personal  
liability—Liability in execution.

Surety bonds hypothecating immoveable  
properties as security for the due performance of  
a decree can be enforced by execution without a  
separate suit for sale. Where the equity of  
redemption is held by the surety, the surety is the  
primary person from whom the amount of  
security can be recovered and S. 145 C. P. Code  
is intended to enable the enforcement of such  
security 17 A. 99 ; 38 A. 327 ; 42 A. 158 ; 41 M.  
327 Rel. (Walsh and Kanhaiya Lal, JJ.) BETI  
MAHALAKSHMI BAI v. CHAUDHARI BADAN SINGH.

74 I. C. 927 : 45 A. 649 :  
21 A. L. J. 604 : L. R. 4 A. 306.

—S. 48—Decree against some defendants  
—Surety—Decree against on appeal—Execution  
of original decree—Limitation.

Plaintiff obtained a money decree in 1907  
March against debts 1 to 4 but the trial Court  
did not pass a decree against the 5th debt, who  
was impleaded as a surety. On appeal by the  
plffs. the High Court seeking to make the 5th  
debt liable the High Court dismissed the appeal  
in 1909. The plaintiffs made several attempts to  
execute the decree against the defendants 1 to 4.  
In November 1919 the plaintiffs sought to amend a  
prior execution application by seeking attachment  
of certain properties. In 1920 the plaintiffs  
applied for attachment of another house belong-  
ing to debts 1 to 4. *Held* that the applications  
were barred by time. As no relief was asked  
for against defendants Nos. 1 to 4 in the appeal  
to the High Court, the decree which was being  
executed was the decree of the trial Court and  
limitation began to run from the date of the  
decree of the trial Court and not of the High  
Court on appeal. (Macleod, C. J. and Crump, J.)  
KALYANCHAND LALACHAND v. BHOGILAL JAYA-  
CHAND. 25 Bom. L. R. 371 : 73 I. C. 310 :  
1923 Bom. 400.

—S. 48—Decree—Execution—Right to  
apply.

S. 48 C. P. Code deals with the maximum limit  
of time prescribed for execution and does not pre-  
scribe the period within which each application for  
execution is to be made. The right to apply for  
execution in a case where money is payable  
within 6 months of the decree occurs from the  
date when default in making the payment occurs.  
(Kanhaiya Lal, J.) SURAJMAN CHAUBE v.  
ANJORE SHUKUL. 21 A. L. J. 861 :

L. R. 4 A. 591 : 9 O. & A. L. R. 989.

—S. 48—Execution of application—Fresh  
application—Limitation—Continuation of old  
application.

## C. P. CODE (1908), S. 48.

In order to entitle a decree-holder to claim that an application should be regarded as a continuation of the previous application two conditions must be satisfied, first that the previous application was dismissed for no fault or default on his part and secondly that the present application is similar in scope and character to the previous application. If these conditions are satisfied there is no reason why the court should not regard the present application as a continuation of the previous one. (*Das and Adami, JJ.*)  
DHAROHAR SINGH v. RAM PRASAD NARAYAN SAHAI. 1 Pat. L. R. 139 : 72 I. C. 862.

—S. 48, O. 20 R. 11—Order for payment by instalments upon compromise—Limitation—Extension.

The parties agreed that the decretal amount should be paid by instalments, and it appeared that the Court accepted the compromise and consequently passed an order striking off the execution proceedings. Held the Court, when accepting the request of the parties, intended that the decretal amount should be payable by instalments; and the order which was passed was in essence and substance one made under section 210 of the Civil Pro. Code, which extended the period of limitation. (*Shadi Lal, C. J. and Fforde, J.*)  
BANARSI DAS v. RAMZAN RAJ BIBI. 73 I. C. 671 : (1923) Lah. 381. ON APPEAL FROM 72 I. C. 477.

—S. 48 (1) (b)—Limitation—Starting point—Order directing payment of money on a certain date—Compromise after decree.

To render S. 48 (1) (b) of the C. P. Code applicable there must be an order of court directing the payment of money on a certain date. Where there was a decree for money in a lump sum, the fact that the parties come to some arrangement out of Court for payment in instalments would not attract the operation of this clause or prolong the period of limitation. (*Broadway, J.*)  
BANARSI DAS v. RAMZAN RAJ BIBI. 72 I. C. 477.

—S. 48 (1) (b)—Order by executing court recording compromise—Effect—Limitation.

An order under S. 48 (1) (b) C. P. C. must be made by the court which made the decree and not by a Court executing the decree.

Where a Court executing the decree records a compromise the original decree is not altered and limitation for purposes of execution is still calculated from the date of the decree. (*Broadway, J.*)  
JIVAN BAKSH v. MUBINAL HUG. 1923 Lah. 678 : 73 I. C. 794.

—S. 49—Transfer of decree—Judgment debtor if could attach money deposited for a decree against Assignee.

A decree being assigned the judgment debtor deposited the money in court and in execution of a decree he had against the assignee attached the sum in court. Held he was entitled to do so. (*Baker, O. J. C.*)  
CHUNNILAL v. GULZARILAL. 19 N. L. R. 164.

—S. 51 and O. 40, R. 1—Receiver—Appointment of—Mortgage decree—Objection of decree holder—Effect. See (1922) DIG. COL. 180 MALIK

## C. P. CODE (1908), S. 60.

MOKHTAR AHMAD v. MT. BIBI RAHIM-UNNISSA BEGAM. 4 Pat. L. T. 58.

—S. 51 (e)—Decree—Execution—Supplementary relief. See (1922) DIG. COL. 181.  
MARATHI SIVARAMAN NAIR v. SETHU PATTAR. 70 I. C. 529.

—S. 53—Decree against assets—Execution—Gratuity given to heir of deceased employee—If part of assets

A gratuity granted to the heirs of a deceased employee by a Railway administration is not assets of the employee in the hands of his heirs and cannot be attached in execution of a decree against him (*Wazir Hasan, J.*)  
LACHMI NARAIN KAUL v. UMAID RAI. 28 O. C. 53 : 69 I. C. 893 : 1923 Oudh 21.

—S. 53—Hindu father—Decree debt—Pious obligation—Extent of.

A Hindu son is liable for the unsatisfied decree debts of his deceased father to the extent of the ancestral properties unless he shows that the debt was contracted for an illegal or immoral purpose. This is so even if the son was a party to the decree against the father (*Piggott and Walsh, JJ.*)  
RAMANAND SHUKUL v. CHHOTAY LAL. 71 I. C. 417 : 1923 A. 124.

—S. 53 & 54—Question relating to execution—Hindu father—Son's liability—Separate suit.

Under the present law there is no necessity of any order for attachment of the property in execution of a mortgage decree. Consequently, after father's death the proceedings in execution may be continued against the son. The sons of a Mitakshara family have been made, by express enactment under S. 53 of the Code of Civil Procedure, legal representatives of their father in respect of the property which descends to them under the Hindu law and which has been made liable for the satisfaction of the decree passed by the Court. (*Jwala Prasad, and Adami, JJ.*)  
SHEIK KAROO v. RAMESHWAR RAO. 1923 P. 143.

—S. 53—Scope of—Liability of heirs of deceased judgment-debtor.

It is only the son or lineal descendant of a deceased Hindu that comes within the scope of S. 53 of the C. P. Code and there is no obligation on the part of any other coparcener who has acquired rights by survivorship to pay up the decree debts of the deceased co-parcener 42 B. 54 Ref. (*Walsh and Ryves, JJ.*)  
JAGARNATH SINGH v. MOTILAL. 21 A. L. J. 353 : L. R. 4 A. 220 : 45 A. 455 : 73 I. C. 958 : 1923 A. 539.

—S. 60—Agriculturist, meaning of.

The party alleging that he is an agriculturist must prove that he earns his livelihood wholly or principally by agriculture or that he ordinarily engages personally in agricultural labour. (*MacLeod, C. J. and Coyajee, J.*)  
RUBINE v. BALWANTRAI. 1923 Bom. 12.

—S. 60—Attachment—Exemption from—Tools of artisans. See (1922) DIG. COL. 282.  
VITHOBA v. BABU LAL. 19 N. L. R. 22 : 1923 Nag. 289.

## C. P. CODE (1908), S. 60

## S. 60—Attachment—Crops grown by heir of tenant.

Where crops are grown on a tenancy by the heir of a deceased tenant after his death, such crops cannot be said to be his crops and as such liable to attachment and sale in the hands of the heir under S. 60 C. P. Code 84 P. W. R. 1916 followed. (*Scott Smith, J.*) *ABDUL AZIZ v. SARAB DAYAL*. 69 I. C. 520.

## S. 60—Attachment—Hindu widow—Compromise—Life interest in lands—Maintenance—T. P. Act, Ss. 6 and 10.

A compromise under which a Hindu widow was allotted certain lands for her maintenance ran as follows. "I (the widow) have taken for myself the property for the period of my life time. I alone shall pay jodi.....and I shall go on making vahivat. I shall not sell or mortgage or give it on self-reducing mortgage or give it as present or in any manner give it into the possession of others. If I do so, it will not be valid.

After my death, the said minor alone is owner of the said property. Held that this restriction on alienation prevented the judgment debtor from having a disposing power" within the meaning of S. 60 C. P. Code and the restriction being valid, the property could not be attached. 10 B. 342; 15 M. L. J. 7 Ref. (*Murien and Fawcett, JJ.*) *BASANGOWDA v. IRGOWDATI*.

24 Bom. L. R. 293; 47 Bom. 597; 73 I. C. 196; 1923 Bom. 276

## S. 60—House of agriculturist—Panchotra Money—Attachment.

The only house of an agriculturist is not liable to be attached and sold in insolvency.

The income of panchotra is not covered by S. 60 of the C. P. Code (*Broadway, J.*) *NAND SINGH v. LACHMI NARAIN SINGH* 73 I. C. 928.

## S. 60—(b) Article for making jaggery Exempted from attachment.

Article used for making jaggery are implements of husbandry and hence exempted from attachment (*Shah, A. C. J. and Crump, J.*) *RAKSHMAN MHASU BHAGAT v. NARHARI DADASA GUJAR*.

25 Bom. L. R. 1211.

## S. 60 (f)—Attachment—Jatri Bahis of a Gavawal, See (1922) Dig. Col. 182

*LACHMAN LAL PATHAK v. BALDEO LAL THATWARI*. 1 Pat. 619

## S. 60 (1) (k)—Deposit under Provident Funds Act—If attachable.

A deposit in a provident fund which so long as the subscriber was in service was a compulsory deposit within the meaning of S. 2 (4) of the Provident Funds Act does not become attachable by a creditor the moment the subscriber retires, irrespective of whether it has been drawn out or not. (*Daniels, J.*) *DEVI PRASAD v. SECRETARY OF STATE FOR INDIA*. 21 A. L. J. 454;

L. R. 4 A. 256; 45 A. 554; 74 I. C. 746; 1924 A. 68

## S. 60 (1) (k)—Liability to attachment—Provident Fund—State Railway—Deposit of railway official—Provident Funds, Act S. 4 sub-S. (1)—Railway Code, Vol. II App. I, R. 30.

Compulsory deposits made in a State Railway Provident Fund by an officer of the Railway

## C. P. CODE (1908), S. 64

during his employment are not liable to attachment in execution of a money decree against him even though he has ceased to be in the service of the Railway at the time of execution. The rules regulating the General Provident Fund do not apply to the State Railway Provident Fund. The fact that the deposits became repayable to the officer after he left the service did not remove them from the category of compulsory deposits, 29 B. 259; 5 Bom. L. R. 454; 35 C. 641; 46 C. 962 Ref. (*Richardson and Ghose, JJ.*) *SECRETARY OF STATE FOR INDIA v. RAJ KUMAR MUKHERJEE*. 50 Cal. 347; 27 C. W. N. 472; 1923 Cal. 585.

## S. 63—Sale by court of lower grade—Effect.

Where property is under attachment by two courts of different grades and the sale is held by the court of lower grade, the sale is not invalid (*Mookerjee and Walmesley JJ.*) *GIRIS CHANDRA GANGOPADHYAYA v. SRI KRISHNA DE NAG*;

38 C. L. J. 266; 75 I. C. 325.

## S. 64—Applicability—Prohibitory order restraining payee of pro-note—If an attachment.

A prohibitory order restraining the payee of a promissory note from receiving the money under it, has not the effect of an attachment—Such an attachment is invalid and S. 64 C. P. Code does not apply (*Phillips and Devadoss, JJ.*) *SUBRAMANIA AIYAR v. CHOKKALINGA MUDALIAR*

46 Mad. 415; 17 L. W. 314;

(1923) M. W. N. 317 (2); 72 I. C. 189;

44 M. L. J. 206.

## S. 64—Attachment—Effect of—Rights of creditor.

An attachment creates no charge on the attached property and confers no title on the attaching creditor but it merely prevents a private alienation of the property 25 C. 179; 42 C. 72 Ref. (*Martineau and Harrison, JJ.*) *RAM BHAI DATTA v. RAM DAS*. 3 Lah. 414; 69 I. C. 720; 1923 Lah. 261.

S. 64 and O. 21. R. 63—Attachment of debt—Claim—Order allowing claim—Suit by defeated decree-holder and decree in his favour—Effect of decree—Revivor of attachment. See (1921) Dig. Col. 165. See (1922) Dig. Col. 182. *ANTHAYA HEGADE v. MANJAYIA SHETTY*.

69 I. C. 642.

## S. 64—Attachment—Private sale—Agreement by decree-holder to exonerate property sold—Assignee of decree with knowledge of agreement.

A decree holder after attaching certain items of property entered into an agreement for consideration with a private purchaser of a particular item that he would not bring to sale that item of property. Subsequently an assignee of the decree with knowledge of the aforesaid agreement sought to bring the property alienated to sale in execution. Held that the prohibition against alienation after an attachment was one for the benefits of the decree holder which he could waive and that an assignee from him with knowledge of such waiver stood in the same position as his assignor and could not execute the decree against the property

## C. P. CODE (1908), S. 64.

alienated. (*Krishnan and Venkatasubba Rao, JJ.*)  
NANDIGAM GANGAYYA v MADUPALLI VENCATA-  
RAMAYYA. 44 M. L. J. 80 : 1923 M. W. N. 51 :  
72 I. C. 839 : 1923 Mad 230

—Ss 64 and 73—Claims enforceable under the attachment—Right to rateable distribution—Liability of transferee pending attachment. See (1922) DIG. COL. 183 CHUNILAL DEVAJI v. KARAM CHAND SHRICHAND. 69 I. C. 161.

—S. 64 and O. 21, R. 57—Execution petition Attachment—Dismissal of application—Alienation by judgment-debtor—Subsequent application for execution—Dismissal for omission to furnish particulars of property to be attached and sold Effect of.

The default of the decree holder contemplated by O. 21, R. 57 C. P. Code as a ground for dismissal of an execution application must be default in the discharge of some obligation laid on him by the Code or the rules framed under it. The omission of the decree-holder to attend the sale and his failure to bid at the sale does not constitute such default as covered by O. 21, R. 57 C. P. Code and where an application for execution is dismissed on that ground, it does not terminate the attachment. Under a mistaken impression that an attachment of property had ceased by reason of dismissal of a prior execution application the decree holder put in a fresh execution application and the Court ordered him to pay batta and file a schedule of the immoveable properties required to be attached. Owing to his default in furnishing the said schedule the execution application was dismissed. Held that the dismissal of the execution was not one under O. 21, R. 57, C. P. Code and that the attachment already subsisting on the property did not cease. (*Oldfield and Devadoss, JJ.*) VENKATESWARAYAN v ASWATHA NARAYANAN 45 M. L. J. 315 : (1923) M. W. N. 529 : 75 I. C. 491 : 1923 Mad. 703.

—S. 64 and O. 21, Rr. 57 and 63—Transfer pending attachment—Cessation of attachment on dismissal of execution petition—Effect of.

S. 64, C. P. Code avoids an alienation made which was made while an attachment remained subsisting and enforceable and not one which might have been enforced under an attachment which has since come to an end. Consequently where an attachment ceases to exist consequent on the dismissal of an execution application for default, a mortgage which was made pending such attachment cannot be impeached by the attaching creditor when he attaches the property on a fresh execution application. (*Miller, C. J. and Foster, J.*) BHAGWAN LAL v. RAJENDRA PRASAD SAHAI. 4 Pat. L. T. 409 : 1923 F. 564.

—S. 66—Applicability of.

Where one of two joint mortgages, one alone sued making the other *pro forma* defendant, and obtained a decree in execution of which he purchased the property in his own name, and the question arose whether the other joint mortgagee can claim a share of the property purchased. Held that S. 66 of the C. P. Code does not apply and he is not entitled to claim a share,

## C. P. CODE (1908), S. 73.

29 All. 557 and 37 All 545 P. C. Dist. (*Gokul Prasad, J.*) MAKHAN LAL v. BADRI PRASAD. 1923 A 405.

—S. 66—Applicability of—Agreement with auction-purchaser—Specific performance of contract—No bar.

A suit claiming specific performance of an agreement to sell made by a purchaser, cannot be described as a suit brought on the ground that the purchase was made on behalf of the plaintiff i.e., *benami*. The purchase is made on behalf of the purchaser with whom the title remains until the plaintiff obtains specific performance of the contract. The object of the section appears to be to prevent the executing Court being led to believe that a person who is not the purchaser is the purchaser. If the plaintiff proves the original contract and fails to prove the subsequent contract, he is entitled to fall back on the original contract. 43 Mad. 643 P. C. at 649 and 42 Mad. 615 ref. (*Batten, J. C.*) ABDULLA KHAN v. JALAM SINGH. 1923 Nag. 11 (2)

—S. 66—Applicability of—Benamidar not claiming the property—Effect of.

S. 66 C. P. Code has no application in a case where the benamidar himself does not claim under the sale certificate. (*Walmsley and Subramanyam, JJ.*) SARADINDU CHAKRAVARTHY v. GOSTA BEHARI. 37 C. L. J. 403 : 27 C. W. N. 208 : 75 I. C. 196 : 1923 Cal. 302.

—S. 66—Execution Sale—Hindu Joint family—Manager—Purchase at execution sale benami in the name of stranger with family funds—Suit by other members for a share—C. P. Code of 1882, S. 317 See (1922) DIG. COL. 184 NATARAJA MUDALIAR v. RAMASWAMI MUDALIAR. 73 I. C. 479.

—S. 66—Not retrospective—Execution sale under the old code.

S. 66 C. P. Code has no retrospective operation and does avail an execution purchaser whose title was perfected under the Code of 1882. 47 C. 1108 Rel. (*Mookerjee and Chozner, JJ.*) FROMADE KUMAR ROY v. MADAN MOHAN SAHA 27 C. W. N. 305 : 70 I. C. 555 : 1923 Cal 228

—S. 68 and 69—Alienation of land—Agriculturist—Power of Civil Court to order temporary alienation. See (1922) DIG. COL. 185. SAIN DITTA v NUR AHMAD. 74 I. C. 194.

—S. 73—Assets—Meaning of—Change in Code. See (1922) DIG. COL. 185. HANICHAN ROY CHAUDHURI v. BIRENDRA NATH SAHA. 70 I. C. 541.

—Ss. 73 and 115—Assets held by Court—Money deposited by sureties for release of an attachment before judgment—Rateable distribution of such money—Interference in revision. See (1922) DIG. COL. 185. GHISULAL AGARWALLA v. TODARMULL AGARWALLA. 70 I. C. 539.

—S. 73—Identity of judgment-debtors.

S. 73 C. P. Code is imperative and does not imply an application for execution is necessary to obtain the benefit of it. It is not necessary that all the judgment-debtors in the several decrees

## C. P. CODE (1908), §. 73.

should be identical, and the fact that in one, there is an extra judgment-debtor does not make the section inapplicable.

The addition of the word "passed" in 1908 has not restricted the application of the section, (*Jwala Prasad and Ross, JJ.*) MT. INDERBASI KUER v. SATNARAIN SINGH, 4 Pat. L. T. 373 : 74 I. C. 626 : (1923) Pat. 216 : 1923 P. 521.

—§. 73 — Nature of proceedings — Inquiry into bona fides of decree.

The proceedings under S. 73 C. P. C are non-judicial in character and the court has no power to inquire into the validity or otherwise of the decrees under which payments are claimed, (*Kotwal, A. J. C.*) SETH MAGANMAL v. RAJA RAGUNATH BAO, 19 N. L. E. 172.

—§. 73—Rateable distribution—Attachment before judgment—Suit instituted by creditor and debtor's moveables attached before judgment—Money realised by sale of the attached moveables kept to the credit of the suit—Subsequent suit by another creditor and attachment before judgment by him of the money—Rights of rival decree holders, See (1921) Dig Col. 174. SUBBIE v. NACHIAPPA CHETTIAR. 70 I. C. 20 (2).

—§. 73—Rateable distribution—Conditions to be satisfied—Attachment before judgment of goods—Goods sold and price paid into Court—Money in court deposit attached by other creditors in suits against debtor—Priority.

In a suit by S against defendant in the Court of the District Munsif certain properties were attached before judgment and their sale proceeds were deposited in Court to the credit of the suit on 11-4-1917. Subsequently N brought a suit against the same defendant in the same Court and attached the money in court deposit to the credit of the prior suit. N obtained a decree on 19-4-1917 and on 7-6-1917 he applied in S's suit for payment out to him of the money in Court. While this application was pending S got a decree on 2-7-1917 and on the next day applied for payment out to him. In the meantime one R had brought a suit in the same Court against the same defendant, obtained a decree and applied for payment of the money in Court on 29-6-1917. On a question arising as to which of the plaintiffs, S, N. and R. was entitled to be paid the sum in Court, held that under S. 73, C. P. Code the money in Court, was liable to be rateably distributed among the three decree-holders S, N. and R. 44 M. 100 : 39 M. L. J. 608 Relied on, 42 M. 692 diss, (*Schwabe, C. J., Krishnan, and Wallace, JJ.*) NACHIAPPA CHETTIAR v. SUBBIE, 46 Mad. 506 : 44 M. L. J. 413 : 17 L. W. 390 : 32 M. L. T. (H.C.) 198 : 72 I. C. 320 : 1923 Mad. 505 : On appeal from 70 I. C. 20 (2).

—§ 73 and O. 21, B. 83 and O. 34 B. 6—Sale of property free from mortgage—Sale postponed to enable judgment-debtor to raise money by private alienation.

Under Section 73 of the Civil Procedure Code where any property liable to be sold in execution of a decree is subject to a mortgage or charge, the

## C. P. CODE (1908), §. 80.

Court may with the consent of the mortgagee or incumbrancer, order that the property be sold free from the mortgage or charge, giving to the mortgagee or incumbrancer the same interest in the proceeds of the sale as he had in the property sold. But it is not so in the case of a private alienation where there is absolutely no necessity to refer to the prior incumbrancer. For a private alienation all that is necessary under O. 21 R. 83 Civil Procedure Code, is that the Court should be satisfied that the application is made in good faith and that the decree amount may be raised by the mortgage or sale of a part or whole of the attached property. In the present case it was represented to the Court that the decretal amount could be raised by private alienation. The decree holder consented to time being given to the judgment-debtors for raising money by private alienation. The plaintiff was not asked to give up his mortgage lien, nor did he or his agent make any statement in court to the effect that he would give up his mortgage lien if the judgment debtors would satisfy the decree by private alienation. Held that the absence of any express consent on the part of the plaintiff it could not be held that plaintiffs had given up his mortgage security and that his rights as a mortgagee had come to an end. (*Martineau and Motisagar, JJ.*) BENARSI DAS v. GOPI CHAND, 5 Lab. L. J. 279.

—§. 73 (1) (b)—Mortgagee—Position of.

S. 73 (1) (b) applies only to a mortgagee whose charge is valid against the executing decree holder. When he holds a money decree apart from his mortgage, he can apply for rateable distribution. (*Mullick and Bucknill, JJ.*) BABU BISHUN MOHAN SAHAY v. NARAYAN PRASAD ASTHANA, 74 I. C. 140.

—§. 80—Notice under—Necessity for—Suit against Official Assignee.

Plaintiff purchased certain property from the defendant who was soon after adjudged an insolvent. The Official Assignee objected to an application by the plaintiff to have his name entered as owner in the Record of Rights. Plaintiff thereupon sued for declaration of title without giving notice under S. 80, C. P. Code to the Official Assignee. Held that the suit was maintainable without notice. (*MacLeod, C. J. and Crump, J.*) DAMODAR JAGHIVAN v. GOVINDJE, 25 Bom. L. R. 378 : 73 I. C. 240 : (1923) Bom. 392.

—§ 80—Public Officer—Discharge of duty—Notice—Mala fides.

It is not permissible to read the words in S. 80, C. P. Code as if they were "in respect of any act purporting to be done by such public officer bona fide in his official capacity." It is not legitimate to construe the section by importing into the section words which do not appear in the section, "A public officer is entitled to notice of suit under section 80 of the Civil Procedure Code, even if in the discharge of his duty he has acted mala fide. (*Sanderson, C. J. and Richardson, J.*) DAKSHINA RANJAN GHOSE v. OMAR CHAND OSWAL, 50 Cal. 992 : 28 C. W. N. 10 : 75 I. C. 173 : 38 C. L. J. 104.

C. P. CODE (1908), S. 80.

—S. 80—Public Officer—Village headman—Notice of suit necessary.

A village headman holds an office and by virtue of it he is empowered to place or keep persons in confinement and has various other powers and duties which constitute him a public-officer within the meaning of Ss 2 and 80 C. P. C. Consequently notice of a suit for damages for false imprisonment alleged to have been effected by him in his official capacity must be given in compliance with the provisions of S. 80, C. P. Code. (*Heald, J.*) MAUNG SANYA v. MAUNG NGWE HLA. 2 Bur L. J. 29. 1923 Bang. 250.

—S. 91—No relief in respect of public nuisance but by way of easement sought.

No relief was sought in respect of the public nuisance and there was no claim. Held there can be no declaration that the place in suit is a public thoroughfare and has been obstructed as such. (*Abdul Raoof and Campbell, JJ.*) TIRATH RAM v MD, ABDUL RAHIM. 73 I. C. 616 : 1923 Lah. 546

—S. 92—"Interest"—Meaning of.

It is impossible to define with any degree of accuracy what exactly constitutes an interest as contemplated in S. 92 of the Civil Procedure Code. It need not be a direct interest in the sense that only a beneficiary can institute a suit but it must be a real substantial and existing interest. Where a trust provided for the maintenance of the widow and orphans of a certain caste and dedicated a building for the use of pilgrims as a *Dharam Sala*. Held a suit by some members of the caste living in the *Mohalla* in which the institution was situate could maintain a suit. (*Broadway and Harrison, JJ.*) MURLIDHAR v. SULTAN SINGH. 73 I. C. 302 : 1923 Lah. 518.

—S. 92—Applicability of—Hereditary trustee—Suit against co-trustee for joint possession—scheme and accounts—Sanction if necessary See (1922) DIG. COL. 188 APPANNA PORICHA v. NARASINGA PORICHA. 69 I. C. 304.

—S. 92—Applicability of—Idol—Suit against trespasser on property—Sanction—Necessity for.

If the suit as filed is simply one by an idol in its juristic capacity against persons who are interfering unlawfully with its property or with its income, such a suit has nothing to do with S. 92, C. P. C.

The fact that a person is not the manager or trustee under the particular deed of endowment which he desires to set up for the benefit of the idol, would not prevent him from having a right to act on behalf of the idol in the litigation, if he occupied a position of manager or trustee *qua* the performance of those ceremonies of worship or charities for the benefit of which the trust monies were directed to be applied. (*Piggot and Walsh, JJ.*) DARSHAN LAL v. SHIBJI MAHARJ BIRAJMAN. 45 A. 215 : L. E. 4 A. 50 : 71 I. C. 420 : 1923 All. 120.

—S. 92—Applicability of—Mutt—Suit by Chela of mutt for possession of office and emoluments—Forfeiture of office by reigning mahant.

C. P. CODE (1908), S. 92.

Where the chela of an asthal claims possession of the office of mahant and of the properties of the asthal in his own right alleging that the reigning mahant has forfeited the office by contracting a marriage and other irregularities, the suit is not one falling within the scope of S. 92, C. P. Code and the sanction of the Advocate-General is not necessary therefor. (*Das and Bucknill, JJ.*) MAHANT RAGHUNATH DAS v. SHEO KUMAR MISSEER. 1923 P. 309.

—S. 92—Applicability—Suit against trespasser.

A suit by a trustee for recovery of possession of trust properties against trespassers does not fall under S. 92 C. P. Code. (*Le Rossignol and Martineau, JJ.*) GANGA PURI v. MOHAN LAL. 4 Lah. 295 : 73 I. C. 645.

—S. 92—Applicability of—Suit for declaration that defendants are not trustees of a temple—Suit outside section.

S. 92 restricts the powers of an individual to bring suit of a particular nature without observing certain formalities, and therefore, when a point is taken that a particular suit is of a nature coming within the provisions of that section, before the Court can bar the suit for want of necessary sanction, the Court must be satisfied that the suit comes within the actual corners of the section. That section provides very distinctly that only in two cases does the section apply; either there must be an alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature, or the direction of the Court must be deemed necessary for the administration of any such trust. Unless a suit falls clearly within the scope of S. 92 the mere fact that it resembles in certain respects a suit which may properly be brought under S. 92, can afford no good ground for holding that S. 92 should apply. (*Macleod, C. J. and Shah, J.*) NILKANTH v. RAMKRISHNA. 1923 Bom. 67.

—S. 92—Applicability of—Suit for possession of properties from trustees removed from office.

S. 92, C. P. C. does not apply to a suit in which plaintiffs claim to be appointed as lawful trustees and as such seek to recover possession of the properties of the trust from the former trustees who are alleged to have been properly dismissed from office and who are therefore trespassers. (*Walsh and Ryves, JJ.*) INAYAT HUSAIN v. FAIZ MAHOMED. 45 A. 335 : L. E. 4 A. 142 : 21 A. L. J. 191 : 71 I. C. 767 : 1923 A. 319 (1).

—Ss. 92—Applicability of—Will—Bequest to charity—Administration—Suit for. See (1922) DIG. COL. 189. ANNAVARAPU NACHARAMMA v. MALLADI VENKATAPPAYYA. 70 I. C. 903.

—S. 92—Hereditary trustee—Advisory Board—Creation of a new body—Inexpediency of. See (1922) DIG. COL. 190 DORAIVELU MUDALIAR v. ADIKESAVALU NAIDU. 70 I. C. 87.

—S. 92—Public trust—Acharya of a temple—Constructive trustee—Suit for scheme—Maintainability of.

## C. P. CODE (1908), S. 92.

A constructive trustee within the meaning of S. 92 of the C. P. Code would include a person holding a particular fiduciary position whose obligation as such can be enforced in a court of law. *Held* on the evidence that the Acharya of the Swaminarayan temple at Vadval was a trustee to whom S. 92 of the C. P. Code would apply. It is true that the maintainer or manager of a math is not a trustee in the strict sense of the term when used of an express or declared trust. It would be more accurate to describe him as occupying a fiduciary position. This fiduciary relationship is commonly called an implied trust but the implied trustee is subject to the same obligations as the express or declared trustee. In the case of a math as in the case of a temple the ownership is an ideal person. In the one case it is the idol; in the other case it is the office of spiritual head. The individual who holds the office is trustee for the office the gadi or math or the institution. The succession to the property follows the succession to the office. This is the general law as to trusts. In the case of maths the corpus as well as the income belonging to the institution though a she-bait or head of a math has a higher position than a Dharmakarta, 22 Bom. L. R. 457; 11 M. I. A. 405; 20 Bom. L. R. 1088; 24 Bom. L. R. 629 *Rel. (Marten and Pratt, JJ.) SHRIPAT PRASAD v. LAKSHMIDAS.* 26 Bom. L. R. 747.

————S. 92—Pujary of idol—Suit against—Position of Pujary.

Where a person was put in charge as pujary of an idol in a Dharmshala, he is a servant and not a trustee and a suit under S. 92 C. P. Code, is not maintainable against him. (*Rafiq and Lindsay, JJ.*) *BALDEO DUTT v. GOPALJI.*

21 A. L. J. 310; L. R. 4 A, 190; 1923 A, 247.

————S. 92—Removal of trustee—Failure to keep accounts—Doubt as to existence of trust.

Where there is considerable doubt as to whether there is a trust in respect of certain properties, the omission of the alleged hereditary trustees to maintain proper accounts without any wilful default on their part is no ground for their removal. (1918) M. W. N. 786 foil. 16 L. W. 247 dist. (*Spencer and Devadoss, JJ.*) *JAKKAM REDDI SESHADRI REDDI v. SIR S. SUBRAMANIA IYER.*

32 M. L. T. 89 (H. C.); 74 I. C. 35  
1923 Mad. 168.

————S. 92—Removal of trustee—Stranger as a Receiver.

In a suit under S. 92 the Court has power to appoint a receiver and take the management of the temple out of the hands of the trustees appointed by the Temple Committee pending the disposal of the suit even though there is no prayer for his removal and though he cannot be removed except on a proper enquiry. (*Oldfield and Ramasam, JJ.*) *C. KUPPUSWAMI MUDALIAR v. Y. SUBRAMANIAM CHETTIAR.*

1923 Mad. 224

————S. 92—Sanction to file suit against some defendants not obtained.

A suit under section 92 for declaration and injunction and settlement of a scheme in relation to certain immoveable property, which was alleged to be *wakf* and dedicated to the Imams of Islam, was filed with the previous sanction of the

## C. P. CODE (1908), S. 92.

Collector of Karachi, in the names of two persons as plaintiffs against J and A sons of M who are referred to as his heirs and legal representatives. By their written statement defendants alleged that the property in question originally belonged to M and that on his death it became the absolute property not only of his sons, the two defendants, but of his other heirs, who were not specifically named in the written statement but their names were supplied later to the plaintiffs' pleader who consented to their being brought on the record as co-defendants and applied for amendment of his plaint which was granted. Beyond this, the plaintiff underwrote no alteration in any shape or form. The sanction of the Collector was however not obtained prior to the application for this amendment. Summonses were issued to the newly added defendants who appeared and adopted the same written statement as filed by the original defendants. When the suit came on for hearing the defendants contended as a preliminary point, that as the sanction of the Collector had not been obtained prior to the amendment of the plaint by the addition of the eight defendants referred to above the suit should stand dismissed, as not being a suit sanctioned by the Collector.

*Held*, that the original sanction given by the Collector to the institution of the suit substantially authorised the plaintiffs to sue for a declaration that certain immoveable property was *wakf* and for an injunction against all that claimed an interest therein, and the mere absence of names of some of those interested in the property does not invalidate the sanction already granted or necessitate a fresh sanction before the interested parties could be brought on the record. 36 Bom. 168 Dist. (*Raymond, A. J. C.*) *SAYED BACHAL SHAH v. JUMA SHAH.* 1923 S. 35.

————S. 92—Sanction obtained for some reliefs—Other Reliefs joined.

Where plaintiff's suit asks for some reliefs sanctioned by Collector and others not so sanctioned, the whole suit should not be dismissed. It may be tried so far as the relief sanctioned by the Collector is concerned. (*Macleod, C. J. and Crump J.*) *SAKHARAM BALWANT v. LAXMAN TRIMBAK.*

1923 Bom. 428.

————S. 92—Scheme—Alteration of—Power of Court.

Where a court has sanctioned a scheme for the administration of a religious or charitable trust it is competent to the Court to vary the scheme from time to time according to the exigencies of the case. A clause in a decree settling a scheme giving liberty to the persons interested to apply from time to time for modification of the scheme if necessary does not entitle the Court to vary the rules of succession to the office of high priest which had been determined in the suit according to ancient usage and custom. A variation in this respect cannot be said to be a modification within the meaning of that clause. (*Mookerjee and Rankin, JJ.*) *MANADANANDA JHA v. TARAKANANDA JHA.* 37 C. L. J. 281.

————S. 92—Scheme—Framing of—Powers of Court—Necessity for scheme—Arrangements made by the founder—Decree—Form of,

## C. P. CODE (1908), s. 92.

There is no warrant for the proposition that the Court in framing a scheme under S. 92 C. P. C. had no power to depart from the arrangement contemplated by the author of the trust. The institution of a suit under S. 92 C. P. C. attracts the jurisdiction of the Court and the Court has complete power to make such appointment as it considers proper in the circumstances, even though such appointment may involve a departure from the arrangement contemplated by the author of the original constitution of the trust. There is no legal restriction in the power of the Court; but, although there is no restriction the Court ought not to depart from the arrangement contemplated by the settlor except for a very strong reason. The mere fact that the trust deed does not contemplate a scheme does not mean that a scheme should not be framed in the case if the Court thinks that one is necessary. In a suit for the administration of a public trust it is necessary that the decree should give liberty to the parties to apply. The effect of making such a provision is that the suit is kept alive and it is possible for the parties to take the direction of the Court from time to time and so often as may be necessary. (*Das and Bucknill, JJ.*) MAHOMED WAHEB HUSSAIN v. ABBAS HUSSAIN.

4 Pat. L. T. 326; 71 I. C. 280; 1923 P. 420.

— S. 92—Scheme—Majority of worshippers of certain denomination—Number of trustees.

Where in a scheme suit it was found that the majority of worshippers were of a certain denomination, it is fair that a majority of the trustees also are from that denomination. (*Robertson, C.J., and Lefontaine, J.*) FAZAL RAHMAN v. GULAM HOSSAIN ACHA, 2 Bur. L. J. 208.

— S. 92—Scheme suit—Kattalais—Management—Right to frame a scheme.

A scheme should be framed where there has been gross mismanagement of the affairs of the temple and some scheme for the co-ordination of the various Kattalais and for some control over the various Kattalais in so far as it may ensure the harmonious working of the Kattalais, wherever they have to co-operate, is necessary.

It cannot be said that the income of the various Kattalais belonging to a temple could be mixed up and utilised for all the purposes of the temple indiscriminately. These trusts are somewhat analogous to temple service inams. Just as the latter are different from inam properties belonging to a temple, being granted to office holders on condition of rendering services in a temple and do not belong to the idol, though the idol may be interested in the rendering of the services. Similarly the incomes of the Kattalais do not belong to the idol though the idol is interested in the proper performance of the distinct duties attached to each Kattalai.

A Kattalai is a distinct endowment "under a separate trustee to which specific items of expenditure are assigned as legitimate charges to be paid therefrom."

Where there are numerous Kattalais a scheme has to be framed which will ensure the harmonious working of the Kattalais, when they have to co-operate in the Pagoda Service, and prevent the

## C. P. CODE (1908), s. 92.

embezzlement of the funds of the Kattalai or their diversion by the trustees contracting debts.

It is very necessary that the scheme should contain stringent prohibitions against the borrowing or lending of money by the trustees from or to the trust or funds, or from one Kattalai to another Kattalai.

The preparation of a budget, the proper keeping of accounts in which the income and expenditure of the Kattalais may be separately shown and the periodical audit of those accounts are matters most essentially to be provided for in the regulations in order to fix the trustees with responsibility for the due performance of their trusts and to avoid waste and indebtedness. The need for supervision and co-ordination by a controlling and inspecting body is also apparent. (*Spencer and Ramesam, JJ.*) MANIKKAVACHAKA DESIKA GNANA SAMBANDA PANDARA SANNADI v. VAITHILINGA MUDALIAR. 18 L. W. 247; 74 I. C. 115.

— S. 92—Scope—Arbitration—Private rights—Dispute as to jurisdiction to try suit under—District Court—C. P. Courts Act, S. 17.

A suit under S. 92 C. P. C. does not concern the private rights of the parties thereto and consequently the suit cannot be referred to arbitration. Under S. 17 of the Ceu. P. Courts Act the District Court is the principal Civil Court of original jurisdiction and alone has jurisdiction to try suits under S. 92 C. P. C. Where the law has given jurisdiction to determine a civil dispute to specific tribunals the jurisdiction of other tribunals is excluded. (*Prideaux and Kotwal, A. J. C.*) GANOKA v. NARAYAN. 6 N. L. J. 7; 72 I. C. 1016; 1923 Nag. 112.

— S. 92—Scope of—Suit for removal of trustee—Private right to office. See (1922) DIG. COL. 190. PUTTU LAL v. DAYA NAND. 44 A. 721.

— S. 92—Successive suits—Maintainability of—Application for amendment of scheme. See (1922) DIG. COL. 189. GOVINDASAMI NAIDU v. UCHAPPA GOUNDAN. 70 I. C. 579.

— S. 92—Suit by one trustee against another for accounts—Sanction not necessary.

A suit by a trustee or trustees of a public charitable or religious trust against a co-trustee for accounts and for delivery of account books and other papers does not fall within section 92 of the Code of Civil Procedure and may be brought without the sanction of the Advocate-General. 40 B. 539 Foll 45 M. 113 and 22 B. 496 Ret. (*Kotwal and Prideaux, A. J. C.*) AYUB KAREEM v. JAFFAR AYUB. 6 N. L. J. 209; 74 I. C. 45; 1923 Nag. 298.

— S. 92—Suit for scheme—Trust—Dedication—Denial of trust—Absence of trustee or of trustee de son tort.

Where there is a trust created by will for public purposes of a charitable or religious matter a suit will lie under S. 92 C. P. Code and the heir-at-law in possession of the property impressed with the character of trust is a proper party to the suit. The mere fact that the trust is denied or that there is no trustee lawfully appointed or *de son tort* is no bar to the maintainability of the suit. 26 M. 450; 2 C. L. J. 381; 13 Bom. L.



## C. P. CODE (1908), § 92.

R. 49 ; 15 B. 612 Ref. (*Spencer and Devadoss, JJ.*)  
SRI GADICHERLA VENKATA NARASIMA RAO GARU  
v. NYAPATTY SUBBA RAO. 46 Mad. 300

32 M. L. T. (H.C.) 47 : (1923) M. W. N. 111 :  
17 L. W. 31 : 73 I. C. 991 : 1923 Mad. 376

—S. 92—Trustee *de son tort*—Suit against  
—Maintainability of. See (1922) DIG. COL. 191  
RAM BILAS v. NITYA NAND.

21 A. L. J. 105 : 69 I. C. 990.

—S. 94—Arrest and attachment before  
judgment—Immoveable property—Claim petition,  
—Small Cause Court—Powers of. See C. P. CODE  
Ss. 7, 94, 95. 1 Mys. L. J. 58,

—S. 95—Claim for compensation—When to  
be awarded—Interim injunction

It is doubtful if an award of compensation can  
be made in a case where the order of injunction  
was passed after hearing both the parties and it  
was found there were sufficient grounds for  
making it.

The proper stage for making such an applica-  
tion would be only when the suit is heard and  
until then, it would be premature. (*Ramesam,  
J.*) CHINTAMANENI VENKATAPAYYA v. VENKATA-  
PAYYA. 17 L. W. 150 : 71 I. C. 450 :  
1923 Mad. 352.

—S. 96—"An appeal"—If excludes a fresh  
appeal.

The words "an appeal" in S. 96 C. P. C. do  
not exclude the entertainment of a fresh appeal if  
the dismissal of the first appeal does not bar  
the hearing of the fresh appeal. (*Das and  
Kulwant Sahay, JJ.*) SURAJDEO NARAIN SINGH  
v. PRATAP RAI. 4 Pat. L. T. 405 :  
1923 Pat. 213 : 2 Pat 739 : 75 I. C. 284 :  
1923 P. 514

—S. 96—Party not aggrieved—If can file  
appeal.

Where appellant is not aggrieved by the judg-  
ment dismissing the appeal against him, he is not  
entitled to prefer an appeal against it. (*Shadi  
Lal, C. J. and Abdul Qadir, J.*) GOPALDAS v. MT.  
ZAINALA BIBI. 1923 Lah. 504.

—S. 96—Right of appeal.

Party adversely affected by decree—Water sup-  
ply in ryotwari tracts—Right of Government to  
regulate—Right of private party to appeal against  
decree, 1914 M. W. N. 788 Ref. (*Ayling and Od-  
gers, JJ.*) DHARMA RAJA v. PETTUR RAJA.

46 Mad. 811 : 1923 M. W. N. 677 :  
18 L. W. 243 : 74 I. C. 4 :  
45 M. L. J. 212 : 1924 Mad. 79.

—S. 96 (3)—Consent order—Setting aside  
—grounds for.

When a consent order is sought to be set aside,  
serious and substantial injustice must be shown to  
result from letting the consent order, which was  
made under mistake of fact, stand. (*Lord  
Sumner*) JAMNABAI v. FAZALBHOY HEPTOOLA.

18 L. W. 437 : 3 M. L. T. 376. (P. C.)  
1923 P. C. 184.

—S. 96—Scope of—Execution proceedings.

S. 96 (3) C. P. Code applies only to suits and  
not to proceedings in execution. (*Jawla Prasad*

## C. P. CODE (1908), § 99.

and Foster, JJ.) LACHMAN LAL v. PADARATH  
SINGH. 4 Pat. L. T. 735.

—S. 97—Appeal against final decree—Po-  
wers of appellate Court—Correctness or prelimi-  
nary decree.

It is not open to the appellants, in an appeal  
against the final decree to attack the preliminary  
decree, which might have been directly challeng-  
ed by an appeal. But the appellate court can  
consider whether the preliminary decree was  
capable of enforcement and whether it afforded a  
basis for the final decree as made. (*Mookerjee and  
Panton, JJ.*) TARAPRASANNA SARKAR v. KALIKA  
MOHAN SARKAR. 38 C. L. J. 111 : 75 I. C. 319.

—S. 97—Partition—Preliminary decree—  
Appeal from—Final decree—Not appealed  
against—Effect of.

An appeal against a preliminary decree is not  
maintainable unless there is also an appeal  
against the final decree passed subsequent to the  
preliminary decree by the Court below. 40 C. 1036.  
20 C. W. N. 231 ; 18 C. L. J. 321 ; 10 C. L. J. 113,  
referred to. (*Chatterjee and Pearson, JJ.*) MON-  
OHAR PESHAKAR v. HARAN CHANDRA KARMAKAR.  
71 I. C. 290.

—S. 97—Preliminary decree—Appeal  
against—Passing of final decree—Effect of.

There is a difference between cases where the  
final decree is passed before the appeal is pre-  
ferred from the final decree and cases where it is  
passed after the appeal is preferred. In the latter  
case the appellate court is competent to hear and  
dispose of the appeal. 25 C. W. N. 776, 18 C. L.  
J. 214 18 C. L. J. 321 Ref. (*Newbould and  
Panton, JJ.*) MEA HUSSAIN KHAN v. SHEIKH  
SAMIR. 1923 Cal. 282 (1).

—S. 98—Letters Patent, S. 36—Applicabi-  
lity—Judges differing in opinion.

The natural place to find the rules governing  
the exercise of the appellate civil jurisdiction  
over the other Judges of the High Court would be  
the Letters Patent, while the natural place to  
find the rules governing the exercise of the  
appellate civil jurisdiction over the civil Courts  
of the mofussal subject to the High Court would  
be the Civil Procedure Code. The Code makes no  
provision for an appeal within the High Court,  
that is to say, from a single Judge of the High  
Court. This right of appeal depends on clause  
15 of the Charter. Appeals under the Letters  
Patent are governed by the Letters Patent, and  
appeals under the Code are governed by the  
Code. Further the Code only deals with appeals  
from certain Courts and does not deal with ap-  
peals within the High Court from the decision of  
one Judge of the Court to another. Therefore  
when a Bench of two Judges is hearing an appeal  
from the decision of a single Judge of the same  
High Court whether on the original side or the  
appellate, and they differ in opinion, the opinion  
of the senior Judge would prevail 26 All 10  
(1921) 23 Bom. L. R. 623. Ref. [P. 224 C. 2].  
*Marten and Pratt, JJ.*) PANDY WALAD DAGADU  
MAHAR v. JAMNADAS. 1923 Bom. 218.

—S. 99 and O. 6 R. 14—Failure of plain-  
tiff to sign pleadings—No power of attorney

## G. P. CODE (1908), s. 98.

*given to agent—Objection not raised—Section 99 applies.*

Where the plaintiff filed the plaint through an agent and did not even sign the plaint, there was no power of attorney given by the plaintiff to her agent on the record and no explanation was apparently obtained for her failure to sign the plaint; and no objection however appeared to have been taken. *Held*: S. 99 of the C P C. applies to the case. (*Maccoll, J.*) MA NGWE KIN v. MA HME. 74 I. C. 100 : 1 Bang. 42 : 1923 Bang. 206.

—S. 99—Irregularity—Defendant joined as a minor though in fact a major.

In a suit against the defendant describing him as a minor, the court found that he was in fact a major. The plaint however was not amended and his name continued to be described as a minor though he actually appeared in court instructed his vakil and defended his suit. *Held* that the irregularity in the proceedings was cured by the conduct of the parties. (*Lindsay and Sulaiman, JJ.*) THAKUR HARGOBIND SINGH v. HUKUM CHAND. L. R. 4 A. 291.

—S. 99—Irregularity—Plaintiff a major—Suit instituted by next friend.

Where a plaintiff has attained majority before the institution of the suit a plaint signed and verified on his behalf by a next friend is not valid and the defect is not a mere irregularity in proceeding and cannot be cured by section 98 of the Civil Procedure Code. (*Mears, C. J. and Piggott J.*) RUHUL AMIN v. LALA SHANKAR LAL. 45 A. 701 : L. R. 4 A. 342 : 21 A. L. J. 626 : 1924 A. 54.

—S. 99—Misjoinder—If includes non-joinder,

*Per Schwabe, C. J.*—*Quære* whether 'misjoinder' in S. 99 C. P. Code includes non-joinder. (*Schwabe, C. J. and Wallace, J.*) MOHANAVELU MUDALIAR v. ANNAMALAI MUDALIAR. 17 L. W. 241 : 72 I. C. 63 : 44 M. L. J. 249 : 1923 Mad. 337.

—S. 99 and O. 1, R. 9—Objections as to non-joinder—Procedure. *See* (1922) DIG. COL. 193. THINA SHANMUGA MOOPANAR v. MONA CHUNA NANA SUBBAYYA MOOPANAR. 70 I. C. 645.

—S. 99—Re-trial—Grounds—Omission of judge to sign deposition of witness.

The deposition of a handwriting expert signed by him and admitted in evidence does not vitiate the trial though it is not signed by the Judge (*Batten, J. C.*) ALAM SINGH v. SETH GOPALDAS (1923) Nag. 7 (1).

—S. 99—Scope of—Irregularity in signing Vakalatnama.

S. 99 C. P. Code, covers a case when a person authorised to instruct a pleader actually signs the vakalat for the litigant, where no fraud is committed and the litigant himself knows of it and acquiesces in it. It is a formal irregularity cured by the section. (*Miller, C. J. and Kulwant Sahay, JJ.*) BANWARI RAI v. CHETHRU LAL RAI 74 I. C. 1033.

## G. P. CODE (1908), s. 100.

—S. 99—Suit in the name of Chairman Municipal Board—Objection not taken—Effect.

A suit instituted in the name of the Chairman of a Municipal Board, while the Municipality itself could have sued, is not liable to be dismissed in appeal where the objection is taken for the first time. (*Wazir Hasan, A. J. C.*) SHAMSHUDDIN KHAN v. AGHA SYED FATEH SHAH. 90 & A. L. R. 1041.

—S. 100—Alienation Finding as to necessity.

Where the lower appellate Court has decided the question as to the existence of necessity on entirely wrong principles his finding is vitiated and can be examined in second appeal. (*Broadway, J.*) ANOKH SINGH v. SAPURAN SINGH. 1923 Lah. 660.

—S. 100—Certificate as to—Second appeal. *See* (1922) DIG. COL. 194. NATHU v. BANNA. 69 I. C. 507.

—S. 100—Conclusion from finding of fact can be attacked.

Although in second appeal findings of fact cannot be impugned, it is nevertheless open to a party to challenge the correctness of the conclusions drawn from such findings. (*Broadway and Moti Sagar, JJ.*) BAJ SINGH v. PARTAP SINGH. 1923 Lah. 497 (2).

—S. 100—Construction of document—Question of fact or law.

The expression 'construction' as applied to a document includes two things: first, the meaning of the words; and secondly, their legal effect. The meaning of the words is in all cases a question of fact. The effect of the words is a question of law. (1891) 1 Q. B. 79, *Foll.* A second appeal is not admissible merely because some portion of the evidence is in writing of which the meaning has been mistaken by the lower appellate Court. (*Campbell and Moti Sagar, JJ.*) DAL SINGH v. PLUIMAN. 1923 Lah. 626.

—S. 100—Contract of sale—Condition of goods—Damage.

Where under the terms of a contract of sale, goods were to be undamaged, and the Courts below found it to be damaged, it is a finding of fact binding in second appeal (*Jwala Prasad and Ross JJ.*) FIRM OF RAMDAYAL RAM NARAIN v. FIRM OF BHAIRU BUX GOWRIDUTTA. 1 Pat. L. R. 398.

—S. 100—Custom—Evidence—Power of High Court to consider *See* (1921) DIG. COL. 183. KALANDAR v. KALANDAR. 69 I. C. 570.

—S. 100—Custom—Finding as to—Mixed question of law and fact.

Where a point of custom raises a mixed question of law and fact the court can in second appeal go into the evidence to see whether it establishes the alleged custom. (*Simpson and Wazir Hasan, A. J. C.*) BALBHADDAR PRASAD v. NARAYAN DAS. 73 I. C. 727 : 1923 Oudh 102.

—S. 100—Custom—Gift—Jains—Hindu Law—Certificates.

## CODE (1908), s. 100.

Jains are subject to Hindu Law in matters of enation except where a special custom is proved. A widow would not be competent to make a gift under Hindu Law, the question whether she has this right by custom is one that cannot be raised in the absence of a certificate in second appeal. (*Broadway and Brasher, JJ*) CHHAJU MAL v. KUNDAN LAL, 70 I. C. 838 : 1923 Lah. 53.

—S. 100—Custom—Whether High Court should consider the admissibility and quantum of evidence to establish custom.

In second Appeal the Court should consider whether the evidence that is brought forward to prove custom is not only legally admissible evidence but whether the sum total of that evidence regarded from the point of quantum is of sufficient weight to justify the Court's coming to a conclusion that the custom has been proved. (*Mears, C. J. and Piggott, J*) MT. DHOLA KUAR v. MATHURA SINGH. 75 I. C. 657 : 1923 A. 341.

—S. 100—Decree—Future interest—Discretion of Court.

A question of the award of future interest is discretionary with the Court and is no ground for interference in second appeal. (*Motisagar, J.*) AGHA MAHOMED ASLAM v. JODH SINGH. 1923 Lah. 513 (2).

—S. 100—Discretionary matter—Second Appeal—No interference in. See (1922) DIG. COL. 194. BHUP CHAND v. UDE RAM. 5 Lah. L. J. 135.

—S. 100—Estate—Lands whether part of—Question of fact.

Where both the courts below have found that the suit lands did not form part of an estate so as to oust the jurisdiction of Civil Courts, the decision is binding on the High Court. (*Ayling and Odgers, JJ.*) TOTA VARAHALIAH v. SRI VENKATA SURYANARAYANA. 75 I. C. 465 : 18 L. W. 324. (1923) M. W. N. 732.

—S. 100 and O. 41, R. 17—Ex parte hearing of appeal—Interference on second appeal. See (1922) DIG. COL. 195 GHULAM HAIDAR v. JIWAN. 69 I. C. 499.

—S. 100—Failure to consider evidence—Effect.

Where the lower appellate Court does not judicially consider the evidence on record, it is ground for interference in second appeal. (*Fremantle S. M. and Burn, J. M.*) GOBIND v. MR. ZAKA ULLAH KHAN. L. R. 4 All. 358 (Rev.)

—S. 100—Failure to consider evidence on record—Finding of fact—Interference.

A finding of fact arrived at without a judicial consideration of the evidence or record is open to attack in second appeal. (*Fremantle S. M. and Burn, J. M.*) KATTAL v. DEBI DEHAL. L. N. 4 All. 401 (Rev.)

—S. 100—Finding as to character of a property.

A finding as to the character of property arrived at after a full consideration of the evidence is a pure finding of fact and it cannot be impugned in second appeal. (*Motisagar, J.*) BALBIR SINGH v. GOBIND. 1923 Lah. 532.

## C. P. CODE (1908), s. 100.

—S. 100—Finding based on misreading of judgment.

A finding cannot be sustained in second appeal if it is based on a misreading of the first court's judgment. (*Scott Smith and Ffode, JJ.*) MT. BASANTI v. CHANDA SINGH. 1923 Lah. 502 (2).

—S. 100—Finding based on statement not admissible in evidence—Can be questioned in second appeal. RAM v. MALIK GHANESHAM DASS. 1923 Lah. 150 (1).

—S. 100—Finding as to existence of necessity for alienation.

The finding as to the existence of necessity is clearly a finding of fact and cannot be impugned in second appeal. (*Moti Sagar, J.*) DALJIT SINGH v. HARI CHAND. 1923 Lah. 669.

—S. 100—Finding of fact

A simple finding of fact arrived at by the lower appellate Court could not be disturbed on second appeal and if disturbed, the judgment of the Judge of the High Court can be reversed on Letters Patent appeal. (*Shadi Lal, C. J. and Ffode, J.*) GIRDHARI v. ABDULLAH. 73 I. C. 232 : 1923 Lah. 236 (1).

—S. 100—Finding of fact.

The conclusion that the plaintiff was a full owner and not merely a *dohildar* is clearly a finding of fact and cannot be impugned in second appeal. (*Moti Sagar, J.*) CHHITRU v. CHAJJU. 1923 Lah. 611.

—S. 100—Finding of facts.

Issues of facts cannot be agitated in second appeal. (*Shadi Lal, C. J. and Brasher, J.*) MT. CHHOTO v. MT. SONA DEVI. 70 I. C. 299 : 1923 Lah. 11 (2).

—S. 100—Finding of fact. See (1922) DIG. COL. 196. SYED MOHAMMED HAMEED v. SYED MANZUR HUSAIN. 69 I. C. 807.

—S. 100—Finding of fact—Acquiescence.

Acquiescence is not a question of fact, but of legal inference from the facts found. (*Halifax A J C.*) RAMRATAN v. SHIODATTARAI. 73 I. C. 137.

—S. 100—Finding of fact—Adverse possession—Inference from facts.

The question whether possession is adverse or permissive may be one of legal inference from documents. The mere fact that the evidence in the case is merely documentary does not constitute the finding of the lower court findings of law. The question of the weight to be attached to the instances proved by the documentary evidence is one of fact. 29 A. 203 : 42 A. 152 referred to. (*Daniel, J.*) MOHAMMED AHMED v. BABU. 71 I. C. 762 : 1923 A. 442.

—S. 100. Finding of fact—Appellate Court not applying its mind to evidence on record—Effect.

A finding of fact is open to attack in Second appeal if the lower appellate Court has not applied its mind to the evidence on record. (*Fremantle S. M. and Burn, J. M.*) RADHE RAM v. RAJA SURAJ-PAL SINGH. L. R. 4 A. 376 (Rev.)

—S. 100—Finding of fact based only on local investigation.

## C. P. CODE (1908), s. 100.

The judgment of a lower appellate court based entirely on a local investigation conducted by the Judge of the Court of first instance cannot be sustained in second appeal. 52 I C 241 and 39 Mad 501 Foll. (*Marlineau, J.*) RALLA v HARNAM SINGH, (1923) Lah. 208 (1).

## —S. 100—Finding of fact—Burden of proof Cast on wrong party—Disregarding evidence.

A finding of fact arrived at by throwing the burden of proof on the wrong party and disregarding evidence on record is not binding on second appeal (*Mullick and Bucknill, JJ.*) SHEOPUJAN RAI v. KESHO PRASAD SINGH. 2 Pat. 919.

## —S. 100—Findings of fact—consideration of evidence—Kabuliya.

It is not proper in the second appeal generally to consider whether or not the lower courts have taken a right view of evidence in coming to findings of fact, but the construction of Kabuliya upon which the courts below mainly based their view, that a custom was shown, can certainly be considered by the High Court in order to see whether their meaning has been rightly interpreted. (*Bucknill and Ross, JJ.*) NATHUNI RAI v. MAHARAJADHIRAJ RAMESHWAR SINGH BAHADUR 1 Pat. L. R. 289 : 73 I. C. 629

## —S. 100—Finding of fact—Deduction to waqf.

A finding that certain property is not waqf and does not belong to it is one of fact with which the High Court will not interfere in second appeal. (*Chevis and Dunlop JJ.*) ILAHI BAKHSI v. KALA RAM 5 L. L. J. 11.

## —S. 100—Finding of fact—Documentary evidence—Misconstruction

The date, at which a particular holding first began to be held as a definite holding, is essentially a question of fact, and must depend on evidence. That evidence may be, and naturally is, documentary, but the documents admitted in evidence upon that question are really historical materials, and although they have to be construed, and if possible understood, they are not to be treated as involving issues of law merely because they have to be construed. It is not as though they were being construed, as instruments of title or mere contracts or statutes, or otherwise the direct foundation of rights. (*Lord Sumner*) THE MIDNAPUR ZAMINDARY CO. LTD., v. UMA CHARAN MANDAL. 4 Pat. L. T. 627 : 33 M. L. T. 291 (P. C.) : 45 M. L. J. 663 : 1923 M. W. N. 832 : 25 Bom. L. R. 1287 : L. R. 4 P. C. 184 : 74 I. C. 482 : 21 A. L. J. 723 (P. C.) : 1923 P. C. 187.

## —S. 100—O 41, R. 23 and O 43, R. 1 (a)—Finding of fact—First appellate Court misunderstanding the whole case.

In an appeal from an order of remand findings of fact cannot be examined by High Court sitting as a Court of second appeal but where the finding of the lower appellate Court appears to have been based on a misappreciation of the true controversy between the parties, a rehearing of the appeal by the lower appellate Court may be directed, 13 I. C. 445 Foll. (*Broadway, J.*) QADIR BAKSH v. SHAMAS DIN. 73 I. C. 758 : 1923 Lah. 206.

## C. P. CODE (1908), s. 100.

## —S. 100—Finding of fact—General issue but evidence led in a particular point—Effect.

When a particular point of dispute was covered only by a general issue but evidence was led in on the point, the finding of fact will be accepted in second appeal (*Fremantle S. M.*) SAYED MD JAWAD v. SHERO NANDAN 4 L. R. 4 All. 394 (Rev.).

## —S. 100—Finding of fact—Inadmissible evidence—Consideration of—Effect of.

Where a finding of fact is materially based on inadmissible evidence, the High Court will not accept it in second appeal (*Halifax, A. J. C.*) RAOJI v. WARLU. 1923 Nag 107.

## —S. 100—Finding of fact—Inadmissible evidence—Finding based on—Open to attack in second appeal.

Finding of a lower appellate Court based on inadmissible evidence can be impeached in Second appeal. 2 W. R. 74 21 C. L. J. 45 Ref. (*Mookerjee and Chotzner, JJ.*) TARAKMAR GHOSH v. KUMARA ARUN CHANDRA SINGH. 74 I. C. 383 : 1923 Cal. 261.

## —S. 100—Finding of fact—Inference from fact.

Where more than one inference is legally open from the evidence, the High Court cannot in second appeal refuse to be bound by that inference drawn in the Court below, (*Broadway, J.*) ABDUL GHANI v. ISHAR SINGH. 1923 Lah. 239 (1).

## —S. 100—Finding of fact—Inference from facts found—Interpretation of documents—Custom or usage. See (1922) DIG. COL. 200. KRISHNA RAO v. NILKANTH. 69 I. C. 800.

## —S. 100—Finding of fact—Insufficiency of evidence.

A finding of fact cannot be attacked in second appeal on the ground of the insufficiency of evidence (*Newbould and Pantou, JJ.*) PROSANTA KUMAR BEDANTA v. MADHU BADYA. 1923 Cal. 279.

## —S. 100—Finding of fact—Marriage.

A finding as regards the factum of marriage between the parties is a finding of fact with which the High Court will not interfere in Second Appeal. (*Broadway and Martineau, JJ.*) RAM DAS v. MT. PANNA DEVI. 5 Lah. L. J. 117.

## —S. 100—Finding of fact—Misconstruction of evidence.

A finding of fact to the effect that the defendant was co-sharing with the last tenant, based on a misconstruction of the settlement entries, can be set aside in second appeal (*Fremantle S. M. & Burn, J.M.*) RAJA SINGH v. SALIK SINGH. L. R. 4 A. 270 (Rev.).

## —S. 100—Finding of fact—Misreading of evidence.

A finding of fact based on a misreading of evidence can be attacked in second appeal. (*Mol. Sagar, J.*) THE FIRM, JOWAL DAS, PARMANUND v. UTTAM CHAND. 1923 Lah. 585.

## —S. 100—Finding of fact—Mistake of fact.

## C. P. CODE (1908), s. 100.

Where the finding of the lower appellate court is based on a mistake of fact it does not bind the High Court on second appeal. (*Ryves and Gokul Prasad, JJ.*) *HABIBKHAN v. FIDA HUSAIN KHAN.* L. R. 4 A. 138 (Rev.). 71 I. C. 1017.

—S. 100—Finding of fact—Negligence. See (1922) DIG. COL. 201 SYED SADAQ v. KHOSHMOHINI DASL. 71 I. C. 846.

—S. 100—Finding of fact—Not based on evidence but on conjecture.

Where the lower Appellate Court's finding that the common ancestor of the parties occupied the land in suit was not based on any evidence but was merely conjectural, it is liable to be set aside in Second Appeal. (*Martineau, J.*) *KISHEN LAL v. KANHAYA.* 5 Lah. L. J. 106

—S. 100—Finding of fact—Not supported by evidence.

A finding of fact unsupported by any evidence is no finding at all and it can be set aside. (*Burn, S. M.*) *GANGADHAR v. JASWANT SINGH.* L. R. 4 A. 36 (Rev.).

—S. 100—Finding of fact—Partnership not one. See (1922) DIG. COL. 201 MOULA BUX v. MUHAMMAD AFZAL. 69 I. C. 781.

—S. 100—Finding of fact—Second appeal—Interference in.

The question of acquiescence from the facts found by the lower Court is one of law and not a question of fact. 21 A. 496 followed. (*Hallifax, A. J. C.*) *SHANKER v. RANGUBAI.* 71 I. C. 942.

—S. 100—Finding of fact when not binding on the court of second appeal. See (1922) DIG. COL. 196 RAM SINGH v. GANGA RAM. 70 I. C. 202.

—S. 100—Findings of fact—When interfered with.

In second appeal a finding of fact will not be interfered with unless in arriving at it, the court below has gone wrong on a question of law or there is no evidence to support it. (*Dawson Miller, C. J. and Mullick, J.*) *AJTI CHAUDHURI v. JANAK LAL CHAUDHURI.* 1923 Pat. 332.

—S. 100—Finding of fact—Whole evidence not considered—Effect. (See) (1922) DIG. COL. 200. LALA GIRJA PRASAD v. JUGAL KISHORE. 70 I. C. 853.

—S. 100—Finding of legal necessity.

A finding as to legal necessity cannot be questioned in second appeal. When the amount of consideration for a sale which is found to be without necessity represents only a small portion of the entire consideration it is not necessary to convert the sale into a mortgage. (*Motisagar, J.*) *BALBIR SINGH v. GOBIND.* 1923 Lah. 532.

—S. 100—Improper admission of evidence in lower Court.

Although an erroneous omission in the trial court to object to an admission which was irrelevant did not make it relevant and admissible in evidence, an objection that a document that *per se* is not admissible in evidence, has been improperly admitted in evidence cannot be entertained

## C. P. CODE (1908), s. 100.

in second appeal. (*Mookerjee and Rankin, JJ.*) *SAYERUDDIN AKONDA v. SAMIRUDDIN AKONDA.* 72 I. C. 985 : 1923 Cal. 378.

—S. 100—Inference from documents—If a question of law.

Inferences drawn from documentary evidence are not questions of law and cannot be challenged in second appeal. (*Dalal, A. J. C.*) *BINDESHRI PANDE v. SHEO RATAN PANDE.* 90 & A. L. R. 443 : 74 I. C. 811.

—S. 100—Genuineness of signature—Evidence Act, S. 45—Comparison of handwriting.

Comparison of signatures is one of the modes of proving hand writing and although, where there is no other evidence such proof would be regarded as hazardous and inconclusive, it cannot be regarded as an error in law to base the conclusion on such proof alone, and a Court of second appeal would have no power to set aside a finding based on such comparison. 14 I. C. 741, *Foll.* (*Broadway and Moti Sgar, JJ.*) *BATAK RAM MAHOMED SAID.* 1923 Lah. 695.

—S. 100—Inferences from facts admitted—If a question of law.

Where the facts are not in dispute, the legal inference to be drawn therefrom is a question of law. (*Chatterjee and Cumming, JJ.*) *LAKSHMI NARAIN BAIJINATH v. SECRETARY OF STATE FOR INDIA.* 27 C. W. N. 1017 : 1924 Cal. 92.

—S. 100—Inference from facts—Interference.

An inference drawn from facts by the lower appellate court is a finding of fact and cannot be interfered with in second appeal. (*Miller, C. J. and Kulwant Sahay, JJ.*) *BION v. SHEOGULAM LAL.* 74 I. C. 843.

—S. 100—Judgment based on opinions of experts open to challenge in second appeal.

Where the findings of the Courts below are based on an examination and balancing of opinions and view of experts to sufficiency of the facts observed and of the inferences drawn can always be examined. Where there is a material difference of opinion, their value and sufficiency even when accepted by one court or any other can be attacked in second appeal. (*Kanhaya Lal, J.*) *ALTAFAN v. IBRAHIM.* 21 A. L. J. 811 : L. R. 4 A. 561 : 75 I. C. 502 (2).

—S. 100—Judgment of reversal.

In a judgment of reversal it is absolutely necessary that good grounds should be shown for coming to any finding of fact. There must be sufficient material in the judgment of Appellate Court to show the High Court that Lower Appellate Court has considered the evidence and duly considered the reasons given by the trial Court in its judgment for coming to a contrary decision. (*Adami, J.*) *BHIKHU MANDAL v. BHIKHU HAKAR DUTTA.* 1923 P. 275.

—S. 100—Limitation—Facts not decided—If can be raised for first time in second appeal.

Where for the decision of a question of limitation, the ascertainment of facts is necessary, the point cannot be allowed to be raised for the first time

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<sup>1</sup>n second appeal, (*Chandrasekhara Aiyar C. J. and Subbanna, J.*) VENKATARAMANIYA v. APPAIYA. 1 Mys. L. J. 79.

—S. 100—Maintainability of second appeal—Order not appealable—Objection to jurisdiction.

Where there is no appeal provided against a certain order, but the appellate court erroneously admits the appeal and passes a decree in the same, the decree is subject to a second appeal. But the objection to the maintainability of the appeal in the Court below can be raised there for the first time. (*Kanhariya Lal, J.*) BHAGWAN DAS v. MT. MAHOMED BANO, L. R. 4 All. 447.

—S. 100—Misconstruction of document—Misreading of documentary evidence.

Misreading of the documentary evidence is not a question of law which justifies a second appeal (*Das, J.*) MAHABIR MISSEER v. MT. ASOKLER. 1923 P. 154.

—S. 100—Misconstruction of record.

Misconstruction of records is a ground for second appeal. (*Fremantle S.M. and Burn, J.M.*) RAMBALI SAHAI v. RAM RAO KUSHNA JATAR. L. R. 4 A. 178 (Rev.)

—S. 100—Mixed question of fact and law—Duty of Court—Conclusion on facts found.

In second appeal, the court can legally decide a mixed question of fact and law, but it is undesirable to dispose of the question in the absence of findings of fact by the lower appellate Court.

Where a right conclusion has been drawn on the facts found can be gone into in second appeal. (*Batten, J. C.*) PONDUSA v. BAHENABAI. 69 I. C. 193 : 1923 Nag. 124.

—S. 100—Negligence—Mixed question of law and fact whether can be reviewed in second appeal. See (1922) DIG. COL. 201. ASAD ALI v. FAIZAZ ALI 70 I. C. 591.

—S. 100—New plea.

Where there is no reference to a plea in the judgments of the Courts below or in the pleadings of the parties, the point cannot be allowed to be raised in second appeal. A decree for a sum cannot be granted in second appeal, when no such relief was asked for in the Courts below. (*Shadi Lal, C. J. and Abdul Qadir, J.*) FIRM RAM DYAL SHEO PERSHAD v. FIRM GHAMANDI LAL NARAIN DAS 1923 Lah. 56.

—S. 100—New plea—Raising for first time.

A point which was not raised in either of the Courts below cannot be entertained in the High Court. (*Broadway and Brasher, JJ.*) CHHAJU MAL v. KUNDAN LAL. 70 I. C. 838 : (1923) Lah. 53.

—S. 100—New point—Fresh evidence required—Practice. See (1922) DIG. COL. 204. DODDAVA v. YELLAWA. 70 I. C. 417.

—S. 100—New point of law when entertained.

Though questions of limitation being questions of law are not excluded from being heard in Second Appeal, when they have not been raised

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in the lower Court, it has always been maintained that where a question of law depends on a finding of fact on evidence and that evidence has not been led in the Trial Court, then the High Court in second appeal will not deal with the question of law. (*Macleod, C. J. and Crump, J.*) DIGAMBAR v. LAHYADEO. 25 Bom. L. R. 245 : 72 I. C. 326 : 1923 Bom. 254.

—S. 100—New point—Question involving consideration of evidence.

Where a point of fact was not raised in the courts below nor had any issue been framed with reference to it, cannot be raised for the first time on second appeal. (*Greaves, J.*) NAYAJAN ALI v. MIDNAPORE ZAMINDARI COMPANY. 1923 Cal. 285.

—S. 100—New point—When allowed to be raised for the first time in appeal or second appeal.

The court will allow a party to raise a new point of law on second appeal when no further investigation of facts is necessary and when there is no surprise to the other side. If however the new plea raises a question of fact or mixed question of fact and law, the court will not allow it to be raised 35 A. 273 : 10 M. 1 Ret. (*Mookerjee and Cuming, JJ.*) SECRETARY OF STATE FOR INDIA v. UPENDRA NARAIN ROY. 71 I. C. 849 : 1923 Cal. 247.

—S. 100—Perverse finding not binding.

Ordinarily it is not possible on second appeal to go behind concurrent findings of fact, but where not only the findings are perverse in the sense that they were opposed to the weight of the oral evidence, but that was due to the fact that the trial Court wholly ignored the entry in certain documents whilst the first Appellate Court entirely failed to realise its probative value the High Court set aside the concurrent findings of fact. (*Bratt, J.*) MAUNG HLAING v. MAUNG CHIT SU. 1 R. 135 : 1923 Rang. 196.

—S. 100—Plea raised for the first time—When can be entertained.

A law point which is patent upon the record even if it has not been taken at all in either of the courts below could be raised for the first time in the second appeal and must be considered (*Campbell, J.*) SOHAN SINGH v. SANTA SINGH. 1923 Lah. 491.

—S. 100—Point of limitation not raised in court below—If to be allowed to be raised.

Points under the Limitation Act not taken in the court below should not ordinarily be allowed to be raised in the High Court. (*Schwabe, C. J. and Wallace, J.*) PARA DEKKAN v. AMEERUDDIN SAHIB. 72 I. C. 131 : 17 L. W. 169 : 1923 Mad. 306.

—S. 100—Possession—Question of fact—

Where a house was found to be occupied by the defendant's father adversely to the plaintiff landlord for more than 12 years before suit, this finding of fact is fatal to the appeal. 41 All. 669 Dist. (*Ryves and Daniels JJ.*) BESHESHAR NATH v. ABDULWAHID. 75 I. C. 672 : 1923 A. 382 (1).

C. P. CODE (1908), S. 100.

—S. 100—*Question of fact—Adverse possession—Inference from facts found.*

The question of adverse possession is one of inference from facts found and is a question of law justifying a second appeal. (*Hallifax, A J.C.*)  
 MT. MUNGA v. LACHMI PRASAD. 6 N. L. J. 70.  
 74 I. C. 51 : 1923 Nag. 65.

—S. 100—*Question of fact—Whether a place is a town.*

The question whether a certain place is a town for the purposes of the Punjab Pre-emption Act is a question of fact and cannot be raised in second appeal. It cannot be denied that whenever such a question arises it is to be denied upon the evidence and the particular circumstances of each case. It is therefore, difficult to hold that it is a question of law. It is not necessary that a custom prevailing in the town should apply to the mohallas or suburbs. (*Abdul Raoof, J.*)  
 DIWAN CHAND v. NIZAMDIN

75 I. C. 610 : 1923 Lah. 443.

—S. 100—*Question of jurisdiction raised for the first time in Second Appeal—Competent.*

The question of jurisdiction can be for the first time agitated in Second Appeal (*Broadway and Jafar Ali, JJ.*)  
 RAM KISHAN v. RANSHAN.

1923 Lah. 551

—S. 100—*Question of law—Documentary evidence—Inference from—Not a question for second appeal.*

A second appeal does not lie, because some portion of the evidence may be in writing and the Judge makes a mistake as to the meaning of it. For instance, a writing supposed to contain an admission may be put in as part of the evidence, but a mistake in its meaning is not a misconstruction of a document upon which a special appeal will lie if it is connected with other evidence affecting its construction. The misconstruction of a document which is the foundation of the suit, which is in the nature of a contract or a document of title, is allowed to be a ground for second appeal. (*Mukherjee and Chotzner, JJ.*)  
 PRANKISHORE TARAFDAR v. SARADA PRASAD PAKRAS.

37 C. L. J. 580 : 72 I. C. 55 :  
 1923 Cal. 358.

—S. 100—*Question of law or fact—Custom—Alienation—Necessity*

Question of necessity for an alienation may be one of fact or of law, and when the point raised is whether the Court below has infringed rules and maxims laid down by the High Court and has decided on wrong principles as to the quantum of proof of necessity required, then the question is one of law. (*Campbell, J.*)  
 PREM DAS v. SARBALAND.

1923 Lah. 41.

—S. 100—*Question of law—Point involving evidence.*

The appellant cannot in second appeal take a point of law which involves the taking of additional evidence. (*Marten and Pratt, JJ.*)  
 SHRIDHAR LAXMAN v. JANARDHAN.

72 I. C. 993 :  
 1923 Bom. 37.

—S. 100—*Question of law—Legal inference from proved fact—Finding of fact and infer-*

C. P. CODE (1908), S. 102.

*ences from facts—Liability to be disturbed in second appeal.*

While the District Court's decision as to the effect of the evidence must stand final as to the facts, the soundness of the conclusions from those facts may involve matters of law and may be questioned by a Court of second appeal. The proper legal effect of a proved fact is essentially a question of law, 20 Cal. 93 and 46 Cal. 189 Foll. (*Broadway, J.*)  
 PURAN v. LALA.

73 I. C. 795 : 1923 Lah. 216.

—S. 100—*Question of Law—Mis-construction of documentary evidence—When a question for second appeal.*

Where a Court of appeal has read entries in revenue papers and has simply decided to what extent the entries indicated the plaintiff's possession of certain plot of land and it has in no way interpreted these entries to indicate any legal point, his decision in interpreting these documents is a decision of fact and not of law. Where there is sufficient evidence to support a finding of fact in second appeal it cannot be impeached on the ground that the reasoning is not accurate. (*Stuart, J.*)  
 SHEIKH MUHAMMED SHUKER v. ABDUL GHANI

71 I. C. 369 : 1923 A. 362.

—S. 100—*Question of law—New point, going to the root of the whole case.*

The High Court may be justified in an exceptional case, in permitting a point of law to be taken in second appeal which goes to the root of the merits of the whole case. (*Stuart, J.*)  
 RAM GAJADHAR v. MT. SURTANI.

71 I. C. 381 :  
 1923 A. 343.

—S. 100—*Question of status of a party.*

The finding of the Court below on the question of plaintiff's status is a finding of fact and it cannot be attacked in second appeal. (129 P.L.R. 1912. Ref.) (*Campbell and Moti Sagar, JJ.*)  
 DAL SINGH v. PLAIMAN.

1923 Lah. 626.

—S. 100—*Res Judicata—Plea raised for the first time.*

It is open to the High Court, in Second Appeal to allow a plea of *Res judicata* to be raised even though it had not been raised in any of the courts below or even in the memorandum of second appeal. 4 A. 69 ; 22 I. C. 12 foll. (*Campbell, J.*)  
 MIR KHAN v. SARFU.

5 Lah. L. J. 163 : 74 I. C. 577 : 1923 Lah. 560.

—S. 100—*Small cause suit—Execution proceedings.*

In a suit of a small cause nature, no second appeal lies even in the matter of execution. (*Spencer and Devadoss, JJ.*)  
 VEMURI PITCHAYYA v. RAJA YARLAGADDA.

18 L. W. 739 : 33 M. L. T. 125 (H. C.) :  
 45 M. L. J. 651.

—S. 100—*Words—Meaning of—Whether a question of facts or law.*

The meaning of words is a question of fact in all cases, the effect of the words is a question of law : (*Stuart, J.*)  
 BADRI PRASAD v. RAJ KUNWAR.

75 I. C. 686 : 1923 A. 337.

—S. 102—*Execution proceedings—Suit of a small cause nature below Rs. 500—Second appeal.*

C. P. CODE (1908), s. 102.

There is no second appeal against an order in execution of a decree passed in a suit of a small cause nature for less than Rs 500. (*Kanhat Lal, J.*) SURAJMAN CHANBU v. ANJORE SHUKUL, 21 A. L. J. 861 : L. R. 4 A. 591 : 9 O. & A. L. R. 989

—S. 102—Second appeal—Small Cause decree—Execution proceedings.—

There is no civil miscellaneous second appeal from proceedings in execution of a small cause decree. (*Oldfield and Venkata Subba Rao, JJ.*) MUTHU KARUPPA CHETTY, v. PAIYA KAVUNDAN.

1923 M. W. N. 406 : 45 M. L. J. 210 : 73 I. C. 956 (2) : 18 L. W. 17 : 1924 Mad. 32.

—S. 102—Small Cause nature—Suit for compensation for removal of trees not exempted from the cognisance of a Small Cause Court. See Prov. Sm. C. C. Act, Sch. II, Art. 35.

27 C. W. N. 469

—S. 102—Suit against President District Board for damages—If of a Small Cause nature. See Prov. Sm. C. C. Act, Art. 1, 3 and 19.

32 M. L. T. 378 (H. C.)

—Ss. 102 & 115—Second appeal—Suit of small cause nature—Suit for price of fish taken from a tank.

There is no second appeal from the decree in a suit for recovery of the price of fish removed from a tank after declaration of title, when the value of the suit does not exceed Rs. 500. But the appellate court empowers the declaration of title. (*Woodroffe and Ghose, JJ.*) ARADHAN MONDAL v. ABHOYA CHARAN MONDAL.

1923 Cal. 321.

—S. 102—Small Cause nature—Suit—Second Appeal.

Where the subject-matter of a suit under S. 73 Cl. (2) of the C. P. Code for recovery of money wrongly distributed is less than Rs. 500/-, no second appeal could be preferred from the decree. (*Lindsay and Daniels, JJ.*) KESHO SARAN v. KHAIRATI LAL.

21 A. L. J. 248 : 45 A. 359 : 1923 A. 310 : 74 I. C. 836.

—S. 102—Suit for damages—Holder of monopoly—Infringement, by previous holder—Second appeal. See Pro. Sm. C. C. Act, Sch. II, Art. 35 (h).

69 I. C. 431.

—S. 103 and O. 41, R. 25—Powers of High Court on second appeal—Finding of fact. See (1922) Dig. Col. 207 SRI CHIDAMBARA SIVAPRAKASA PANDARA SANNADHIGAL v. VEERAMA REDDI.

27 C. W. N. 245 : 37 C. L. J. 199 (P. C.).

—S. 104—Arbitration Act, S. 19—Appeal from order under.

No appeal lies under section 104, Civil P. C. from an order passed under Section 19 of the Arbitration Act staying a suit.

1 S. L. R. 86 F. B; 28 A. 349, Foll. 45 B. 245 : 16 S. L. R. 174 Appi. (*Kincaid, J. C. Aston, J. Madgavakar, A. J. C.*) FIRM OF MENGHRAJ KHALDAS v. MESSRS LANGLEY BILLIMORIA AND CO.

1923 S. 38.

—S. 104—Order under S. 19—Arbitration Act—If appealable.

C. P. CODE (1908), s. 105.

There is no appeal from an order staying a suit under S. 19, Arbitration Act (*Kemp, A. J. C.*) SODAWATERWALA v. VOLKART BROS.

1923 S. 25.

—S. 104 (f)—Order filing the award—If what is

An order filing an award from which an appeal is provided for in S. 104 (f) C. P. Code is one which is passed after objections to the award have been disposed of. It does not mean the order by which the arbitrators are directed to bring the award to Court. (*Harrison J.*) GHULAM MUSTAFA GHULAM SADIQ.

73 I. C. 820.

—S. 104 (1) (i) and Sch. II para 21 (2)—Decision as to filing of award—Right of appeal—Distinction between the two provisions

The effect of section 104 (1) (i) seems to give a right of appeal against the decision of the Court on the question whether the award should be filed or not. Paragraph 21 (2) of the Second Schedule allows an appeal also if the decree of the Court does not correctly interpret the award and on an appeal under this provision the decree can be corrected so as to bring it in accordance with the award. But when the decree does correctly interpret the award then there is no appeal against the decree, in other words when an award has lawfully been made there is no appeal against the decision of the arbitrators. (*Corr, J.*) MAUNG TUN U v. MAUNG PO SHOK.

1 Rang 265 : 1923 Rang. 199.

—S. 105 and O. 22 R. 9—Abatement—Order setting aside—Objection to an appeal from the decree.

Where a Court sets aside the abatement of a suit under O. 22, R. 9 C. P. Code ignoring the objections of a party it is open to him on appeal from the decree passed in the suit to object to the order setting aside the abatement. 31 M. 345, 13 M. L. J. 308; 34 A. 562 followed. (*Abdul Raoof and Moti Sagar, JJ.*) AJUDHIA PARSHAD v. IMA-MUDDIN.

71 I. C. 587 : 1923 Lah. 230.

—S. 105 and O. 9 R. 13—Order Setting aside decree—Propriety of.

Not only can an order setting aside an *ex parte* decree not be questioned on appeal from the decree but any error in the proceedings is not one affecting the decision of the case within the meaning of section 105 of the Code (*Harrison J.*) SUNDAR SINGH v. NIGAHYA

1923 Lah. 425 (1) : 72 I. C. 410.

—S. 105—Scope of.

The policy of the Legislature in enacting S. 105 C. P. Code was to give finality to orders of remand (*Mookerjee and Rankin, JJ.*) BISAI NATH v. TARA NATH DEB.

72 I. C. 588 : 1923 Cal. 385.

—S. 105 (2)—Effect.

Where on appeal by the plaintiff the case is remanded on the ground that the burden of proof was on the defendants and not on the plaintiff section 105 (2) precludes the defendants from questioning the correctness of that decision in second appeal. (*Hallifax, A. J. C.*) DAU v. RAMPRASAD.

1923 Nag. 283



C. P. CODE (1908), S. 105.

—S. 105 (2)—*Failure to appeal against order of remand—Effect.*

Where the lower appellate court holding a test suit in ejectment was maintainable remanded the suit for disposal on the other issues and the order was not appealed against, it cannot again be agitated in an appeal from the order passed on remand. (*Burn. J. M.*) RAGHUBIR v. CHET RAM. L. R. 4 A 388 (Rev.).

—S. 105.—*Order of remand—Failure to appeal—Effect.*

Where it was open to the persons aggrieved by an order of remand to appeal against it but they failed to do so they are precluded from further contesting the correctness of that order. (*Brown, A. J. C.*) MAUNG PO KAING v. MA TOK. 70 I. C. 893 : 1923 Rang. 29.

—S. 107 and O. 7, R. 10—*Appellate Court.*

O. 7, R. 10 applies to appeals by virtue of S. 107 *Halliday, A. J. C.*) NARAYAN v. TUKARAM 1923 Nag. 310

—Ss. 109 and 110—*Confirming judgment—Decree confirmed but on different grounds.*

When the two judges of the High Court forming a Division Bench confirm that the decree of the court below but for different reasons the judgment of the High Court is one of affirmance. 44 M. 293 : 25 A 10 foll. (*Daniels and Lyle, A. J. C.*) MAHOMMAD ALI KHAN v. GHAZANFAR ALI KHAN. 70 I. C. 283 : 1923 Oudh 49.

—Ss. 109 and 110—*Final order—Meaning of, See (1922) DIG. COL. 208 SHRI SATCHIDANAND VIDYA SHANKER v. SHRI VIDYA NARASIMHA BHARATI.* 47 Bom. 106.

—S. 109—*Final order—Order for a personal decree in mortgage suit—Appeal to Privy Council.*

In an execution appeal arising out of a mortgage decree, the decree holders were the appellants in the High Court. They had obtained execution of their mortgage decree in a somewhat unusual but perfectly lawful, manner. They had exhausted the whole of the property covered by the decree, and they alleged that a very considerable portion of the decree still remained unsatisfied. They applied to the Court below for the preparation of a decree covering this unsatisfied balance, under the provisions of Order 34, rule 6 of the Code of Civil Procedure. The office report prepared at the time the application was made showed that the amount due under the decree on the date of the said report, namely, the 23rd of May, 1918, was Rs 32,119-7-6, and that the total amount realised by the sale of the mortgaged property was only Rs. 18,600. The judgment-debtors objected that the application for a decree under Order 34, rule 6 was statute-barred under appropriate article of the Indian Limitation Act. The execution Court upheld this contention and dismissed the application of the decree-holders. On appeal, a Bench of the High Court, held that the application was within time. The order of the Court below, was then set aside and the execution Court was ordered to re-admit the application of the decree holders on to its file of pending applications and to dispose of it according to law.

C. P. CODE (1908), S. 109.

Held that under the circumstances this amounted to a direction that a decree under Order 34, rule 6 should be prepared, the details of which were left for the Execution Court to settle, and that the order of the High Court was a final order against which leave to appeal to the Privy Council should be granted. (*Meers, C. J. and Piggott, J.*) SANTI LAL v. RAJ NARAIN. 21 A. L. J. 686 : 45 A. 741 : 9 O. & A. L. R. 832 : L. R. 4 A. 577.

—Ss. 109 and 110—*Leave to appeal to the Privy Council—Final order—Meaning of—Suit for dissolution of partnership and accounts. See (1922) DIG. COL. 208 SATHAPPA CHETTY v. SUBRAMANIAN CHETTY.* 71 I. C. 334.

—S. 109—*Leave to appeal to Privy Council—Value of the subject matter—Injunction.*

Plaintiff sued for possession of two houses and for an injunction restraining defendant from using a well and compound. He was awarded possession of one house and a portion of the other, and he got a decree jointly with deft. for the user of the well and the compound. The relief with respect to the house was valued at Rs. 5,000. Though the value of the well and compound was more than Rs. 5,000 plaintiff's share in them was below 5,000 in value. On an application by the plaintiff for leave to appeal to the Privy Council. Held, that for purposes of S. 110 C. P. Code, the value of the subject matter was in excess of Rs. 10,000 and leave should therefore be granted (*Macleod, C. J. and Fawcett, J.*) APPAYA PADDAYA GARU v. LAKHAM GOWDA. 25 Bom. L. R. 77 : 72 I. C. 127 : 1923 Bom. 176.

—S. 109—*Legal Practitioner—Refusal to enrol. See (1922) DIG. COL. 1077 SUDHANSU BALA HAZRA In the matter of.* 1 Pat. 590 : 70 I. C. 172 : 4 Pat. L. T. 229.

—S. 109 (a)—*Interlocutory order.*

The substantial portion of the order which the applicants complained of in their petition for leave to appeal to His Majesty in Council was really passed on the Civil Extraordinary application, but it did not finally dispose of the rights of the parties and the suit was left at practically the stage at which it was when filed.

Held, it cannot be said that this is a final order within the meaning of S. 109 (a) or that it is a final judgment within the meaning of Cl. 39 of the Letters Patent (*Shah and Crump, JJ.*) SHRI NIWAS v. HANMAT, 1923 Bom. 39.

—S. 109, Cl (a) and (c)—*Leave to appeal to the Privy Council—Order of remand—When appealable.*

Ss. 97 and 105 of the C. P. Code do not regulate the right of appeal to His Majesty in Council for an order which the Code declares to be final may yet be open to an appeal to His Majesty in Council, if the effect of the order is to negative the right of a party to continue the suit. Such an order would have the effect of finally determining the rights of the parties. The nature of the order in each case would determine whether it was final or interlocutory. If the order finally disposes of the rights of the parties, it ought to be treated as a final order, but if it did

C. P. CODE (1908), s. 109.

not it is an interlocutory order from which no appeal could be entertained. Where the order in question did not finally determine the rights of the parties but merely disposed of a subsidiary issue, the determination of which would require the continuation of the trial held that if the suit ultimately failed on the merits an appeal to the Privy Council might become wholly necessary and that leave to appeal to the Privy Council could not be granted. To determine whether special leave should be given it must be borne in mind that what is contemplated in S. 109 (c) of the C. P. C. is a class of cases in which there may be involved question of public importance, or which may be important precedents governing numerous other cases, or in which, while the right in dispute is not exactly measureable in money, it is of great public or private importance. Cases reviewed, (*Kanhaya Lal, J. C. and Dalal, A. J. C.*) MAHOMED KARIM KHAN v. SADIQ HUSAIN. 71 I. C. 339: 10 O. L. J. 289.

—S. 109 (c)—Construction of agreement—Question affecting rights of considerable private importance.

The construction of an agreement which would affect rights of great public or private importance is a matter regarding which leave to appeal to the Privy Council can be granted under S. 109 (c). (*Schwabe, C. J. and Coleridge, J.*) NATTU KESAVA MUDALIAR v. U. S. GOVINDACHARIAR. 18 L. W. 348: 1924 M. W. N. 3: 45 M. L. J. 514.

—Ss. 109 (c) 110 and O. 45, R. 4—Different suits involving substantially same questions—Separate judgment in the first Court—Same judgment on appeals—Latter judgment.

Two suits involving substantially the same questions were decided by distinct judgments in the first Court. There were two appeals to the High Court which were disposed of originally by one judgment. Afterwards in one of the appeals a review petition was filed and eventually that appeal was reheard on review and another judgment was given which adopted the original judgment in appeal to the extent to which it still stood. On an application for leave to appeal to the Privy Council in the High Court in the latter case and for consolidation for the purpose of pecuniary valuation. Held, that consolidation could not be ordered under O. 45, R. 4 of the Civil Procedure Code, as the judgments which decided the suits were different in the first Court and on appeal.

The fact that leave to appeal was given in the other case does not bring the latter case within the terms of S. 109 (c) of the Code 5 I. C. 583 not followed.

For leave to appeal to the Privy Council being granted under S. 109 (c) of Code some substantial question of law of general importance must be involved in the case. 24 A. 174; 30 M. 185 Referred to. (*Oldfield and Krishnan, JJ.*) B. RAJA RAJESWARA SETHUPATHI alias MUTHU RAMALINGA SETHUPATHI AVERGAL v. ARUNACHALAM CHETTIAR. 44 M. L. J. 424: 73 I. C. 217 (2): 1923 Mad. 602.

C. P. CODE (1908), s. 109.

—S. 109 (c)—Leave to appeal to His Majesty in Council—Substantial question of law—What is—Costs of appeal to Privy Council—Order as to.

S. 109 (c) of the Code of Civil Procedure, contemplates a class of cases in which there may be involved questions of public importance, or which may be important precedents governing numerous other cases, or, in which, while the right in dispute is not exactly measurable in money, it is of great public or private importance.

Where the point in issue appears to be of general importance to the appellant but not of sufficient importance to the proposed respondent to warrant the High Court in putting him to the expense of an appeal to the highest tribunal, the High Court must refuse leave to appeal to His Majesty in Council.

The High Court has no power, in granting leave to appeal, to impose a condition that the appellant should, in any event, pay all the costs of the other party. (*Schwabe C. J., Coultis Trotter and Kumaraswami Sastri, JJ.*) RAJA RAJESWARA SETHUPATHI v. TIRUNEELAKANTAM SERVAI. 44 M. L. J. 217: 17 L. W. 775: 1923 M. W. N. 415: 72 I. C. 250: 32 M. L. T. (H. C.) 126 1923 Mad. 232.

—S. 109 (c)—Leave to appeal to the Privy Council—Question of general importance.

In order to obtain leave to appeal to the Privy Council where the valuation is not above 10,000 Rs. application must show that the questions involved are generally important in the way that the decision of them will affect a large number of persons. (*Batten, J. C. and Hallifax, A. J. C.*) MOHANLAL BALBHADRA v. BISSESARDAS. 1923 Nag. 272: 73 I. C. 221.

—S. 106—(c) and 110—question of general importance—Valuation—Plaintiff if can behind his own valuation in the plaint and appeal—Indirectly affecting property of over 10,000 rupees in value.

To come within S. 109 (c) C. P. Code it must be shown that the decision sought to be appealed against might result in a precedent governing numerous other cases or decides a right of great public or private importance. 21 I. C. 783 Ref.

The question whether a decree involves indirectly a claim or question to property worth more than 10,000 rupees in value must be decided with reference to actual circumstance at the time and not to circumstances which are remote, and not in particular to a mere possibility that future suits as to all or part of a large extent of the property alleged to be concerned may be instituted at some time in the future. 15 L. W. 140; 24 A. 236; 35 A. 445, 8 C. 210; 4 C. L. R. 125 Ref.

Where the plaintiffs had estimated the market value of the property in dispute at Rs. 2,500 for purposes of court fee in the Court of first instance and on appeal, they could not be allowed to change their valuation for the Privy Council (*Oldfield and Spence, JJ.*) ALAGAPPA CHETTY v. NACHIAPPAN. 63 I. C. 385: 1923 Mad. 125.

—Ss. 109 (c) and 110—Substantial question of law—Land tenure—Forfeiture on alienation

The question whether the permanent tenures known as Karamkuri and Adimayavana in

C. P. CODE (1908), S. 110.

Malabar have the incient of forfeiture on alienation attached to them by custom is a substantial question of law and one of general interest in Malabar sufficient to justify the grant of leave to appeal to the Privy Council even though the valuation is less than Rs. 10,000.—45 Mad. 394 followed. (*Krishnan and Venkatasubba Row, JJ.*) *ZAMORIN OF CALICUT v. KANNAN NAIR* 17 L. W. 445 · 72 I. C. 918 : 1923 Mad. 443.

— S. 110—*Decision—Affirmance.*

The word "decision" in S. 110, Cr. P. Code, means the decision of the suit by the court. To constitute an affirming judgment it is not necessary that the appellate court should affirm the grounds of facts upon which the judgment was made. 25 A. 109 Ref (*Robinson, C. J. and Macgregor, J.*) *S. N. SEN v. ABDUL AZIZ*.

1923 Rang. 55.

— S. 110—*Decree for more than Rs. 10,000—Value of the property involved less.*

The High Court reversed the decree of the trial Court and granted a declaration that the deed in question was void, and that the plaintiff was entitled to the possession of the property mentioned in the deed.

*Held*, it is not necessary for the purpose of an application for leave to appeal His Majesty to inquire into the question as to whether the property actually handed over to deft. applicant is worth Rs. 10,000 or not, if, whatever the value of that property may be, it is clear that the whole of the property as to which the question arose in the appeal and in respect of which the decree has been passed in High Court is worth more than Rs. 10,000 (*Shah and Crump, JJ.*) *PYARIBIBI MARD MUNZI MAHOMED BAHADUR v. HASANALLI MIR ABDULLALI INAMDAR* 1923 Bom. 59.

— S. 110—*Leave to appeal to the Privy Council—Appealable value—Directly or indirectly involving property over 10,000 rupees in value.*

Where a decision given with respect to one half of the property conveyed under a deed can have no possible effect on a future litigation relating to the other half of the property, such decision cannot be said even indirectly to involve a question respecting the subject matter of the said litigation. (*Ashworth and Simpson, A.I.C.*) *BHAGWATI PRASAD v. ACHHAIBAR SINGH*.

26 O. C. 24 : 74 I. C. 214 : 1923 Oudh 93

— S. 110—*Leave to appeal to the Privy Council—Valuation—Admissions to parties.*

Where the defendants accepted the valuation given by the plaintiffs in the plaint and in their own memorandum of appeal, they cannot afterwards contend that the valuation is wrong and that the case is of the appealable value to the Privy Council. (*Ashworth and Simpson, A. J. C.*) *BHAGWATI PRASAD v. ACHHAIBAR SINGH*.

26 O. C. 24 : 74 I. C. 214 : 1923 Oudh 93.

— S. 110—*Leave to appeal to the Privy Council—Valuation—Indirectly affecting property—Question of public importance.*

It is not possible to hold that a decree directly or indirectly involves a claim or question respecting property of the statutory value where it is

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necessary to investigate the terms and conditions of leases in respect of lands which are not included in the suit. Before it could be held that a decision between a landlord and tenant involving a question of wide public importance, there should be some evidence that the rights of landlords and tenants in a locality or province are, generally speaking, dependent on the same facts as appear in the suit and that the terms of the leases regulating such leases are also similar. (*Sanderom C. J. and Ghose, J.*) *BUPENDRA NARAYAN SINGH v. NURPUT SINGH* 27 G. W. N. 204 : 1923 Cal. 451.

— S. 110—*Leave to appeal to the Privy Council—Valuation—Market.*

The rules under the Survey Valuation Act in accordance with which the land is valued for the purposes of jurisdiction do not apply in determining the value for the purpose of Section 110 of the Civil Procedure Code, but it is the market value which has to be ascertained (*Abdul Raoof and Martineau, JJ.*) *NAWAZ ALI v. ALLU*, 4 Lah. 185 : 75 I. C. 520.

— S. 110—*Leave to appeal to the Privy Council—Valuation of subject-matter—Substantial question of law—Suit for rectification.*

A person who had obtained a decree on a mortgage sued for rectification of that decree on the ground that a share of the property which had been purchased by the 8th defendant in the suit had by mistake been omitted from the decree owing to a mis-description in the mortgage deed. The Court below as well as the High Court decreed the suit as brought. On an application by the 8th defendant for leave to appeal to the Privy Council by the 8th defendant the plaintiff objected that the value of the subject-matter on appeal to His Majesty in Council was the market value of the share of the property claimed by the 8th defendant which was less than Rs. 10,000. It was also objected that there was no question of law in the case. *Held* that the claim of the plaintiff against the 8th defendant was part and parcel of the mortgage transaction and as there was no claim by title paramount set up by the 8th defendant, the value of the appeal to His Majesty in Council was not the value of the share of the 8th defendant but was the entire value of the mortgage suit which was about the appealable value. *Held* further that the question whether the plaintiff was entitled to have the decree rectified was a substantial question of Law. (*Sanderson, C. J. Ghose, J.*) *BEPIN KRISHNA ROY v. PRIYABRATA BOSE*

71 I. C. 371 : (1923) Cal. 387.

— S. 110—*Leave to appeal to the Privy Council—Valuation of the subject matter—Interest on the amount decreed.*

The suit was based on a mortgage deed for Rs. 7,000 and the amount claimed was Rs. 9,776 together with interest to the date of the decree and further interest to the date of payment. The plaint was presented on the 11th December 1916, and was returned to be signed by the plaintiffs personally. It was again presented to the Subordinate Judge on the 2nd February 1917. The first hearing was on the 16th January 1917, and the suit was decided on the 17th November 1919, when a preliminary decree for sale was granted.

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The decree was for Rs. 9,776 and 3,451.6-3 compound interest at 9 per cent per annum up to the 17th May 1920, the day fixed for payment, together with interest on the total amount at 6 per cent per annum up to the date of the actual payment. The appeal was filed in the High Court on the 20th February 1920, and decided on the 21st December 1921. *Held* on an application for leave to appeal to His Majesty in Council the case satisfied the requirements of section 110 C. P. Code as to amount and nature, since on the date of the decree the amount to be paid on the date fixed already included to ether with interest an amount exceeding Rs. 10,000 and a decree including interest up to the date of the decree had been asked for in the plaint (*Batten, J. C. and Halifax, A. J. C.*) SETH MAGAN LAL v. DARBARI LAL CHOWDHURY.

72 I. C. 395 : 1923 Nag. 239.

—S. 110—Mortgage suit—Valuation. See (1922) DIG. COL. 211 SANSUTI PRASAD v. MUNSHI EHTISHAM ALI. 73 I. C. 407

—S. 110—Question of procedure—Point not allowed to be raised for the first time in second appeal—Appeal

In a second appeal arising out of a suit for specific performance filed on the last day of limitation a point was for the first time raised in the High Court that specific performance ought not to be granted as there was extraordinary delay in filing the suit and also because damages had been alternatively asked for. The Court refused the point to be raised at that late stage—*Held*, the question of procedure involved was not a proper one for appeal to His Majesty in Council (*Mears, C. J. and Piggott, J.*) OUDH NARAYAN SINGH v. KAULESHWER SINGH.

1923 All. 463

—S. 110—Subject matter.

Where the subject matter of the suit was the question whether the applicants were permanent tenants of the site, or mere tenants at will, and the plaintiff laid no claim whatever to the buildings on the site, *Held* the matter in dispute between the parties was solely the nature of the tenancy of the site.

The second paragraph of S. 110 means that the suit must involve rights and claims to property which rights and claims were worth Rs. 10,000 or upwards, not that the rights affected properties whose value was Rs. 10,000 or more, (*Broadway and Abdul Quair, JJ.*) DHANNA MAL v. RAI SAHIB LALA MOTI SAGAR.

75 I. C. 654 : 1923 Lah. 286 (2).

—S. 110.—Substantial question of law—Abatement—Leave to appeal to His Majesty in Council.

In a suit for possession by a Hindu widow the defendant pleaded that the suit was not maintainable inasmuch as a previous suit by the predecessor-in-interest of the plaintiff had abated under O. 22, R. 9 of the Civil Procedure Code and that the plaintiff having adopted a son during the pendency of the suit she was not competent to continue it without bringing the adopted son on record. The High Court held that the previous suit had not abated and that in view of an agreement

## C. P. CODE (1909), S. 110

between the widow and the father of the adopted boy by vesting the management of the estate of the widow during the minority of the boy the widow could continue the suit in her own name:

*Held* that the decision involved no substantial question of law of general importance within the meaning of the section 110 of the Civil Procedure Code and leave to appeal to His Majesty in Council should not be granted. (*Mears, C. J. and Piggott, J.*) BU ALI KHAN v. KANI SUJAN KUAR. 45 A. 667 : 21 A. L. J. 665 : L. R. 4 A. 293 : 75 I. C. 100.

—S. 110.—Substantial question of law—Several decisions of Court—Point of law.

Where there have been a number of cases beginning in the year 1868 and going down to the year 1913 all to the same effect, namely that the claims for *matruana* being claims in respect of an interest in land did become barred absolutely by limitation under the provisions of the Statute of the Act of 1871 and that the statute of 1871 and 1877 did not have the effect and could not have the effect of reviving the claim which has already become barred, *Held* that owing to this long consensus of opinion on the question the High Court would not treat it as a substantial question of law remaining to be determined but should refuse the present application for leave to appeal to the Privy Council on the ground that there is no substantial question of law, and if the appellant wished to have this question brought before their Lordships of the Privy Council he would have to make a special application to that effect. (*Miller, C. J. and Kutub-ud-Din, J.*) BABU RAMNIRANJAN CHAUDHARY v. BABU GOBARDHAN TARKUR.

1 Pat. L. R. 314.

—S. 110.—Valuation for appeal—Annuity.

S. 110 of the Code of Civil Procedure applies to the value of an annuity which is sought to be recovered, not to the value of the property upon which that annuity is charged. (*Lord Atkin, J.*) MINZA ABID HUSSAIN KHAN v. AHMAD HUSSAIN. 45 M. L. J. 253 : 1923 M. W. N. 590 : 26 O. C. 216 : 33 M. L. J. 252 (P. C.) : 10 O. L. J. 238 : 9 O. & A. L. R. 484 : 28 C. W. N. 269 : 75 I. C. 502 (1) : 18 L. W. 146 (1923) P. C. 102 (P. C.)

—S. 110—Valuation of appeal—Interest subsequent to suit—Inclusion of.

For the purpose of ascertaining the pecuniary value of an appeal for purposes of leave to appeal to His Majesty in Council, interest subsequent to the date of plaint and up to the date of the decree must be included in the subject-matter. 16 L. W. 18 Rel. 39 M. 843 dist. (*Olafeld and Ramesam, JJ.*) RAGHUNATHASWAMI IYENGAR v. GOPAUL RAO. 32 M. L. J. 1. H. C. 1 : 74 I. C. 396 : 1923 Mad. 135.

—S. 110—Valuation of appeal—Substantial question of law.

To enable an applicant to obtain leave to appeal to the Privy Council it must be shown that the value of the subject matter in the Court of first instance was Rs. 10,000 at the date of the decree of that Court. A decision as regards the validity of a particular alienation by a co-heir of properties worth less than Rs. 10,000 does not

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affect other alienations made by other co-heirs to different persons.

The power of co-heirs in respect of alienation of joint and undivided property is well settled and is not a question of general importance. For the grant of special leave the question involved must be not merely substantial but must be of great public or private importance which did not exist in the case 27 A. 174, 6 B. 408, 39 Mad. 843 foll. (*Robinson, C. J. and Macgregor, J.*) *MAUNG THWE v. A. L. A. R. CHETTY FIRM.*

1923 Rang. 71.

## S. 110—Valuation—Future interest.

Where in a suit for sale on a mortgage the plaintiff claimed Rs. 9,300 with interest pending the suit and the plaintiff got a decree for more than 10,000 rupees, the case satisfies the requirements of S. 110 C. P. C. as regards the valuation. (*Mears, C. J. and Piggott, J.*) *GAJADHAR MAHTON v. AMBIKA PRASAD TIWARI.*

45 A. 133.

69 I. C. 645 (1) : 1923 A. 78.

## S. 110—Valuation—Proceedings under the Bombay Rent Act.

Plffs. sought to eject their tenant in order that they might occupy the premises themselves while the tenant sought the protection of the Bombay Rent Act. The monthly rent of the premises was Rs. 275 and capitalised at 20 years' purchase the value of the property would be over Rs. 10,000. The plff. got a decree and debt applied for leave to appeal to the Privy Council. Held that the decree involved directly a claim, or question to or respecting property over Rs. 10,000 and leave to appeal must be granted. (*Macleod, C. J. and Coyaje, J.*) *KASTURBHAI MANI CHAI v. HIRA LAL.*

1923 Bom. 23 (1)

## S. 110 (1)—Cause of action different against defendants—Valuation how made.

In a suit against several persons where the cause of action against each is quite distinct and different from the others, the fact that a joint suit is brought cannot make the subject matter of the appeal the same as that of the joint suit. The valuation will depend upon the relief claimed against the particular defendant. (*Spencer and Krishnan, JJ.*) *VADIVELU AMMAL v. RAJARATNA MUDALIAR.*

1923 Mad. 30.

S. 110 (2)—Deed—Construction. See (1922) DIG. COL. 213. *SARSUTI PRASAD v. MUNSHI EHTISHAM ALI.*

73 I. C. 407.

## S. 110 (3)—Substantial question of law—Decree of High Court dismissing appeal, yet varying decree of lower court—Effect.

Where the High Court dismissed an appeal with costs, but yet made one substantial variation which amounted to overruling the decision of the lower court on that point, it cannot be held there was an affirmance of the decision of the court below. Hence a substantial question of law was not necessary for appealing to the Privy Council. (*Sanderon, C. J. and Richardson, J.*) *NAGENDRABALA DAS v. DINANATH.*

70 I. C. 933 : 1923 Cal. 215.

## S. 110 (3)—Variation in decree regarding costs—If decree one of affirmance.

A variation, not touching the merits of the case but relating only to costs, does not make the

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decree anything other than an affirming decree. (*Spencer and Krishnan, JJ.*) *VADIVELU AMMAL v. RAJARATNA MUDALIAR.*

1923 Mad. 30.

## S. 111—Appeal from single judge acting in revision—If lies.

There is no appeal to his Majesty in Council from the order made by a single judge in revision under S. 115, C. P. C. and S. 107, Govt. of India Act. (*Krishnan and Mallace, JJ.*) *SRI RAJAH BOMMA DEVARA VENKATA SATYANARAYANA v. VENKATA BHASHYAKARULU.*

46 Mad. 958 :

18 L. W. 655 : 75 I. C. 604.

## S. 113, and O. 46 B. 1—"Reasonable doubt"

Where it was perhaps somewhat difficult to hold that the judge making the reference entertained any reasonable doubt as to whether a decision was correct, but the respondent withdrew any objection on this ground, as he said the questions that arose would affect a very large number of cases and must affect a very large amount of money reference was entertained. (*Robinson, C. J. and May Oung, J.*) *DAWOODJEE v. THE MUNICIPAL CORPORATION OF THE CITY OF RANGOON.*

1 Rang. 220 : 1923 Rang. 193.

## S. 115—and O. 1, R. 10—Addition of parties—Refusal—Interference in revision.

Where in a suit for partition among Co-sharer, landlords the court below refused to add the tenants as parties in the exercise of its discretion. Held that there was no case for interference by the High Court. (*Odgers, J.*) *RATNACHALAM AIYAR v. SIVACHIDAMBARAM PILLAI.*

18 L. W. 198 :

(1923) M. W. N. 403 : 45 M. L. J. 703 :

1923 Mad. 690.

## S. 115—Amendment of plaint—Principles guiding grant of—Order when revisable. See C. P. CODE O. 6, R. 17.

1923 Lah. 505.

## S. 115—Appeal—Conversion into revision—Interference.

Where it would amount to a denial of justice to the appellant to refuse relief and it appears that no appeal lies against the decision of the Court below, the High Court would convert the appeal into a revision petition and interfere. Where the lower court had erroneously and without jurisdiction purported to amend a final decree, the High Court set aside the order in revision. (*Ghose and Panton, JJ.*) *NAWABKHAJEH HABIBULLA v. GOLA ASMOTER KHATUN.*

37 C. L. J. 395 : 27 C. W. N. 720 :

74 I. C. 575 : 1923 Cal. 612.

## S. 115—Appeal—Incompetent appeal entertained by Appellate Court—Revision.

Where a lower appellate Court erroneously entertains an appeal against an order under O. 21, R. 101 C. P. Code the High Court can interfere in revision and set aside the decision of the lower appellate Court. (*Macleod, C. J. and Crump, J.*) *BAI MANI v. RANCHODLAL.*

25 Bom. L. R. 147 :

72 I. C. 256 : 1923 Bom. 214.

## S. 115 and Sch. II, Para. 15—Arbitration Award—Setting aside for misconduct—Revision.

Where a Court sets aside an award of arbitrators on the ground of misconduct on the part of

C. P. CODE (1908), S. 115.

the arbitrators its order is not open to revision under S. 115, C. P. Code, 26 B. 551 foll. (*Macleod, C. J. and Crump, J.*) CHIMANBHAI v. KESHVLAL. 25 Bom. L. R. 443; 47 Bom. 721. 73 I. C. 464; 1923 Bom. 402.

—S. 115—Board of Revenue—Proceedings under S. 169 Madras Estates Land Act—Nature of—Power of High Court to revise

An appeal preferred to the Board of Revenue in a matter referring to Recording of Rights was dismissed without hearing the party in person or by pleader. *Held* the High Court would not interfere in revision (1) because the petitioner had a remedy by suit in a Civil Court under S. 170 of the Estates Land Act and (2). The order of the Board is not that of a Court exercising judicial functions and subject to the appellate jurisdiction of the High Court (*Spencer and Devadoss, JJ.*) BURLA APPANNA v. ANALA LATCHAYYA. 18 L. W. 649; 33 M. L. T. 92 (H. C.). 45 M. L. J. 725.

—S. 115—Case—Application for leave to amend—Order refusing—Revision.

An application for leave to amend the pleadings is not a case, and an order therein refusing leave will be revisable either under S. 115 C. P. Code or S. 25 Pro. SMALL CAUSE COURTS ACT (*Wazir Hasain, A. J. C.*) BADRI PRASAD v. MURLI DHAR. 9 O. & A. L. R. 846.

—S. 115—Case decided—Decision as to jurisdiction of the Court.

Where on the objection of the defendant that the Court has no jurisdiction to enter in the suit the Court decides it has jurisdiction, the order of the Court does not amount to a decision of a case and no revision lies against it. 40 P. W. R. 1921; 41 A. 43; 42 A. 564, referred to. (*Abdul Raof, J.*) COLONY FLOUR MILLS CO., LTD v. FIRM OF SANT SINGH. 5 L. L. J. 140; 71 I. C. 487; 1923 Lah. 414.

—Ss. 115 and 144—Case decided—Decision as to payment of court-fee.

An order of the appellate court directing the appellant to pay *ad valorem* court fee is a case decided within the meaning of S. 115, C. P. Code and the High Court can revise the order. (*Oldfield, J.*) SUDALAI MUTHU PILLAI v. SUDALAI MUTHU PILLAI. 17 L. W. 623; 71 I. C. 173; 1923 Mad. 270.

—S. 115—Case decided—Meaning of—Order under S. 10 of Act, 14 of 1920.

The expression "Case" in S. 115 of the C. P. Code does not necessarily mean the whole case and includes a particular branch of the case which is quite distinct. An order directing the defendant to deposit money under S. 10 of the Charitable and Religious Trusts Act, is open to revision by the High Court. (*Brasher, J.*) MAHANT KIRPAL SINGH v. NARINJAN SINGH. 60 I. C. 658.

—S. 115—Case decided—Order staying suit.

*Semble*:—There is no revision against an order of the lower court staying the trial of a suit. 42 A. 409; 42 C. 926; 27 M. L. J. 494; 15 C. W. N. 666 Ref. (*Abdul Raof, J.*) MEELA RAM v. RIKHI SINGH. 1923 Lah. 69.

C. P. CODE (1908), S. 115.

—S. 115—Case decided—Refusal to adjourn.

The refusal by a court to adjourn the hearing of a suit in order to enable the applicant to pay the court is not an order which should be revised by the High Court. (*Piggott and Walsh JJ.*) CHAKHAN LAL v. KANHAIYA LAL. 45 A. 218; 9 O. and A. L. R. 146; 69 I. C. 921; 1923 A. 118.

—S. 115—Case decided—Refusal to issue interrogatories.

The refusal to issue interrogatories for the examination of witnesses does not amount to "a case decided" within the meaning of S. 115 C. P. Code and hence the order is not revisable. (*Scott-Smith, J.*) ROOP CHAND v. THE CHURCH MISSIONARY TRUST ASSOCIATION. 69 I. C. 417; 1923 Lah. 282 (2).

—S. 115—Case decided—Refusal to sue in forma pauperis.

Where a court refuses permission to leave in *forma pauperis*, the order is capable of being raised, as it is "a case decided" within S. 115 C. P. Code. (*Baker, O. J. C. and Halliday, A. J. C.*) ACHAL SINGH v. SETH JIWANDAS. 19 N. L. R. 165.

—S. 115—Case decided—What is—Interlocutory order—Powers of interference—Bombay Regulation II of 1827, S. 5.

In a suit relating to a municipal election two first preliminary issues were raised and decided whether the Government was a party and secondly if the Court had jurisdiction to hear the suit. *Held*, the decision amounted to the decision of a case and could be raised both under S. 115 and under S. 5 of Regulation II of 1827. Case law renewed. (*Shah, A. C. J. and Coyajee, J.*) SECRETARY OF STATE v. NARSIBAI DADABAI PATEL. 25 Bom. L. R. 992.

—S. 115—Compromise decree—Order extending time—Revision.

An order extending time for payment of money under a compromise decree cannot be raised under S. 115 C. P. C. (*Mullick and Bucknill, JJ.*) MT. NAND RANI KUER v. DURGA DASS NARAIN. 2 Pat. 906.

—S. 115—Correcting in decree—Inclusion of mortgage item—Interference.

Where through omission, one of the mortgage items was omitted in the plaint and decree in a mortgage suit and the court corrects the mistake under S. 152 C. P. C. there is no ground for interference in revision. (*Duckworth, J.*) MAUNG CHIT HLAING v. N. A. R. M. CHETTY. 74 I. C. 1020.

—S. 115—Court subordinate to the High Court—Meaning of—Rent Court. See (1922) DIG. COL. 1078. CHAUHARJA BAKSH v. KALKA PANDE. 72 I. C. 394.

—S. 115—"Decided"—New Code and old Code See (1922) DIG COL. 215. UDEY CHUND v. MULLA REASAT HOSSAIN. 70 I. C. 484.

—S. 115—Delay in application—No interference.

Where the applicant in revision offers no explanation whatever for the inordinate delay

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with which the application has been filed, (namely one year) this alone is a sufficient reason for dismissing it without entering into the merits. (*Daniels, A.J.C.*) *BINDA PRASAD v. BANARSI DAS* 10 O. L. J. 208 : 1923 Cal. 271.

## —S. 115 and O. 22, R. 2—Delay in bringing legal representative—Revision.

Where an application to bring on record the legal representative of a deceased defendant is presented out of time on the ground of ignorance of the death on the part of the applicant and the Court below excused the delay. *Held*, that the Court ought to have considered whether the applicant's ignorance of the death was justified and afforded sufficient cause for the delayed application. (*Daniels, J.*) *GOPALASWAMI IYER v. RAMACHANDRA IYER*. (1923) M. W. N. 199. 32 M. L. T. (H. C.) 298 : 72 I. C. 131. 1923 Mad. 503.

## —S. 115—Dismissal for default—Restoration—Interference.

When the general policy of the legislature is to provide an appeal when a court refuses to restore an application dismissed for default, while none is provided in cases where the trial court itself restores the application, here restoration jurisdiction should be sparingly exercised. (*Asanworth and Simpson, A.J.C.*) *BABU RAM v. MR. RAM DULAN DEBI*. 20 O. C. 194. 1922 Cal. 30.

## —S. 115 and O. 9, R. 13—Dismissal for default—Setting aside—Improper refusal—Revision.

Where a court dismissed an application to set aside an order of dismissal of a suit for default without considering the existence of sufficient cause for non-appearance of the plaintiff the order is open to revision under S. 115 C. P. Code. (*Krishnan, J.*) *KOWIHA SURYANARAYANA GARU v. YARUDALA VENKAYYA*. 70 I. C. 38 : 1923 Mad. 177.

## —S. 115 and O. 17, R. 2 and 3—Dismissal of suit—Appeal—Revision.

Where the lower Court dismisses a suit making it clear that it is proceeding under the provisions of O. 17, R. 3 C. P. Code and not under O. 17, R. 2 the remedy of the plaintiff is by way of appeal and not in revision to the High Court. (*Mullick and Kulwant Sahay, JJ.*) *SYED BAKAR HUSSAIN v. MIRZA HUSSAIN MIRZA*. 4 Pat. L. T. 46. 73 I. C. 373 : 1923 P. 223.

## —S. 115—Enquiry into disputes regarding election—Finality of order—If capable of being revised. See MADRAS LOCAL BOARDS ACT.

44 M. L. J. 161.

## —S. 115—Erroneous decision of lower appellate Court as to jurisdiction of trial Court.

The High Court has jurisdiction to interfere under section 115(c) when a lower appellate Court erroneously decides in the exercise of its admitted jurisdiction as an appellate court that the court of first instance has or has not jurisdiction to entertain a suit. In any case the High Court can take up under section 115 (b) both orders of the court below read together on the question

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whether the first court has failed to exercise a jurisdiction vested in it. (*Campbell, J.*) *DALIPA v. BARKET ALI*. (1923) Lah. 412.

## —S. 115—Erroneous decision on point of limitation—Interference.

An erroneous decision on a question of limitation can be revised, if the order results in an improper refusal to exercise jurisdiction e.g. to execute a decree. (*Kahaiyya Lal, J.*) *SURAJMAN CHAUBE v. ANORE SHUKUL*. 21 A. L. J. 861 : L. R. 4 A. 591 : 9 O. and A. L. R. 989.

## —S. 115 Error of law—Failure to note a promise to section—Powers of interference.

An error of law, such as construing a section by overlooking a material proviso to the same, is not an illegality justifying interference in revision. (*Carr, J.*) *MAUNG NYAN v. MAUNG SHWE NI*. 2. Bur. L. J. 275.

## —S. 115—Error of law—Interference. See (1921) Dig. Col. 216. HARI CHARAN ROY CHAUDHURI v. BIRENDRA NATH SAHA. 70 I. C. 541.

## —S. 115—Error of law—No ground for revision.

Where the Judge in the Court below has applied his mind to the question of law arising in the case but had decided it wrongly there is nothing to attract the interference of the High Court under S. 115, C. P. C. (*Daniels, J.*) *BHOLA NATH v. RAM SAHA*. 71 I. C. 472 : 1923 A. 465 (2).

## —S. 115—Error of law—No ground for revision.

Even if the Court below has taken an erroneous view of the law, it is no ground for interference in revision. (*Batten, J. C.*) *MR. BARI BAHU v. KUNDAN SINGH*. 71 I. C. 31.

## —S. 115—Error of law—No Ground for revision.

A mere error of law does not justify the court in interfering under S. 115 C. P. Code. (*Greaves, J.*) *GOLAM SOBIAN v. ALI HOSSAIN BAKADUR*. 1923 Cal. 322 (1).

## —S. 115—Error of law—Not a ground of revision.

Where a matter is entirely within the jurisdiction of the lower court, a mere error of law in arriving at a finding is no ground for revision by the High Court. 41 C. 32 Rst. (*Newbould and Panton, JJ.*) *RAJENDRA NATH ROY v. SHEIKH ABDOL*. 1923 Cal. 260.

## —S. 115—Error of law—Limitation—No ground for revision.

Where the Court below took a wholly erroneous view of the law of limitation, but at the same time its decision was one arrived at with jurisdiction, it cannot be revised under section 115 C. P. C. *MR. BIBI ZAINAB v. PARAS NATH*. 4 Pat. L. T. 491 : 1 Pat. L. R. 361 : 2 Pat. 800 : 75 I. C. 430 : 1924 P. 37.

## —S. 115—Error of law—Misconstruction of rules made by the High Court.

An erroneous construction of the rules framed by the High Court as regards costs of proceedings in subordinate Courts, is no ground for

C. P. CODE (1908), S. 115.

revision. (*Das and Adam, JJ.*) RAMKISHUN DAS v. BENI PRASAD. 1923 P. 90.

—S. 115 and O. 21, R. 89—Execution sale—Application to set aside—Sale of property by judgment-debtor—Locus standi to apply.

After an execution sale of the properties of a judgment-debtor he sold them to a third person and deposited the execution sale price with 5 per cent. in addition as required by O. 21, R. 89 C. P. Code. On a question arising as to whether the sale should be set aside the first Court held that it should be set aside and the Appellate Court held the contrary. On revision to the High Court, held, that the Court had jurisdiction to decide the question as it did, and that no revision lay. 40 M. 793; 43 A. 334; referred to 44 M. 554; 4 Pat. L. J. 340 dissented. (*Banerji Piggott and Walsh, JJ.*) YAD RAM v. SUNDAR SINGH.

21 A. L. J. 313. (F. B.):  
45 A. 425; L. R. 4 A. 402; 74 I. C. 778;  
1923 A. 392

—S. 115—Execution sale—Deposit to set aside—Power to make—Revision. See (1922) DIG. COL. 218. MOHENDRANATH NANDA v. BAIDYA NATH TRIPATHI. 70 I. C. 127

—S. 115—Exercise of wrong jurisdiction—Evidence of title under O. 33, R. 6.

The Court is not entitled to take evidence from the parties upon the question of the plaintiff's title before coming to the conclusion whether it would grant or refuse the application under rules 5 and 6 of O. 33. If it takes evidence on the question of title it exercises a jurisdiction not vested in it by law within S. 115. (*Banerji and Gokul Prasad, JJ.*) MT. SHAUHAN BIBI v. ABDUS SAMAD. 1923 A. 577.

—S. 115—Failure to exercise jurisdiction vested by law—Interference. See (1922) DIG. COL. 221. BASANTI CHARAN SINHA v. RAJANI MOHAN CHATTERJI. 49 Cal 928

—S. 115—Failure to exercise jurisdiction—Limitation—Decision on.

Where by reason of a wrong decision on a question of limitation a court does not entertain a proceeding, it is a failure to exercise a jurisdiction vested in the Civil Court and the High Court can entertain a revision under S. 115 C. P. Code 44 M. 554 foll. (*Spencer and Venkatasubba Rao, JJ.*) THE BRITISH INDIA STEAM NAVIGATION CO. v. SHARAFALLEY. 46 Mad. 938; 44 M. L. J. 100; 17 L. W. 705; 70 I. C. 888; 1923 Mad. 435

—S. 115—Interlocutory order—Appeal—Revision—Interference when justified.

Where there is a right of appeal from the decree that might be passed in the suit, the High Court will not interfere in revision with the judgment on an interlocutory order passed by the Court below. (*Miller, C. J. and Foster, J.*) HARIHAR PRASAD SINGH v. KESHO PRASAD SINGH. 71 I. C. 911.

—S. 115—Interlocutory order Interference.

High Court has power to interfere with an interlocutory order when no appeal lies from the order impugned, if irreparable damage would

C. P. CODE (1908), S. 115.

result from a refusal to interfere at that early stage. When the order impugned held a court had jurisdiction to try a suit the order is open to revision. (*Hald and Sena-gre, JJ.*) THE JUPITER GENERAL INSURANCE COMPANY v. ABDUL AZIZ. 1 Rang. 231; 1924 Rang. 2.

—S. 115—Interlocutory order—If open to revision.

Interlocutory orders cannot or at any rate should not be interfered with in revision. (*Zafar Ali, J.*) THE FIRM RAHMAT ULLAH-FAKHAR-UD-DIN v. THE FIRM RAHM BAKHS QUMAR-UD-DIN. 75 I. C. 107; 1923 Lah. 301 (2).

—S. 115—Interlocutory order—Misjoinder of parties and causes of action—Interference. See (1922) DIG. COL. 219. VELAPPA NADAR v. CHIDAMBARA NADAR. 70 I. C. 684.

—S. 115—Interlocutory order—Order of remand—Inherent power—Revision—Interference. See C. P. CODE O. 41, R. 23. 26 O. C. 10.

—S. 115—Interlocutory order—Refusal to frame issue—Revision—Interference—Government of India Act, S. 107.

As a general rule, except upon proof of irreparable injury the High Court will not interfere in revision under S. 115 of the Code of Civil Procedure, when there is another remedy open to the applicant. Interlocutory orders are not exempted. Where the Court below refused to raise an issue clearly arising from the pleading of the party, without assigning any reason whatever, the High Court interfered under S. 107 of the Government of India Act. (*Mullick and Ross, JJ.*) SHEO PRASAD SINGH v. SHUKHU MAHTO. 4 Pat. L. T. 401; 72 I. C. 148; 1923 P. 518.

—S. 115—Interlocutory order—Refusal to issue commission—Interference.

In a case where a Court refused to examine a witness on commission, when it had no discretion to refuse it, the High Court will interfere in interlocutory proceedings rather than permit a trial to go on, on an illegal course which will entail unnecessary expenditure and waste of time. (*Wallace, J.*) JAGANATHA SASTRY v. SARATHAMBAL AMMAL. 46 Mad 574; 17 L. W. 251; 71 I. C. 530; 1923 M. W. N. 157; 1923 Mad. 321; 44 M. L. J. 202.

—S. 115—Interlocutory order—Revision—Appeal.

The High Court refused to interfere in revision with an interlocutory order of the lower court directing a commissioner to ascertain mesne profits as the applicant had a remedy by way of appeal from the final decree. (*Spencer, J.*) HUSSAIN SAHIB v. HAMMAD SAHIB. 1923 Mad. 43.

—S. 115—Interlocutory order—Revision—Other remedy open.

It is no doubt the practice of this Court not to interfere in revision, when another remedy is available, but the High Court may interfere in exceptional cases especially where it is not clear that there is in fact another remedy. (*Oldfield, J.*) HARI KRISHNA PILLAI v. ARUR PANDITHAR. 18 L. W. 105; (1923) M. W. N. 354; 72 I. C. 688; 1923 Mad. 663.



C. P. CODE (1908), S. 115.

—S. 115—*Interpretation of words in a document. Interference in Revision.*

On a mere question of the interpretation of particular words in a document, where the words were clearly susceptible of more than one interpretation, the High Court would decline to interfere in revision. (*Piggott, J.*) KRISHNA DATT v. BRIJ LAL. 1923 All. 269.

—S. 115.—*Jurisdiction—Adjournment on payment of costs.*

Where a court grants an adjournment on condition costs are paid, and on failure to pay the same decided the suit *ex-parte*, it had ample jurisdiction to do so and the order is not revisable. (*Das and Macpherson, JJ.*) CHOTU MIAN v. PALTO GOPE. 1 Pat. L. R. 270.

—S. 115.—*Jurisdiction—Declining of—Dismissal of execution petition as not sustainable*

Where the lower appellate Court erroneously holds that the District Munsif had no jurisdiction to execute a decree and dismisses the execution petition as having been referred to a Court not having jurisdiction, the lower appellate Court must be held to have declined to exercise a jurisdiction within the meaning of S. 115 C. P. Code. (*Oldfield and Venkatasubba Rao, JJ.*) MUTHUKARUPPA CHETTY v. PAIYA KAVUNDAN. 18 L. W. 17 : 45 M. L. J. 210 : 1923 M. W. N. 406 : 73 I. C. 956 (2) : 1924 Mad. 32.

—S. 115.—*Jurisdiction—Erroneous decision on point of law—Revision.*

Where a Court assumes jurisdiction to pass an order for an erroneous view of the law, in a matter where it has in fact no jurisdiction, it is a case for interference of the High Court under S. 115, C. P. Code. (*Krishnan and Venkatasubba Rao, JJ.*) RAMASWAMI GOUNDAN v. MUTHU VELAPPA GOUNDAN. 46 Mad. 536 : 44 M. L. J. 1 : 1923 M. W. N. 183 : 71 I. C. 1039 : 1923 Mad. 192.

—S. 115.—*Jurisdiction—Failure to entertain plea of illegality suo motu.*

Where a court fails to entertain plea of illegality *suo motu* i.e. that that a certain contract is opposed to public policy, and even refuses to allow the defendant to raise it, must be deemed to have declined a jurisdiction vested in it and to have acted with material irregularity in the exercise of jurisdiction. (*Philips, J.*) KANDASAMI GOUNDAN v. NARAYANASWAMI GOUNDAN. (1923) M. W. N. 566 : 45 M. L. J. 551.

—S. 115.—*Jurisdiction—Objection to—Trial of Small Cause Suit as a regular Suit without objection.*

Where a suit for Rs. 400 cognizable by a Small Cause Court was tried by a District Munsif on the regular side without any objection by the parties and there was also an appeal to the District Court which was heard without objection, Held that the High Court would not interfere in revision. 21 C. 249 : 25 A. 135. Relied on. 33 M. 323 : 25 B. 417 dist. (*Baker, O. J. C.*) KAMRUDDIN v. MT. INDRANI. 19 N. L. R. 179.

—S. 115.—*Jurisdiction—Revision against decision of Kumaun High Court.*

C. P. CODE (1908), S. 115.

The High Court of Kumaun is not a Court subordinate to the Allahabad High Court for purposes of revisional jurisdiction. (*Piggott, J.*) SARDAR SINGH KONDARI v. AMAR SINGH KONDARI. 45 A. 383 : 71 I. C. 991 (2) : 1923 A. 291 (2).

—S. 115.—*Leave to sue in forma pauperis—Refusal—Interference in revision*

Where the Court below refuses to grant leave to sue *in forma pauperis*, it is open to the High Court to interfere in revision. The order on an application for permission to sue *in forma pauperis* is a case decided within the meaning of S. 115 C. P. Code. 12 O. C. 381 followed, 43 A. 564 : 44 A. 248 distinguished. (*Ashworth, J. C.*) SHEO NARAYAN LAL v. MT. MUNAQA. 74 I. C. 344 : 9 O. L. J. 610 : 1923 Oudh 118.

—S. 115.—*Leave to withdraw—Appellate Court acting on erroneous grounds—Interference.*

Where after a suit is dismissed on the merits an appellate court grants permission on insufficient grounds it amounts to material irregularity justifying interference in revision. (*Fremantle, S. M. and Burn, J. M.*) JAGAT NARAIN KURMI v. JAI NARAIN LAL. L. R. 4 All. 410 (Rev.)

—S. 115.—*Material irregularity—Defect of procedure—Revision.*

Where the Court disposed of a suit on a case not raised by the parties and to which evidence had not been directed, there was a substantial error or defect of procedure, (*Ross, J.*) GAYAN SAHU v. BALCHAND SAHU. 73 I. C. 41.

—S. 115.—*Material irregularity—Decision on imaginary facts—Perversity.*

Where the decision of the court below was based not merely on a forced and impossible construction of the facts that were before the court, but on the importation of facts which were admitted by both parties not to exist this is clearly a material irregularity in the exercise of jurisdiction of the sort contemplated by S. 115 (c) C. P. Code. (*Halifax, A. J. C.*) PANDURANG v. KALLU DAS. 1923 Nag. 108.

—S. 115.—*Material irregularity—Direct Contradiction between evidence and finding.*

(*Obiter*) If there is a direct contradiction between the evidence and the finding, there is material irregularity justifying interference in revision. (*Baker, O. J. C. and Halifax, O. J. C.*) ACHAL SINGH v. SETH JIWANDAS. 19 N. L. R. 165.

—S. 115 (c)—*Material irregularity—Refusal to frame issue—Court-fee—Valuation—Revision.*

Where the defendant in his written statement objected that the suit was grossly undervalued but the Court below instead of raising an issue thereon merely recorded the objection, Held that the court below acted with material irregularity in refusing to raise an issue and decide it. (*Davados, J.*) VENKATACHALLAM CHETTIAR v. KRISHNASWAMI THEVAN. 69 I. C. 542 : 1923 Mad. 134 (2).

C. P. CODE (1908), S. 115.

—S. 115—Material irregularity—Refusal of hearing—Interference. See (1922) DIG. COL. 223 BACHUBAI JAIRAD v. IBRAHIM ISAK MOTIVALA.

47 Bom. 11 : 69 I. C. 169.

—S. 115—Material irregularity—Want of Jurisdiction — Distinction between—Omission to decide material point.

When a court of law has taken up a point of fact or law for decision and has decided that point wrongly it has acted with full jurisdiction and regularly and legally and no revision lies unless, that decision itself affects the court's own jurisdiction but when having jurisdiction, the court has failed or refused to take up the point for decision, it has exercised jurisdiction irregularly and the more the failure or refusal affects the exercise of its jurisdiction, the greater the irregularity will be. Authorities reviewed (*Wallace, J.*) AHMAD THAMBI MARAICAI v. BASAVA MARACAVAR.

46 Mad. 123 : 44 M. L. J. 69 : 1923 Mad. 254 : 72 I. C. 902.

—S. 115—Misjoinder of causes of action—Revision—Interference See (1922) DIG. COL. 223 ARUNACHALAM CHETTIAR v. ARUNACHALAM CHETTIAR

69 I. C. 966.

—S. 115.—Omission to consider evidence—Revision.

Where the Court below misconstrued a material document and did not consider the other evidence, on the record, it is a sufficient ground for interference in revision. (*Fremantle, S. M. and Burn, J. M.*) CHAUBEY GAYA PRASAD v. RAM LAL.

L. R. 4 A. 248 (Rev.)

—S. 115—Order allowing suit to be withdrawn—If open to revision

An order allowing a suit to be withdrawn with liberty to bring a fresh suit, if improperly made is capable of being revised by the High Court. (*Abdul Qadir, J.*) GHULAM RASUL v. MT. RAMZAN BIBI.

1923 Lah. 97 (2).

—S. 115—Order for sanction—Revision—Costs.

Having regard to the accepted view that a revision against an order granting sanction to prosecute should be treated as one under S. 115 of the C. P. Code, it is competent to the Court to award costs of the petition. (*Daniels, A. J. C.*) MT. FERROZA JAN v. MIRZA AMIR ALI.

9 O. &amp; A. L. R. : 103 : 74 I. C. 445 :

24 Cr. L. J. 781 : 9 O. L. J. 593 : 1923 Oudh 119.

—Ss. 115 and 151—Orders passed under in herent power—Revision.

Where a Subordinate Court has express jurisdiction to pass an appealable order but has gone out of its way to invent a novel form of procedure, and consequently makes an order for which no appeal is provided in the Code, the High Court will be ready to consider whether this course was really necessary, and will not hold itself precluded from setting aside the order by taking a strict view of the provisions of section 115. (*Dalal and Simpson, A. J. C.*) BHAGWAN BAKHSH SINGH v. SURENDRA BIKRAM SINGH.

10 O. L. J. 209 : 74 I. C. 335 :

1924 Oudh 11.

C. P. CODE (1908), S. 115.

—S. 115—Order of remand—If open to revision. See C. P. CODE O. 41, R. 23.

1923 All. 464 (8).

—S. 115—Order under S. 10 C. P. Code—Interference in revision.

An order staying a suit under section 10 of the Civil Procedure Code is not "a decision of a case" within the meaning of section 115 of the Civil Procedure Code any more than a decision by a Subordinate Court in a case in which the only question is whether it has or has not jurisdiction to go on with a suit.

In order to come to a finding as to whether the requirements of section 10 C.P. Code have or have not been fulfilled, the Court is bound to determine certain matters mentioned in the section, and if it does, it cannot be said that the Court has acted illegally in the exercise of its jurisdiction which was vested in it by law. (*Motisarar, J.*) FIRM OF RAMCHAND DIVANCHAND v. FIRM OF PRITHVICHAND & Co.

73 I. C. 247 : 1923 Lah. 615.

—S. 115—Other remedy open—Interference.

Where another and equally effective remedy is open to a party aggrieved by an order, the High Court would not interfere in revision with the order, 30 A. 331 : 33 A 647 foll. (*Prideaux, A. J. C.*) RAMJI v. BALKRISHNA.

69 I. C. 719.

—S. 115 — Other remedy open—Suit—Interference by High Court in revision.

It is the practice of the High Court that where there is another remedy, it will not interfere under S 115 C. P. C. As the unsuccessful party in the present case had a right of suit, the court refused to interfere in the exercise of its revisional powers. (*Mullick and Bucknill, JJ.*) KAPLESHWAR JHA v. RAGHUNANDAN PARSAD.

1 Pat. L. R. 370 : 4 Pat. L. T. 718 : 74 I. C. 474.

—S. 115—Pauperism—Failure to consider—Question of title.

In an application for leave to see *in forma pauperis* a court acts without jurisdiction in going into the evidence elaborately and trying the question of title in order to see if he has a good cause of action so also failure to take evidence on the question of pauperism amounts to not exercising a jurisdiction vested in it by law and the order can be interfered within revision. (*Banerji and Gokul Prasad, JJ.*) SHAURAN BIBI v. ABDUS SAMAD.

45 A. 548 : 21 A. L. J. 441 :

L. R. 4 A. 252 : 73 I. C. 538.

—S. 115—Permission to withdraw with liberty—Interference.

Where a court decides wrongly to grant permission to withdraw from a suit with liberty to bring a fresh suit, but still has applied its mind to the question whether there was a formal defect by reason of which the suit was liable to fail, the High Court cannot interfere in revision. (*Daniels, J.*) NANNHU v. ROSHAN SINGH.

74 I. C. 112.

—S. 115—Powers under—When exercised

So long as a court has jurisdiction to determine a question even if a wrong decision is come to, the High court will not interfere in revision, especially where substantial justice has been done

## C. P. CODE (1908), S. 115.

A petitioner who claims revision must come to court with clean hands and shew he has been unjustly treated. (*Pipon, J. C.*) *RAM DAS v. RAM LAL*. 73 I. C. 873

—S 115—Question of jurisdiction to try suit—Revision *See* C. P. CODE SS. 20 AND 115. 1923 Lah 565.

—S 115—Rateable distribution—Order regarding—Interference.

Order under S 73, C.P. Code, are not ordinarily revisable under S 115 C. P. Code (*Mullick and Bucknill, JJ.*) *BABU BISHUN MOHAN SAHAY v. NARAYAN PRASAD ASTHANA*. 74 I. C. 140

—S. 115—Refusal to accept deposit.

It is now the settled practice of the Patna High Court to treat a refusal to accept deposit tendered for the purpose of setting aside a sale as a refusal to exercise jurisdiction (*Mullick, and Macpherson, JJ.*) *AULAD ALI v. ABDUL HAMID*. 2 Pat. 715 : 74 I. C. 102 : 1923 P. 490.

—S 115—Refusal to issue interrogatories

A refusal to issue interrogatories for the examination of witnesses is not a ground for revision. (*Scott Smith, J.*) *ROOP CHAND AND MEHA RAM v. THE CHURCH MISSIONARY TRUST ASSOCIATION*. 69 I. C. 417 : 1923 Lah. 282 (2).

—S. 115 and O. 41, Rr 23 and 27—Remand—Improper order—Revision—Interference when justified. *See* (1922) DIG. COL. 225. *SHEIK MAHOMED MARACAYAR v. RANGASAMI NAIDU*. 69 I. C. 826.

—S 115—Rent Court—Order if reversible

The orders of a Rent Court under the Oudh Rent Act are revisable by the High Court in the absence of any provision of law barring but exercise of powers. (*Dalal J. C.*) *JAGANNATH PERSHAD v. BECHU*. 90. & A. L. R. 931.

—S 115, O 47 R. 1—Review—Rejection of an application—Revision—Other remedy open

Exercising cases where an obvious injustice has to be remedied the High Court need not interfere in revision with an order rejecting an application for review. 26 A 573 : 35 P. R. 1911 referred to. (*Broadway, J.*) *TOTA RAM v. CHANDU MAL TOTA RAM*. 71 I. C. 160

—S. 115 and O. 47, R. 1—Review—Refusal to grant—Revision.

The grant of review is a matter peculiarly within the discretion of the Judge who passed the decree and a Court would not interfere in revision with the exercise of such discretion when a review has been refused. (*Daniels, A. J. C.*) *JAG MOHAN SINGH v. MATA BADAL*. 90 L. J. 623 : 74 I. C. 351 (1) 1923 Oudh 153

—S. 115—Revision—Lunacy Act—S. 14 Proviso 2—Orders of District Magistrate—Not judicial but executive—No revision by the High Court. *See* LUNACY ACT, S. 14 PROVISIO 2. 4 Lah. 1.

—S 115—Sanction to prosecute—Irrelevant evidence—Material irregularity—Revision.

Where the Court below grants sanction to prosecute on evidence which is legally inadmissible it acts with material irregularity and the

## C. P. CODE (1908), S. 115.

order is open to revision by the High Court in revision. (*Rafiq, J.*) *PEARY LAL v. EMPEROR*. 21 A. L. J. 399 : L. R. 4 A. 92 (Cr) : 75 I. C. 148 : 24 Cr. L. J. 909.

—S 115—Sanction to prosecute—Refused by Munsif and granted by District Judge.

Where the District Munsif refused sanction to prosecute but on an application under S. 195 (6) Cr. P. Code the District Judge granted sanction, an application for revision to the High Court lies under S. 115 C. P. Code and not under S. 195 (6) Cr. P. Code. (*Lindsay, J.*) *RAM NARAIN v. HARBANS SINGH*. 71 I. C. 617. 1923 A. 490 (1).

—S 115—Scope of.

Section 115 Civil P. C., which corresponds in its wordings to S. 44 of the Punjab Courts Act, applies to jurisdiction alone, the irregular exercise or non-exercise of it, or the illegal assumption of it, and it is not directed against conclusions of law or fact in which the question of jurisdiction is not involved. (*Motisar, J.*) *THE PUNJAB BANKING COMPANY LTD. v. DIWAN DHANPAT RAI*. 75 I. C. 487 : 1923 Lah 506 (2).

—S. 115— and 10—Stay of suit—Refusal by lower Court—Interference in revision.

Where a subordinate Court proceeds with the trial of a suit in contravention of S 10 C. P. Code, it usurps a jurisdiction, not vested in it by law and its order refusing to save the suit, though interlocutory, is open to revision by the High Court 42 A. 409 dist. (*Phillips, J.*) *RAMA CHANDRAM PILLAI v. NFFI AMBALACHI*. 70 I. C. 5 : 1923 Mad. 88 (1).

—S 115—Subordinate Court—Case decided—City of Bombay Municipal Act S 33—Election petition—Decision of Chief Judge of Small Cause Court.

The High Court has no jurisdiction under S. 115 of the C. P. Code to interfere with the decision of the Chief Judge of the Small Cause Court in an election petition. The Chief Judge acting under the powers given to him by S. 33 of the City of Bombay Municipal Act is a *persona designata*. (*Macleod, C. J. and Crump, J.*) *NAVAL KAR v. MRS. SAROJINI NAIDU*. 25 Bom. L. R. 463 : 73 I. C. 133 : 1923 Bom. 421.

—S. 115—Subordinate Court—District Judge—Trial of elections—Material irregularity.

A District Judge trying the validity of an election under the Madras Local Boards Act XIV of 1902 is not acting as a *persona designata* but as a court. His orders are judicial and liable to interference in revision by the High Court. The mere fact that the order of the District Judge is declared to be "final" merely means that it could not be questioned by way of appeal but it does not exclude the exercise of revisional jurisdiction by the High Court. (*Krishnan and Venkata-subbarao, JJ.*) *RAMASWAMI GOUNDAN v. MUTHU VELAPPA GOUNDAN*. 46 Mad 536 : 71 I. C. 1039 : 1923 M. W. N. 133 : 1923 Mad. 192 : 44 M. L. J. 1.

G. P. CODE (1908), S. 115.

—S. 115—*Subordinate Court—High Court Kumaun—If subordinate to the Allahabad High Court.*

The High Court of Kumaun is not a Court subordinate to the Allahabad High Court for purposes of revisional jurisdiction under the Code of Civil Procedure. (*Piggott, J.*) SADAR SINGH KONDARI v. AMAR SINGH KONDARI.

45 A 383 : 71 I. C. 991 (2) : 1923 A. 291 (2).

—S. 115—*Subordinate Court—Land Acquisition Officer—Omission to make reference—Revision.*

Where a Collector in a land acquisition proceeding refuses to make a reference to the District Court on the question of the apportionment of the compensation, the High Court has no power to interfere with the order in the exercise of its revisional jurisdiction, as the Collector is not a "Subordinate Court" to the High Court. 42 M. 231 dis. (*Macleod, C. J. and Crump, J.*) BALKRISHNA DAI v. THE COLLECTOR "BOMBAY SUBURBAN" 47 Bom. 699 : 25 Bom. L. R. 398 : 73 I. C. 354 : 1923 Bom. 290.

—S. 115—*Subordinate Court—Oudh Rent Act, Ss. 135, 119.*

The revisional jurisdiction of Judicial Commissioner's Court, Oudh under S. 115 C.P.C. read with S. 135 of the Rent Act is restricted to those cases in which the course of appeal lies to it under Ss. 119 and 119-B of the latter act, and does not extend to cases in which the course of appeal lies to the Board of Revenue. (*Simpson and Wazir Hasan, A. J. C.*) CHANHARJA BAKHSH v. KALKA PANDE. 1923 Oudh 18 : 72 I. C. 394.

—S. 115—*Suit dismissed for want of jurisdiction—Remand by first appellate court—Revision.*

Where a suit was dismissed by the Court holding that it had no jurisdiction and the lower appellate court remanded the case to the trial court for taking action under O. 7, R. 10—Held a revision lay from the Order of remand (*Broadway, J.*) DWARKA DAS v. RAHIM BAKHSH. 73 I. C. 755 : 1923 Lah. 524.

—S. 115—*Want of jurisdiction a good ground for revision—Wrong decision not ground for revision.*

On the mere ground that the decision was wrong a High Court certainly will not interfere, but where the lower Court had no jurisdiction to enquire into the question the High Court has power to interfere in revision. (*Carr, J.*) MAUNG TUN U. v. MAUNG PO SHOK. 1 Rang. 265 : 1923 Rang. 199.

—S. 115 and O. 23, R. 1—*Withdrawal of suit with liberty to sue—Ill-advised grant of leave—Revision.*

Where in granting leave to withdraw a suit with liberty to sue afresh the judge never applied his mind to the merits of the application and gave no reasons for allowing the plaintiff permission to bring a fresh suit and it was quite clear that if he had considered the language of the section for a moment such a permission could never have been given. Held that the High Court can and will

G. P. CODE (1908), S. 141.

interfere in revision in such cases. (*Daniels, A. J. C.*) PULAI v. RANA UMANATH SINGH. 9 O. & A. L. R. 3 : 72 I. C. 1034.

—S. 115—*Subordinate Court—Sub judge trying an election petition.*

A sub-judge trying an election petition questioning the validity of the election of a municipal commissioner under the Madras District Municipalities Act is not a Court subordinate to the High Court within S. 115 C. P. Code, Consequently the High Court has no jurisdiction to interfere with the order of a sub-court refusing to try an election petition. 21 B 279 foll. 38 M. 581 Ref. (*Devadoss, J.*) DEIVANAYAGAM PILLAI v. P. T. S. DIWAN MOHIDEEN ROWTHER. 44 M. L. J. 39 : 70 I. C. 780 : 1923 Mad. 169.

—S. 122—*Powers of High Court.*

The High Court has power to alter, amend and add to rules of procedure laid down in the Code of Civil procedure according to S. 122, but he has no power to alter the period of limitation provided by the Limitation Act (*Abdul Raoof, J.*) MADAN GOPAL v. MALWA RAM. 1923 Lah. 96.

—S. 141—*Applicability—Execution proceedings.*

S. 141 C. P. Code applies only to proceedings in original suit. (*Jwala Prasad and Foster, J.J.*) LACHMAN LAL v. PADARATH SINGH. 4 Pat. L. T. 735.

—S. 141 and O. 9, R. 9—*Applicability to proceedings under O. 9 R. 9—Appeal. See (1922) DIG. COL. 227. HARA KUMAR MITTER v. MURARI MOHAN BOSE. 69 I. C. 1003.*

—S. 141—*Applicability to proceedings under S. 105 of the Bengal Tenancy Act.*

S. 141 C. P. C. does not apply to proceedings under S. 105 B. T. Act. as they are filed in a Revenue Court and before Revenue Officers. (*Miller, C. J. and Kulwant Sahay, J.*) HAZARI LAL SAHU v. AMBICA GIR. (1923) Pat. 273.

—Ss. 114 and 115—*Application in execution proceedings Dismissal for default—Appeal—Refusal to restore—Revision.*

S. 141 of the Code of Civil Procedure is not applicable to execution proceedings, and an application for execution dismissed for default could be restored only under the provisions S. 151 of the Code—Exercise of powers under S. 151 of the Code is purely discretionary with a court and if the lower appellate Court refused to exercise these powers their non-exercise is not a good ground for revision II Mad. 793 Foll. (*Motisarur, J.*) THE PUNJAB BANKING CO. LTD. v. DIWAN DHANPAT RAI. 75 I. C. 487 : 1923 Lah. 506 (3).

—S. 141 and O. 9, R. 9—*Application to set aside ex parte decree—Dismissal of application for default—Restoration.*

Where an application to set aside an order of dismissal for default has itself been dismissed for default, it is open to the Court to set aside that dismissal under O. 9, R. 9 read with S. 141 C. P. Code, 4 P. L. J. 135; 44 C. 950, dissented, 23 O. C. 319 followed. (*Daniels, J. C.*) MT. JAMNA v. Mt. RAMRAJ. 9 O. L. J. 627 : 9 O. & A. L. J. 32 : 74 I. C. 380 : 1923 Oudh 146.

C. P. CODE (1908), S. 141.

—S. 141 and O. 9, R. 2—*Dismissal of suit—Application for restoration of suit—Dismissal for default—Appeal.*

S. filed a suit against the applicants in the Court of the Subordinate Judge of Bilaspur. Certain preliminary issues were framed and the parties were told to appear on the 12th of July 1921, to argue them. The defendants were present but the plaintiff was not and the suit was accordingly dismissed. On the 23rd of July 1921 made an application for setting aside the order of dismissal. She appeared on the 3rd of September 1921, but notices on the opposite party had not then been served. The case was adjourned to 8th October 1921, and the order passed on that date was as follows:—

"S. in person. Non applicants absent. The previous notices were returned unserved. Notice for this hearing could not be served for want of time as process-fee was paid on 3rd October 1921. I do not find any justification for paying process-fee so late. I therefore dismiss the application for default of the applicant.

*Held* that the application was dismissed under O. 9, R. 2 and that no appeal lay against the order (*Hallifax, A. J. C.*) HIRASA v. SHEKHUWAR.

72 I. C. 547.

—S. 141—Execution proceedings—Dismissal for default—Restoration—Refusal—Appeal. *See* C. P. CODE O 43, R 1 (c).

21 A. L. J. 135.

—S. 141 and O. 9, R. 9—Execution—proceedings—Dismissal for default—Restoration—Inherent power.

S. 141 C. P. Code has not the effect of extending the provisions of O. 9, R. 9, C. P. Code to execution proceedings or of authorising the Court to set aside a dismissal of an execution petition for default. But the Court may, in a proper case in the exercise of its inherent power restore the execution and with such restoration the attachment will revive (*Hallifax, A. J. C.*) SHANKER RAO v. MANIKRAO, 1923 Nag. 18.

—S. 141 and O. 9, R. 4—Execution proceedings—Restoration.

S. 141 of the Civil Procedure Code does not make the provisions of O. 9, R. 4 and all cognate provisions applicable to execution proceedings (*Das and Alam, JJ.*) SHEO NANDAN CHAUDHURY v. DEBI LALL CHAUDHURY. 4 Pat. L. T. 93:

(1923) Pat. 78 : 1 Pat. L. R. 134 :

71 I. C. 484 : 2 Pat. 372 : 1923 P. 239.

—S. 141—Permission given to mutawalli to lease—Order if appealable.

Where a court grants permission to a mutawalli to lease wakf properties the order is passed under S. 141 C. P. Code and is appealable neither under the Code nor any other law. (*Mookerjee and Panton, JJ.*) HABIBAR RAHAMAN v. SAIDANNESSA BIBI. 38 C. L. J. 328.

—S. 141 and O. 43, R. 1 (c)—Scope of—Dismissal for default—Application to set aside—Dismissal.

The procedure laid down in the C. P. Code regarding suits must be followed also in cases of application to set aside dismissal for default and

C. P. CODE (1908), S. 144.

as such O. 9 and O. 43, R. 1 (c) apply to an order of dismissal of such an application. (*Hallifax, A. J. C.*) KALICHARAN v. RATANSINGH.

72 I. C. 559 : 19 N. L. R. 119 : 1923 Nag. 293.

—S. 144—Appeal—Applicability of section impugned.

Where one of the issues was whether S. 144 applied to the facts, and the judges decided it one way or the other, an appeal lies even though one of the grounds of appeal is that the decision on the issue is wrong (*Daniels, J.*) SHEIKH CHHUTAN v. JWALA PRASAD. 1924 A. 64 :

73 I. C. 602.

—S. 144—Applicability—Restitution against auction purchaser.

S. 144, C. P. C., allows restitution to be made against the decree holder who obtains any benefit under a decree which is afterwards reversed in appeal. It does not allow restitution against a third party such as a stranger auction purchaser. (*Kanharya Lal, J.*) BALWANT SINGH v. MT. LAIQA BEGAM. L. R. 4 A. 526 : 75 I. C. 238.

—S. 144—Attachment—Suit by stranger regarding title—Receiver appointment of—Dismissal of suit—Restitution.

A decree holder attached a property in execution whereupon a stranger filed a suit for declaration of his title to the property. A Receiver was appointed in the suit, but the suit was finally dismissed. *Held*, the decree holder cannot get back the property in an application under S. 144, but only by means of a suit. (*Daniels, J.*) SHEIKH CHHUTAN v. JWALA PRASAD. 1924 A. 64 :

73 I. C. 602.

—S. 144—Execution under mistake—Restitution to judgment-debtor—Application for restitution by decree-holder.

The plaintiff decree-holder not having complied with the decree under which he was to make a deposit within a fortnight and the court having under the misapprehension that he had made the deposit granted him relief to which he was not entitled. *Held* it is fully within the court's power to put right the wrong which had been done. S. 144 does not apply to a case where the original decree holds good; but what was reversed here is an order, not the decree granting the plaintiff decree-holder execution under the erroneous impression that he had fulfilled the terms of the decree. (*Daniels, J. C.*) DORI LAL v. MT. JAMAGA. 72 I. C. 879 : 1923 Oudh 16.

—S. 144—Execution sale—Setting aside—Repayment of purchase money—Payment of encumbrances by purchaser. *See* (1922) Dig. Col.

28. JAI BERHAM v. KEDAR NATH MARWARI. 27 C.W. N. 592 : 21 A. L. J. 490 : 37 C. L. J. 351 :

32 M. L. T. (P. C.) 10 : 4 Pat. L. T. 61 :

18 L. W. 802 : 25 Bom. L. R. 643 : L. R. 4 P. C. 117 : 1923 M. W. N. 368 : 2 Pat. 10 : 69 I. C. 278 : 44 M. L. J. 735 (P. C.)

—S. 144 and O. 9, R. 13—Ex parte decree—Plff. executing decree and obtaining possession—Subsequent mortgage by plaintiff and execution sale and purchase by mortgagee—Subsequently set aside—Effect of.

## C. P. CODE (1908), S. 144.

Plaintiff in execution of an *ex parte* decree for ejectment took possession of the property. Subsequently he mortgaged the property and the mortgagee sued to enforce the mortgage and purchased the property in execution. The mortgage purchaser was also put in possession. Subsequently the *ex parte* decree was set aside and the debt applied for delivery of the property back to him impleading the plaintiff and the purchaser in execution of the mortgage decree. *Held*, that the application for restitution was maintainable not merely against the original plaintiff but also against the purchaser in execution who was in law a representative of the plaintiff and in no better position than the plaintiff himself. (*Miller, C. J. and Jwala Prasad J.*) BASANTA KUMARI DAS v. BAIKUNTH MARWARI. (1923) Pat. 1: 2 Pat. 277: 1 Pat. L.R. 338 72 I. C. 912: 1923 P. 371

—S. 144—Restitution—Application for—Limitation—Art. 182 applicable. See LIM. ACT ART. 182. (1923) Pat. 1.

—S. 144—Restitution—Mortgage decree—Increase of mortgage money on appeal—Rights of person in possession—Mesne profits—Interest. Interest at a sufficient rate may be substituted for the profits, which the person in possession under a mortgage decree which was subsequently varied, enjoyed during the period between his execution of the first court's decree and his giving notice that he had deposited the additional amount. 8 L. W. 179 foll. In a suit for redemption of a Kanom the defendants are not entitled to recover possession from the plaintiff (which he had taken in pursuance of the decree of the trial court) simply because the amount of compensation for improvements was increased on appeal. 13 L. W. 449; 44 M. 901 Rel'd on (*Spencer and Krishnan, JJ.*) NEELAKANDAN NAMUDURI v. VASUDEVAN. 18 L. W. 30: (1923) M. W. N. 508 73 I. C. 1041: 33 M. L. T. 45 (H.C.) 45 M.L.J. 323

—S. 144—Suit for damages—Maintainability of. See (1922) DIG. COL. 230, ARJUN SINGH v. PARBATHI. 69 I. C. 173.

—S. 145 and O. 21, R. 40—Judgment-debtor released on giving surety for appearance—Failure to produce debtor—Effect.

Where sureties agreed to produce the judgment debtor but failed without further notice they can be made liable on their bonds for their failure. (*Spencer and Devadoss, JJ.*) NAGIER v. KRISHNAN CHETTIAR. (1923) M. W. N. 770.

—S. 145—Principal and surety—Debt extinguished by merger—Liability of surety.

The liability of a surety for a debt ceases to exist when his principal's debt is extinguished by an act which causes the merger of the estate of the debtor and the creditor.

The plaintiffs obtained a decree for mesne profits against a person and the defendant stood surety for him under an order for stay of execution pending a Second Appeal against the decree. The judgment-debtor died and his estate became vested in the plaintiffs. On an application by plaintiffs to recover the amount from the surety held under the circumstances the plaintiffs were not entitled to recover.

## C. P. CODE (1908), S. 148.

It does not make any difference that the surety bond in the case was executed to the Court under S. 145 of the Civil Procedure Code as the Court holds the security only for the benefit of the decree holder. (*Spencer and Venkatasubba Rao, JJ.*) JEKKANNU SAMI AIVAR v. RAMASWAMI CHETTIAR. 17 L. W. 473 72 I. C. 194: 44 M. L. J. 171: 1923 Mad. 340.

—S. 145—Surety—Death of principal debtor—Decree against estate.

Where a person has rendered himself liable as a surety for any amount that might be decreed against the defendant, the fact that the principal debtor has died since, does not absolve the surety from performing his contract. 41 B. 402 referred to. (*Harrison, J.*) MAULA DAD v. WADHAWA SINGH. 71 I. C. 46.

—S. 146 and O. 22, R. 3—Death of party after suit but before appeal—Practice.

Where a party dies after suit is dismissed against him, but before appeal is filed, his legal representative can file appeal. In such case an application supported by affidavit should be filed. (*Chandrasekhara Iyer, C. J. and Ramaswamy Iyengar, J.*) MUNNOJI RAO v. MUNINANJAPPA. 1 Mys. L. J. 46.

—S. 148—Applicability—Pre-emption suit.

S. 148 C. P. C. does not apply to pre-emption suits. (*Broadway, J.*) KHAN MUHAMMAD v. AHMAN. 73 I. C. 891.

—S. 148—Applicability—Prior to decree.

The general provisions of S. 148 C. P. C. relate only to proceedings antecedent to the passing of a decree. After a final decree is passed, time for payment of money cannot be extended under S. 148. (*Dalal, A. J. C.*) GANGA RATAN v. CHANDIKA PRASAD. 9 O and A L. R. 319: 74 I. C. 573.

—Ss. 148 and 149—Conditional decree—Review.

When the Court has made a decree in plaintiff's favour conditional on his paying an extra court fee, within a specific period and had decreed that if this extra court fee was not paid the suit was to stand dismissed. *Held* that once the term of deposit had been embodied in the decree the Court itself, even if it desired, had no jurisdiction to alter its own dictum on save on an application for review of judgment. (*Scott-Smith, J.*) DIWAN CHAND v. RAM LABBAYA. 1923 Lah. 372.

—Ss. 148 and 142—Extension of time—Rejection of plaint—Restoration (922) DIG. COL. 232. SURENDRA PRASAD LAHRI CHOUDHRY v. AFTABUDDIN AHMED. 69 I. C. 43.

—S. 148—Pre-emption decree—Extension of time fixed by—Legality of.

S. 148 C. P. Code does not enable a Court to extend time for doing acts allowed by a decree (e.g.) the time allowed by a pre-emption decree, for payment of the sale price. 35 A. 582; 39 M. 876; 40 A. 579 Rel. (*Prietaux, A. J. C.*) AMBADAS v. LAXMAN. 19 N. L. R. 8: 71 I. C. 401: 1923 Nag. 210.

C. P. CODE (1908), S. 148.

—S. 148—*Pre-emption decree—Extension of time for payment of money—Appeal—Revision.*

It is not competent to a court to extend the time fixed in pre-emption decree for payment of purchase money 35 A. 582 followed. An order of the Court extending the time under S. 148 C. P. Code is not a decree and is not appealable as such. But the party aggrieved by the order can apply in revision (*Scott Smith, J.*) LABH SINGH v. GANPAT, 1923 Lah 162 : 71 I. C. 35.

—S. 148—*Setting aside ex parte decree—Extension of time to pay money.*

Where an application to set aside an *ex parte* decree has been allowed conditionally on payment of a sum of money by a certain date, the court has power to extend the time. (*Campbell, J.*) THE FIRM GOBIND SAHAI RUP LAL v. GURDAS MAL, 73 I. C. 648 (1).

—S. 148—*Time fixed by decree—Extension of—Payment of court fee.*

Where time has been fixed by a decree of court for payment of court fee, the Court has no jurisdiction to amend the decree so as to enlarge the time for payment. S. 148 C. P. C. is inapplicable to cases where time has been fixed by a decree of court. 35 A. 582 ; 40 A. 579, 39 M. 876 Ref. (*Ghose and Panton, JJ.*) NAWAB KHAJEH HABIBULLA v. GOLA ASMOTER KHATUN.

37 C. L. J. 395 : 27 C. W. N. 720 : 74 I. C. 575 : 1923 Cal 612.

—S. 149—*Appeal—Bona fide mistake is not paying full Court-fees—Deficiency made good after limitation.*

Where full Court-fee is not paid in the first instance through *bona fide* mistake, but the deficiency is made good afterwards, the appellant is entitled to the benefit of S. 149 and accordingly Court can extend the time. (*Martineau and Zafar Ali, JJ.*) MOTI RAM v. BHANU RAM, 1923 Lah. 629.

—S. 149—*Appeal—Insufficient stamp—Rejection of—Reasons to be stated.*

S. 149 of the C. P. C. gives a Court discretion to extend the time for payment of Court fees on an insufficiently stamped memorandum of appeal and where the Lower Court rejected an appeal simply on the ground that the requisite court fee has not been paid without calling upon the appellant to supply the deficiency or exercising any discretion in the matter held that its decision was unsustainable. (*Rafiq and Lindsay, JJ.*) JAI SINGH GIR v. SITARAM SINGH, 21 A. L. J. 333 : L. R. 4 A. 188 : 74 I. C. 757 : 1923 A. 349 (1)

—S. 149—*Application to sue in forma pauperis—withdrawn—Court fee paid beyond limitation—Suit barred.*

Where the plaintiff applied for permission to sue in *forma pauperis* but withdrew his application on the ground that in another Court his application to sue in *forma pauperis* with respect to a previous suit had been rejected and paid the requisite Court fees beyond the period of limitation.

C. P. CODE (1908), S. 149.

Held, his suit was barred and it was not a fit case for the Court to exercise discretion under S. 149. (*Young, J.*) SOOK LAL v. DAL CHAND, 1 Rang. 196 : 74 I. C. 835 : 1923 Rang. 256

—S. 149—*Deficiency of court fee—Extension of time—Effect of on limitation.*

See C. P. Code, O. 7, R. 11 and S. 149.

L. R. 4 A. 251.

—S. 149—*Delay in payment of Court fee—Extension of time—Bona fide mistake.*

Where the omission to pay proper Court fee was due not to a *bona fide* mistake but was deliberate, time should not be granted under S. 149 C. P. Code to make up the deficiency. (*Broadway and Martineau, JJ.*) MUHAMMAD MAJID ULLAH KHAN v. MAHAMMAD HAMID ULLAH KHAN, 69 I. C. 196.

—S. 149—*Deliberate underpayment—Effect.*

Where there is no *bona fide* mistake in the payment of a smaller court fee and the omission is deliberate, a Court should not extend time to pay up the deficiency. (*Campbell, J.*) RAMJI LAL v. SHIBBA, 75 I. C. 667 : 1923 Lah. 309

—Ss. 149, 151—*Execution—Setting aside decree—Condition of deposit—Failure to deposit.*

Defts. judgment-debtors failed to comply with their contract and plaintiff decree holder got a decree for specific performance on condition of deposit within a certain period. He made the payment 4 days after, but, before the expiry of the period allowed, he applied for correction of the decree by the insertion of certain directions as to what was to happen in the event of his making the deposit. The Court on 20th March allowed the amendment, but in the same order stated that plaintiff decree holder had failed to make the deposit and was not entitled to any extension of time. Two months before this order, the plaintiff decree-holder had applied for execution and was given possession of the property, the failure to make deposit not having been brought to the notice of the Court. The judgment-debtor in connection with proceedings which culminated in the order of 20th March, applied to be restored to possession and her application was granted. Held, in revision, where a definite time is fixed by the decree, the Court has no power to extend it; but in any case no extension having been granted plaintiff decree holder was not entitled to any relief (*Daniels, J. C.*) DORI LAL v. MT. JAMAGA, 72 I. C. 879 : 1923 Oudh 16

—S. 149—*Extending time for payment of Court fees—Law upon the point settled—Misapprehension—Effect. See LIM. ACT, S. 5.*

73 I. C. 788.

—S. 149—*Pauper application—Dismissal—Power of court to grant time for payment of court fee.*

When an application for leave to sue in *forma pauperis* is dismissed, the plaint still remains and may be validated by payment of Court fees within a time to be fixed by Court, if the Court is in the exercise of its discretion prepared to grant time. (*Krishnan, J.*) BALAGURU NAIDU v. MUTHU RATNAM IYER, 18 L. W. 451 : 33 M. L. T. 18 (H. C.)

G. P. CODE (1908), s. 149.

—S. 149 and O. 7 R. 11—*Plaint insufficiently stamped—Time allowed for payment of Court fee—Expiry of limitation—Effect of.*

Under S. 149 C. P. Code read with O. 7, R. 11, C. P. Code the Court has power to allow the plaintiff further time within which to make good the deficiency in Court fee on the plaint and if the deficiency is made good within the time prescribed the fact the period of limitation for institution of the suit has expired would not affect its maintainability. 15 A. 65; 1 Pat. L. J. 420 Ref. (Ryves, J.) RAM DIAL v. SHER SINGH.

21 A. L. J. 387; 45 A. 518; L. R. 4 A. 251; 74 I. C. 358; 1923 A. 538 (1).

—S. 149 and O. 7, R. 11—*Plaint—Deficiency of Court fee—Subsequent payment—Effect—Difference between suit and appeal. See (1922) DIG. COL. 233. DEONATH SAHAI v. RADHA KANT PRASAD. 70 I. C. 378.*

—S. 150 and O. 9, R. 13—*Ex parte decree—Application to set aside—Transfer of territorial jurisdiction—Application to be made to which Court. See (1922) DIG. COL. 233. RANGANATHA RAO v. HANUMANTHA RAO. 46 Mad. 1.*

—S. 150 and O. 39, R. 2 (3)—*Injunction—Disobedience—Application for contempt—Transfer of venue.*

The court of M. passed an injunction order under O. 39, R. 1, C. P. Code. Subsequently the local jurisdiction as well as the suit in which the injunction was ordered, were both transferred to the Court of D. Thereupon the applicant applied to the Court of D, for punishing the opposite party for contempt for disobeying the injunction. *Held* that the Court of D. had jurisdiction to entertain the application for punishment for alleged contempt. 26 C. W. N. 216 diss 39 M 907 foll. (Krishna and Venkatsubba Rao, JJ.) MOUNA GURUSAMY NAICKER v. SHEIKH MAHOMEDHU ROWTHER. 46 Mad. 83; 1923 Mad. 92.

—S. 151—*Amendment of decree.*

S. 151 would enable a Court to alter a decree when it does not correctly express what the Court actually decided or intended to decide. (Campbell, J.) ASA SINGH v. JAGIT SINGH.

73 I. C. 679; 1923 Lah. 147 (2).

—Ss. 151 and 152—*Amendment—Mistakes in plaint copied in decree—Dismissal of appeal under O. 41, R. 11, C. P. Code.*

Even though a second appeal has been dismissed under O. 41, R. 11 C. P. Code the High Court has power to amend the plaint and decree so as to rectify a mistake in the description of the properties occurring in the plaint and copied in the decree. (Mullick and Bucknill, JJ.) KARTAR RAI v. TALEY CHOWDHURY. 1923 Pat. 46; 1923 P. 218 (1).

—S. 151—*Amount under O. 21, R. 89, deposit after 30 days—All parties willing to have sale set aside—Power of court. See C. P. CODE, O. 21, R. 89. 9 O. & A. L. R. 983.*

—S. 151—*Applicability—Application for restoration dismissed for default—Restoration. C. P. CODE O. 9, R. 9. 1923 Bom. 386.*

C. P. CODE (1908), s. 151.

—Ss. 151 and 152—*Clerical error—Decree—Duty of Court to rectify.*

The Court which decided an appeal wrote a judgment allowing it but in the decretal portion concluded by remarking that the appeal failed and was dismissed. *Held* that it was incumbent upon the court to rectify the mistake at any time that it was brought to its notice. 7 A 875 R. (Datal, A. J. C.) MT. MAHESHA v. RAMESHAR.

71 I. C. 563; 10 O. L. J. 24; 1923 Oudh 173.

—S. 151—*Consent decree—Setting aside—Factum of consent disputed—Fraud—Power of court. See DECREE—SETTING ASIDE. 1923 Pat. 197.*

—S. 151—*Consolidation—Power to deal with two appeals together.*

In spite of the absence from the Code of Civil Procedure of any provision enabling two cross appeals from the same decree to be consolidated the appellate Court has inherent jurisdiction in such a case in disposing of the two appeals so to mould its decree as to merge the result of the two appeals into one decree representing the final adjustment of the rights of the parties in all the points raised (Mears, C. J. Banerji, Piggoft, Walsh and Ryves, JJ.) GHANSHAM SINGH v. BHOLA SINGH.

21 A. L. J. 465; L. R. 4 A. 265;

45 A. 506; 74 I. C. 411; 1923 A. 490 (F.B.)

—S. 151—*Consolidation of suits—Consent of parties. See (1922) DIG. COL. 234 QAZI SYED MAHOMED AFZAR v. MANKUMAR MAHTON. 1 Pat. 669.*

—S. 151—*Co-plaintiff transferred as defendant—Security for costs—Power to order—Past or future.*

Per Chatterjee, J.:—On a co-plaintiff being transferred as defendant, he can call on the other plaintiff to give security for costs. The matter being one of amendment only, costs up to date of order can be ordered but not future costs.

Per Cuming, J.:—Where as in O. 25, R. 1 and O. 41, R. 10 the C. P. Code has provided for security for costs under specific circumstances, an inherent power of court should not be invoked in cases not falling under either of these. There is no power to order security for costs in other cases. (Chatterjee and Cuming, JJ.) BHAIKABENDRA NARAIN DEB v. UDAI NARAIN DEB.

50 Cal. 853.

—Ss. 151 and 152—*Decree—Amendment—Lapse of time.*

Where the parties allowed a decree to be enforced for 6 years before attempting to amend it, it should not be amended, specially when there is no clerical or arithmetical mistake. (Pridcaux, A. J. C.) RAJE UDAJIRAM v. RAJESHWAR.

1923 Nag. 109.

—S. 151—*Decree not signed—Power to make alterations to make decree consistent. See C. P. CODE, O. 47, R. 1. 17 L. W. 254.*

—S. 151 and O. 9, R. 9—*Dismissal for default—Power to restore.*

That there is an inherent power in the Court to set aside a dismissal for default has been repeatedly held.



C. P. CODE (1908), S. 151.

The power may be exercised where the claim is a substantial claim and would be barred by limitation, if the suit was not restored. (Ross, J.)  
 RAM NARAIN v RAMDHAN SINGH

4 Pat. L. T. 647 : 72 I. C. 668.

— S. 151—*Execution application—Dismissal for default—Restoration.*

Under S. 151 C. P. Code a court has inherent power to restore an application for execution which has been dismissed for default, if the applicant satisfies the court that such order is necessary in the ends of justice. Such an order is not appealable.

Even viewed as an application for review of the order of dismissal for default, notice is not necessary for the opposite party. (Scott Smith, J.)  
 ABDUL KARIM v. CHAUDHRI RAM SINGH.

69 I. C. 506.

— S. 151—Exercise of powers under—Discretion—Order not revisable. See C. P. CODE Ss. 141 AND 151.

1923 Lah. 506 (2).

— S. 151—*Inherent power—Dismissal of execution application for default—Restoration.*

The executing court has inherent power to restore to file an application for execution dismissed for default and thereupon the attachment revives. 35 A. 331 ; 45 B. 648 Ref. (Halliday, A. J. C.)  
 SHANKER RAO v. MANIK RAO

1923 Nag. 18.

— S. 421—*Inherent powers—Dismissal of suit for non-payment of Court fee—No power to restore—Remedy by way of review.* See C. P. CODE O. 7, R. 11.

4 Pat. L. T. 261

— S. 151—*Inherent power—Power to apply analogous provisions of law.* See (1921) DIG. COL. 213. MUTHIA CHETTIAR v. LOND GOVIND DOSS.

69 I. C. 337.

— S. 151—*Inherent power—Reconstruction of lost records—Procedure.*

Where owing to accident or other cause the records of a Court of justice have been destroyed or lost, the Court has an inherent power to reconstruct its records. An appellate Court has the same power to reconstruct the records of the Court from which an appeal lies to it. In reconstructing the record the court may have to go very near to rehearing but the Court will always apply its mind to ascertain not what the rights of the parties were, but what the destroyed record of the suit was and on that record, when reconstructed, it will have to act on the ordinary principles on which it would have acted if the original record had been before it. Affidavits counter, affidavits the hearing of witnesses and the admission of copies are all methods by which the Court may reconstruct the record and an appellate Court may also send the case back to the lower Court for a finding as to the state of record. The best evidence of what took place in the Trial Court would be found in the judgment of that Court if it is available. 7 W. R. : 18 Ref. (Schwab, C. J. Oldfield and Ramesam, JJ.)  
 MARAKKARUTTI v. VEERANKUTTY.

32 M. L. T. (H. C.) 382 : 18 L. W. 21 :

1923 M. W. N. 471 : 46 Mad. 679 : 73 I. C. 1050 :

1923 Mad. 647 : 44 M. L. J. 673 (F. B.)

C. P. CODE (1908), S. 151.

— S. 151—*Inherent power—Security for mesne profits in ejectment suit—Power to order—Revision.*

Suits for possession of landed property usually include a prayer for mesne profits. Although the plaintiff has often a reasonable fear that if he gets a decree he will fail to realise the mesne profits (because the money would be spent up by the party in possession who may not possess any other property), yet the Code has made no express provision for an order requiring the defendant to furnish security for mesne profits in a suit for ejectment. Where the Court makes an order to that effect it constitutes a material irregularity sufficient to justify action under S. 115 of the Code of Civil Procedure. (Dalal and Simpson, A. J. C.) BHAGWAN BAKHSH SINGH v. SURENDRA BIKRAM SINGH—

10 O. L. J. 209 :

1924 Oudh 11.

— S. 151—*Injunction restraining sale—Sale ignoring injunction.*

Pending a partition suit, the District Munsiff issued an injunction restraining an auction sale being held, and soon after refused an application of the judgment-debtor to postpone the sale. He then confirmed the sale ignoring the injunction order. On appeal the sale was set aside as illegal. Held, though a legal act done in breach of an injunction is not thereby invalidated, the sale in such circumstances would be an abuse of process of court and should be set aside under the inherent powers of the Court. (Oldfield and Davados, JJ.) REPAKA MAMILLAYYA v. ADDEPALLI VENKATARATNAM.

1923 M. W. N. 672 :

45 M. L. J. 312.

— S. 151—*Order directing costs of commission being realised—If one in execution under S. 47 Appeal.* See C. P. CODE S. 47.

74 I. C. 186

— S. 151—*Power to alter order of predecessor in office.*

A part from the power to correct clerical or arithmetical errors, or to review a judgment, a court has no inherent power to alter an order passed in Court. (Das and Foster, JJ.) BISHEWAR PRATAP NARAIN SAHI v. ASARFI SINGH.

74 I. C. 110.

— S. 151—*Power of appellate court to add parties—Circumscribed by O. 41, R. 20.* See C. P. CODE O. 41 R. 20.

1923 Lah. 490.

— S. 151—*Powers of Court—Enforcement of orders—Variation as to details.*

Every Court has power to enforce its own orders made by consent of parties, when by the accident of circumstances the carrying out of such detail according to the agreement can no longer be achieved. If a specific Commission is named to do an act, and he refuses to act, the Court can appoint another though the parties do not agree to it. (Walsh and Ryves, JJ.) PAROTTAM DOSS v. SHIAM LAL

1923 All. 460 (2).

— S. 151—*Principle if applies to Agra Tenancy Act.*

Though there is nothing in the Agra Tenancy Act corresponding to S. 151 C. P. C., its principles can be applied to cases thereunder. (Fremantle

C. P. CODE (1908), S. 151.

*S. M. and Burn, J. M.* PT. RAM RAO KRISHNA JATAR v. UDIT RAI. L. R. 4 All. 411 (Rev.).

———S. 151—Recalling an order passed by the predecessor under—Whether beyond jurisdiction and invalid, *See* (1922) DIG. COL. 236. *HIRO SINGH v. KAZI SYED AHMAD HUSSAIN*.

69 I. C. 742.

———S. 151—Refund of court fee—Inherent power.

The appellants in an appeal applied for the grant of a certificate for renewal or refund of the value of stamps worth Rs. 1,627-8-0 used on a memorandum of appeal which was returned to the appellants by the order of the High Court dated 22nd November 1922, because the memorandum of appeal was not properly stamped.

An application was made to the Collector of Patna for renewal or refund of the stamps used on the memorandum of appeal, but he refused the application by his order of the 6th of December 1922.

The appellant then moved the Commissioner, who by his order of the 11th January 1923 directed the petitioners to obtain a necessary certificate for renewal from the Taxing Officer of the High Court. *Held* that even in the absence of any rule the High Court has inherent power under S. 151 of the Code of Civil Procedure to grant the certificate asked for. (*Jwala Prasad and Adam, JJ.*) *BHUANESHWARI PRASAD v. KISHEN DAYAL BHAGAT*. 4 Pat. L. T. 504 : 72 I. C. 402 (1) : 1923 P. 600.

———S. 151—Remand order under—It appealable—Plaint directed to be amended and case re heard—Order not under O. 41, R. 23. *See* C. P. CODE O. 41, R. 23 and S. 151. 73 I. C. 915.

———S. 151—Revival of suit—Suit dismissed for want of letters of administration—Subsequent production. *See* (1922) DIG. COL. 237. *KHUSHAL SINGH v. UMAN SINGH*. 70 I. C. 910.

———S. 151—Scope of—*See* (1922) DIG. COL. 238. *CHOWDHURI CHINTAMONI MAHAPATRA v. SRIMATI MONMOHINI DEBI*. 69 I. C. 200.

———S. 151—Scope of. *See* (1922) DIG. COL. 238. *GANAPATHI MUDALIAR v. KRISHNAMACHARI*. 70 I. C. 743.

———S. 151—Scope of—Inherent power of Court. *See* (1922) DIG. COL. 238. *FIRM F KAHNA MAL BANARSI DASS v. FIRM OF KHLUA MAL NATHU MAL*. 69 I. C. 718.

———S. 151—Scope of—Not to be used to evade law.

S. 151 C. P. C. is intended for exceptional cases for which there is no remedy except the use of the Court's inherent powers. It is not intended to enable courts to evade or ignore the provisions of law which govern procedure.

Where after passing a decree, a court *suo motu* set aside its own decree on the ground it had discovered some documentary evidence on the record, the procedure is illegal. (*Daniels, J.*) *MAHADEO v. KALLUO*. 21 A. L. J. 447 : L. R. 4 A. 365 : 73 I. C. 494 : 1923 A. 603 (1).

C. P. CODE (1908), S. 152.

———S. 151—Stay of execution on ground of fraud—No suit pending—Power of executing Court. *See* C. P. CODE O. 21, R. 29 AND S. 151. 1923 Lah. 514.

———S. 151—Stay of suit—Inherent power—Vexatious and oppressive Suit—Natural forum avoided by plaintiff—Evidence accessible outside Jurisdiction.

Appeals to the inherent jurisdiction of the Court have to be regarded with great caution. But after exercising such caution, the court is clearly of opinion that the jurisdiction ought to be exercised, it should not be intimidated from so doing, because no case on all fours is forthcoming from the reported decisions of the High Courts. The Court will interfere to prevent vexatious proceedings which would have the effect of preventing the due administration of justice. The Court will stay an action brought within the jurisdiction, in respect of a cause of action arising out of the jurisdiction, if satisfied that no injustice will be done thereby to the plaintiff, and that the defendant would be subject to such injustice in defending the action as would amount to vexation and oppression, to which he would not be subjected if an action were brought in another and accessible Court where the cause of action arose. Where the dealings between the parties were at Rangoon and where the evidence was wholly procurable there and the trouble and expense involved in bringing all the evidence to Bombay were great and where the object of the plaintiff in bringing the suit in Bombay was probably to harass and annoy the defendant and coerce him into a compromise. *Held* that the High Court was justified in staying the action if the plaintiff did not withdraw the action within a time prescribed. (*Marten, J.*) *JETHABHAI VERSEY & Co v. AMARCHAND MADHAVJI & Co*. 25 Bom. L. R. 713.

———S. 152—Amendment of decree—Discretion—Principles guiding—Intervention of rights of third parties action in good faith—Effect—Sale in execution of decree—Subsequent application for its amendment—parties—Purchaser of necessary party.

The exercise of the power of amendment under S. 152, C.P.C. is discretionary, and an application for amendment of a decree should be rejected as too late if the rights of third parties acting in good faith have intervened. A purchaser at a sale held in execution of a decree which is subsequently sought to be amended is a necessary party to the application for its amendment on the general principle that persons, whom it is desired to bind by proceedings can and must be impleaded in them and the order allowing the amendment is not binding on him, if they are not so impleaded. (*Oldfield and Ramesam, JJ.*) *NARAYANA AYYAR v. BIVARI BIVI*. 69 I. C. 977 : 32 M. L. T. (H. C.) 98 : 1923 Mad. 57.

———S. 152—Amendment of decree—Mistake in plaint.

Where an error has crept into the record of a case owing to the mis-description of the suit property in the plaint it is incumbent on the Court to correct the error on an application and under

C. P. CODE (1908), S. 152.

S. 152, C. P. C. (*Piggott and Walsh, JJ.*) SURJAN SINGH v. WAZIR SINGH.  
21 A. L. J. 323 : L. R. 4 A 184 : 72 I. C. 483  
1923 A. 349 (2).

—S. 152—Decree passed against legal representative personally—Application to amend decree at a late stage entertainable.

To pass a decree against the legal representative of the deceased defendant so as to make him personally liable is not competent to a Court to direct. When the attention of the Court is drawn to the error, even although it might be at a rather late stage of the proceedings there is no reason why on that account the mistake should not be remedied. (*Macleod, C. J. and Crump, J.*) JAYA VANT RAO NARAYAN v. NARSING SAKHARAM  
1923 Bom. 414.

—S. 152—Mistake, error or omission—calculation of amount due—Overlooking of order of court.

In calculating the amount due on redemption, the office overlooked an order of court directing the calculation up to date of payment. *Held*, it was a mere error or mistake under S. 152, C.P.C. and could be corrected at any time. (*Mears, C. J. and Piggott, J.*) BISHUN NARAIN v. MT. BIRBI RAMJI.  
74 I. C. 842.

—S. 152—Omission of one of the mortgage properties in plaint and decree—Power to correct.

By a mere oversight the plaint and the decree in a mortgage suit omitted one of the items in a mortgage document, though there was no dispute between the parties as to what was included. *Held*, the error can be corrected under S. 152, Cr. P. Code. (*Duckworth, J.*) MAUNG CHIT HLAING v. N. A. R. M. CHETTY.  
74 I. C. 1020.

—S. 152—Scope of.

Though an appeal can lie against an amended decree in the same way as against any other decree, there can be no appeal against an order amending a decree. The Court has power to amend clerical errors which had crept into a decree by following similar errors in the plaint, without causing the pleadings in which the errors first appeared to be amended. (*Campbell, J.*) ASA SINGH v. JAGJIT SINGH  
73 I. C. 679 : 1923 Lah. 147 (2).

—S. 153 and O. 1 R. 10—Dead man—Appeal against—Addition of legal representatives—Procedure.

The respondent whose name was entered in the cause title of an appeal died before its presentation and an application was made to substitute the names of his legal representatives in his place. *Held* that the application could not be sustained. The proper course for the appellant was to file another appeal against the legal representatives and to have the delay excused. (*Oldfield and Venkata Subba Rao, JJ.*) GOVINDA KAVIRAJ PUROHITA v. GAURANGA SAW.  
18 L. W. 54 : 1923 M. W. N. 408 :  
1924 Mad. 56 : 45 M. L. J. 231.

—S. 153 and O. 6, R. 17—Plaint—Amendment—Power of Court after decree is made.

C. P. CODE (1908), O. 1, R. 1.

S. 153 C. P. Code allows the Court to give leave for amendment at any time in any proceeding in a suit, and Order VI, Rule 17, says that the Court may allow such amendments at any stage of the proceedings. *Prima facie* this limits the Court to allowing amendments in pleadings during the actual pendency of the suit and not after the decree has been actually drawn up and sealed.

But when a decree has actually been passed, if it is final, the original Court is, generally speaking, *functus officio* and the occasion for an amendment of pleadings cannot really arise. (*Fawcett, J.*) KISHEN PRASAD AND CO. LTD v. FULLMAL HIRALAL.  
25 Bom. L. R. 888.

—O. 1, R. 1—Co-executors—Suit by some or them on behalf of the estate—Non-joinder of others—Objection by defendant—Second appeal—Addition of other parties if allowed.

Where several executors have been appointed under a will and have entered on their duties as such, it is not open to some of them to sue on behalf of the estate without impleading the others. If a defendant is sued by one only of two persons who have a cause of action against him, he has a right to have the action dismissed unless the other is joined. 6 Cal. 815 referred to.

Where in spite of the objection of the defendant in his written statement that the suit as constituted was bad for non-joinder of the other executors, the plaintiffs proceeded with the case without taking steps to add the other executors either in the trial Court or on appeal the High Court would not, on second appeal allow the addition of the necessary parties. (*Schwabe, C. J. and Wallace, J.*) MOHANAVELU MUDALIAR v. ANNAMALAI MUDALIAR.  
17 L. W. 241 : 72 I. C. 63 : 1923 Mad. 337 :  
44 M. L. J. 249.

—O. 1, Rr. 1 and 3—Different causes of action—Joinder of—All defendants not interested in relief—Effect of.

The effect of the change of language of O. 1, Rr. 1 and 3 of the new C. P. Code is to permit different causes of action to be joined even in respect of several plaintiffs or defendants provided they satisfy the conditions of O. 1, R. 1 or O. 1, R. 3 as the case may be. (*Ramesam, J.*) ALLU RAMALINGIER v. SUBRAMANIA PILLAI.  
32 M. L. T. (H. C.) 46 : 17 L. W. 25 : 69 I. C. 402 :  
1923 Mad. 331 (2).

—O. 1, R. 1—Joinder of Causes of action—Suit for rent—Single suit against different persons in respect of different holdings.

One suit cannot be maintained for the recovery of rent in respect of different and distinct liabilities with regard to separate holdings. (*Atkinson, J.*) MAHIPAT NARAIN SINGH v. KIRAT SINGH.  
1 Pat. L. R. 458.

—O. 1, Rr. 1, 3—Joinder of parties—Plaintiffs—Causes of action.

The claim of the Plaintiff No. 1 was based upon an agreement alleged to have been entered into by and between the defendants Nos. 3 and 20 and himself for sale of a land and colliery. The claim of the Plaintiff No. 2 was based upon the purchase of September

## C. P. CODE (1908), O. 1, R. 1.

1919 from the defendants Nos. 10 to 20. The plaintiff No. 1 had absolutely nothing to do with the claim of the plaintiff No. 2 so far as the possession and partition of the plaintiff No. 2's share was concerned. Similarly the plaintiff No. 2 has no concern with the relief claimed by the plaintiff No. 1. If the two plaintiffs had brought the suits separately there would not be any question of law or fact which would be common to the suits. The rights to the reliefs claimed by the two plaintiffs did not arise out of the same act or transaction, or series of acts or transactions. *Held* that the joinder of the two plaintiffs and the causes of action alleged by them was not authorised by any law or principle (*Mullick and Kulwant Sahay, JJ.*) **RAMJAS AGARWALLA v. LINTON MOLESWORTH AND CO. LTD.**

73 I. C. 71 : 1923 P. 411.

— O. 1, Rr. 1 and 2—Joinder of plaintiff's—Alternative relief—Suit by two sets of plfs. See (1922) DIG. COL. 240. **VELAPPA NADAR v. CHIDAMBARA NADAR.**

70 I. C. 684.

— O. 1, R. 1—Joint appeal by plaintiff and defendant No. 2 against defendant No. 1. *main maintainable.*

The trial Court dismissed the suit as against defendant No. 1 but decreed the claim in full as against the former defendant No. 2 on the ground that he had admitted the receipt of the consideration and had not contested the plaintiff's claim. The plaintiff and the defendant No. 2 preferred a joint appeal against this decree. *Held* that the rule contained in O. 1, R. 1 applies to appeals also and the joint appeal is maintainable. (*Campbell, and Motisagar, JJ.*) **BULAQI MAL v. ABDUL RAHIM.**

1923 Lah. 638.

— O. 1, R. 3—Joinder of claims—Suit for accounts and for negligence.

The plaintiffs brought a suit against the defendant No. 1 who was their cashier and defendant No. 3 who was the Sadar Naib. It was alleged that money was due by Defendant No. 1 on account being taken against him that the Sadar Naib was responsible for any loss which the plaintiffs might have sustained through the action or omission of their cashier which loss had been occasioned by his negligence, his duty being, amongst others to supervise the work and to sign the accounts of the Treasurer. *Held*, that the suit was bad for mis-joinder of parties and causes of action. (*Woodroffe and Ghose JJ.*) **CHANDRA KUMAR BASU v. SASHIMUKHI DEBI.**

71 I. C. 324.

— O. 1, R. 3—Joinder of parties as defendants—Scope of the rule—Cause of action against some of the defts. arising out of the jurisdiction—Effect of. See (1922) DIG. COL. 240. **BENGAL AND NORTH WESTERN RAILWAY CO. LTD. v. SADARAM BHAIRANDON.**

70 I. C. 229.

— O. 1, Rr. 3 & 5—Misjoinder of parties and causes of action—Suit for possession—Different persons in possession of different plots.

It is open to a plaintiff suing for recovery of possession of a single plot of land to join as defendants three different persons who claim to be in possession of three different portions of the

## C. P. CODE (1908), O. 1, R. 8.

property. What the plaintiff is entitled to claim is the recovery of possession of his land as a whole and not in fragments and it is a matter of indifference to him upon what grounds the different defendants in possession may seek to justify the wrongful dis-possession of his property. 29 C. 871 and (*Batten, J. C.*) **LAXMI NARAYAN v. RAM RATAN.**

19 N. L. B. 178.

— O. 1, Rr. 3 and 5—Occupancy holding—Rival claimants—Landlord if necessary party

The landlord is not a necessary party to a suit between rival claimants to an occupancy holding, one of whom is the mortgagor and the other is a successor to the mortgagee who took a usufructuary mortgage, who (the rival claimant) somehow got his name entered in the village papers as occupancy-holder, to which proceeding the mortgagor was not a party, (*Kanhaya Lal, J.*) **MT. DURGA DEVI v. GIRWAR SINGH.**

70 I. C. 938 :

1923 A. 11 (2).

— O. 1, Rr. 8 and 10—Representative suit—Addition of plaintiffs after decree.

In a suit by three persons under S. 14 of the Religious Endowments Act, a decree for damages was passed in favour of the plaintiffs. The plaintiffs neglected to execute the decree whereupon the Court added the trustees of the temple as plaintiffs to enable them to execute the decree. *Held* that as the suit was brought by the plaintiffs in a representative capacity it was competent to the Court under O. 1, R. 8, C. P. Code to add parties even after the passing of a decree. 21 M. L. J. 192, 33 M. 483 : 20 M. L. J. 546 ; 28 Mad. 319 followed (*Spencer and Venkatasubba Rao, JJ.*) **SWAMINATHA MUDALIAR v. KUMARASWAMI CHETTIAR.**

17 L. W. 422 : 1923 M. W. N. 239 :

72 I. C. 284 : 32 M. L. J. (H. C.) 212 :

44 M. L. J. 282 : 1923 Mad. 472 (2).

— O. 1, R. 8—Contract—Fluctuating body—Promise to pay money—Enforceability—Suit to enforce payment

A person can make himself liable to a community (like the Vysia community of a particular place) by agreeing to pay a certain sum of money to it; and a suit to recover the sum may be brought by a member of that community with leave of Court obtained under O. 1, R. 8, C. P. C.

*Quære* whether a promissory note or negotiable instrument can be executed in the name of a community.

Where the members of a community, who had rendered some help to the defendant, stipulated for payment by him of a certain sum of money to the community as a whole, and he promised to do so, *held* that the promise was for consideration and was enforceable. (*Krishnan, J.*) **BUDAVARAM NARASIMHULU CHETTY v. NOOTA IBBUNDRUM NAGARAM VARU.**

44 M. L. J. 240 :

72 I. C. 95 : (1923) M. W. N. 237 :

1923 Mad. 434.

— O. 1, R. 8—Representative Suit—Leave of Court after institution of suit—Legality of.

The permission under O. 1, R. 8, C. P. C. may be given even after the filing of the suit. This is a matter analogous to the addition of powers and amendment of pleadings. Notice under O. 1, R. 8, C. P. C. is required to be given and the provisions

## C. P. CODE (1908), O. 1, R. 8.

of the Rule are mandatory. (*Mulla, J.*) NARIMAN  
v. MUNICIPAL CORPORATION OF BOMBAY  
47 Bom 809 25 Bom. L.R. 689 : 1923 Bom 305

—O. 1, R. 8—Representative Suit—Mahomedan Law—Waqf—Right of beneficiaries to sue—Remedies open to worshippers.

A beneficiary of a trust in respect of a Muhammadan waqf interested in the maintenance of a mosque or other charitable institution may, without having recourse to the provisions of Rule 8, Order 1, Civil Procedure Code and without suing in a representative capacity on behalf of the other beneficiaries, sue for recovery of possession of property wrongfully alienated by the trustee and for the incidental declaration that the subject of the trust cannot be alienated.

The trust property vests in God and the right of a Muhammadan who is entitled to use a mosque to bring a suit for the recovery of property belonging to it is comparable to a right of suit in respect of a private road which many persons have a right to use. Every Musalman who derives any benefit from such a waqf is entitled to maintain an action against the mutwalli to establish his right there-to or against a trespasser to recover any portion of the waqf property which has been misappropriated, without joining any other person who may participate with him in the benefit. It is clear that if the mutwalli himself is the offender or if he is unwilling to act, the beneficiary must have the power to recover the property. (*Mullick and Ross, JJ.*) MAULAWI MAHOMED FAHIMUL HUQ v. JAGAT BALLAV GHOSH. 2 Pat. 391.

4 Pat. L. T. 675 : 74 I. C. 403 : 1923 P. 475.

—O. 1, R. 8—Representative suit—Members of a community—Suit for declaration that property is waqf property. See (1922) Dig. Col. 242 SADIQ HUSAIN v. KHAN BAHADUR HAKIM MIRZA NAZIR HUSAIN KHAN. 26 O C 82

—O. 1, R. 8—Suit for declaration of public right of way—Nature of special damage (1922) Dig. Col. 241. HARISH CHUNDER SAHA v. PRAN NATH CHAKRABARTHI 69 I. C. 910.

—O. 1 R. 8. and 10—Suit for partition by minor sons against their father—Decree holders impleaded defts.—Setting aside decree—Misjoinder—Appeal. See (1922) Dig. Col. 241. SHANMUGHA NADAN v. ARUNACHALLAM. 69 I. C. 961

—O. 1 R. 8—Suit for possession of properties belonging to a village temple—Suit by worshippers—Sanction of court—Necessity for. See RELIGIOUS ENDOWMENT. 44 M. L. J. 116.

—O. 1, Rr. 9 and 10—Addition of parties—Necessary and proper parties—Distinction between—Limitation. See (1922) Dig. Col. 242. SITAL PRASAD RAY v. ASHO SINGH. 2 Pat. 175 : 4 Pat. L. T. 698 : 69 I. C. 677

—O. 1, R. 9—Land recorded as Gairmazrua Am—Suit for declaration of title to—General public, whether necessary parties. See (1922) Dig. Col. 243. TRILOKE PRASAD SINGH v. UMANAND LAL. 72 I. C. 634

—O. 1, R. 9.—Non-joinder—Effect—Form of decree.

## C. P. CODE (1908), O. 1, R. 10.

If two parties contract with a third party, a suit by one of them making the other co-defendant, ought not to be dismissed, merely because the plaintiff has not proved that the defendant had refused to join as a co-plaintiff (*Mookerjee and Rankin, JJ.*) KAMINI MOHAN BASU v. NIBARAN CHUNDR MITRA. 1923 Cal. 506.

—O. 1, R. 10—Addition of parties Preliminary decree passed in the case—Transferee before suit—Addition of.

O. 1, R. 10 of the Code of Civil Procedure gives wide powers to the Court at any stage of the proceedings to direct that the name of any person who ought to have been joined, or whose presence before the Court may be materially necessary in order to enable the Court to effectively and completely adjudicate upon the questions in issue, may be added. But that power can ordinarily be exercised only in proceedings not concluded by a decree, unless the person to be added is a subsequent transferee.

In a suit on a mortgage after the preliminary decree had been passed, a person who is alleged to be interested cannot be impleaded at such a late stage. Scope of O. 1, R 10 considered.

The law gives a wide discretion to add as a party to a proceeding a person interested in it, so as to affect his prospective rights but not with retrospective effect. (*Kanhaiya Lal, J C*) RENU MADHO v. YUSUF HUSAIN KHAN. 26 O C 317 : 72 I. C. 1031 : 10 O L. J. 232 : 9 O. & A. L. R. 826.

—O. 1, R. 10—Dead defendant—Bona fide mistake—Amendment not allowed.

In a suit brought against a deceased defendant the Court has no jurisdiction to allow the plaint to be amended by substituting the names of the representatives of the deceased even when the suit was instituted *bona fide* and in ignorance of the death of the defendant. (*Shadi Lal, C J and Lumsden, J*) MT. BOONDU v. MOTI CHAND. 1923 Lah. 652 (1).

—O. 1, R. 10—Dead man—Appeal against—Application to add his legal representatives as parties—Procedure. See C. P. CODE S. 153 AND O. 1, R. 10. 18 L. W. 54.

—O. 1, R. 10 (1)—Scope of—Institution of suit by person not entitled to continuance by proper persons.

A suit might be continued even where the original plaintiff had no right to sue, provided that the defective institution was due to a *bona fide* mistake. 30 M. 419 : 43 M. 707 Rel (*Spencer and Venkatasubba Rao JJ*) PERINCHERI T. P. RARAPPAN KIDAVU v. UNNICHENNAV 69 I. C. 413 : 1923 Mad. 180 (1).

—O. 1, R. 10, Cl. (2)—Person whose presence is necessary effectually and completely to adjudicate upon and settle all questions involved in the suit—Party on record—Person who would be represented by—Addition of—Power of court—Hindu Law—Widow—Suit by adopted son or his heir—Question in suit as to validity of adoption—Nearest reversionary heir—Addition of—Propriety.

A person who would be represented by a party on the record and bound by the decision

## C. P. CODE (1908), O. 1, R. 20.

against that party is entitled to be impleaded under O. 1, R. 10, Cl. (2), C. P. Code to protect his interests.

The plaintiff, claiming to be the son of an adopted son of S, the last male owner of the suit property, sued for the recovery of possession of the same from 1st defendant, the widow of the last male owner. Plaintiff's case was that his father had been adopted by the 1st defendant, and that he (plaintiff) had been unlawfully excluded from the plaint properties by the 1st defendant on account of an invalid agreement between her and the 2nd defendant. Certain persons, claiming to be the nearest reversioners to the last male owner, applied to be made defendants in the suit and were made defendants by the Court below. One question, and probably the most important question, in the suit was whether the plaintiff's father's adoption to the last male owner was true and valid.

*Held*, that the presence of the nearest reversioners to the last male owner before the Court was necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, and that the Court below was competent to make them defendants. (*Oldfield, J.*) RAJARATNAM AIYAR v. HALASVASUNDARAM AIYAR.

44 M. L. J. 322 : 72 I. C. 156 : 17 L. W. 329 : 1923 Mad 521

—O. 1, R. 20—Addition of plaintiffs after passing of decree—Power of court. See C. P. Code O. 1, RR. 8 AND 10. 44 M. L. J. 282.

—O. 2, R. 1.—Defendants not in possession of debtor's property—Cause of action.

Where the defendants pleaded in clear terms that the debtor left no property as he died in the lifetime of his father, and that the plaintiffs could have no cause of action against them without establishing that such property of the deceased was in their possession, and the plaintiffs failed to mention any such property; *held* according to no rule of law could plaintiff's claim be decreed on the ground that they may be able to indicate in execution proceedings the property, if any, left by the deceased debtor. This would amount to giving them further opportunities to harass the defendants. (*Broadway and Jafar Ali, J.*) FIRM OF BHAG MAL v. GARIMJEE MAL. 1923 Lah. 471.

—O. 2, R. 2—All persons in possession should be joined.

Where the son-in-law was in possession under a sale deed by which half the property was sold to him by the mother-in-law and the daughter along with her husband was in joint possession under a will by which the remaining half was bequeathed to her and the previous suit, after the death of the widow was brought for possession of the portion that had been alienated against the husband only, *held* the present suit against the daughter is barred. Plaintiff should join all the persons in possession of the property which he claims. (*Martineau and Harrison, JJ.*) MAULA BAKHSI v. MT. JIVI. 1923 Lah. 556.

—O. 2, R. 2—Bar of suit.

When a suit sought to be barred under O. 2, R. 2 C. P. Code it must be shown that there was a

## C. P. CODE (1908), O. 2, R. 2.

prior suit to which plaintiff or his predecessor in interest was a party wherein he ought to have claimed the relief (*Datal, J. C.*) SHAIKH MUHAMMAD IBRAHIM v. ASMATULLAH.

9 O. and A. L. R. 1092.

—O. 2, R. 2—Bar of suit—First suit for possession—Subsequent suit for mesne profits.

A prior suit for possession does not bar a suit for mesne profits due for a period subsequent to the institution of the prior suit. The cause of action for such mesne profits is one which has accrued subsequent to the suit for possession. (*C. C. Ghose, J.*) EQUITABLE COAL COMPANY, LTD. v. BAGALA SUNDARI DEBI. 71 I. C. 972.

—O. 2, R. 2.—Bar of suit—Mortgage—Suit by mortgagee for possession on default of payment of interest—Subsequent suit under S. 12 of Punjab Act II of 1913—Maintainability.

In 1902 a mortgagee in enforcement of the terms of his mortgage sued for possession of the mortgaged property on default of payment of interest for the previous years. The mortgagee obtained a decree in 1904 but the Court refused to go into the question of what arrears of interest were due. The mortgagor subsequently applied to the Collector under Punjab Act II of 1913 and obtained a decision that the mortgage could be redeemed on payment of Rs. 570. Thereupon the mortgagee sued for a declaration that there was a further charge on the land for Rs. 5,015 and that there could be no redemption without payment of that amount. *Held* that the mortgagee's suit was not barred under O. 2, R. 2, C. P. Code by reason of the prior suit for possession. 66 P. R. 1912 foll.; 1 Lah. 457 F. B. Ref. (*Martineau and Campbell, JJ.*) KHOTA RAM v. NAWAZ. 5 Lah. L. J. 238 : 72 I. C. 765 : 4 Lah. 76 : 1924 Lah. 21.

—O. 2, R. 2—Bona fide mistake.

Where in a previous suit the plaintiffs omitted to include a certain claim as they were under the mistaken impression that it had not then arisen, O. 2, R. 2 does not bar the claim in a subsequent suit (*Grimwood Mears, C. J. and Banerjee, J.*) NIHAL SINGH v. MT. NAJUBAN.

1923 All. 230.

—O. 2, R. 2—Cause of action—Different causes of action—Successive suits not barred.

Under O. 2, R. 2, every suit must include the whole of the claim arising from one and the same cause of action and it is not necessary that every suit shall include every claim or every cause of action which the plaintiff might have against the defendant. The test is, whether the cause of action in the subsequent suit is different from the cause of action in the earlier suit. If the answer be in the affirmative, the subsequent suit is not barred, even though it might have been open to the plaintiff to unite the cause of action with the cause of action in the prior suit. 8 M. 520 : 23 C. 821 followed. (*Mukerjee and Chatterjee, JJ.*) KULADA PRASAD CHATTERJEE v. KHUDIRAM MISRA. 37 C. L. J. 545 : 27 C. W. N. 673 : 70 I. C. 187.

—O. 2, R. 2—Cause of action—Identity of—Test of—Different evidence.

C. P. CODE (1908), O. 2, R. 2.

A person's cause of action can be defined as consisting of every fact which would be necessary for the plaintiff to prove traversed in order to support his right to the judgment of the Court. One test which is valuable in considering whether the causes of action are identical is whether the evidence which would suffice to enable the plaintiff to obtain a decree in both suits is the same. 16 A. 165, 40 B 351 referred to. (*Ryves and Daniels, JJ.*) MAHOMED UMAR KHAN v AMTUL RAHIM BIBI. 45 A. 376 : 21 A. L. J. 267 : L. R. 4 A. 169 : 71 I. C. 965 : 1923 A. 311

— O. 2, R. 2—Cause of action—Mortgage—Two years term—Mortgagee's suit for interest—Subsequent suit for principal and further interest—Bar.

A mortgage for a term of two years executed in 1904 provided for realisation of interest alone by the mortgagee by suit. The interest was in arrears after 1905. The mortgagee instituted a suit in 1908 for the interest then due reserving the right to sue for the principal and future interest. The suit was decreed. In 1914 he instituted a suit for the principal and interest still due. Held that the suit was barred under O. 2, R. 2, C. P. Code 49 I. A. 9 foll. (*Lord Buckmaster*) KISHAN NARAIN v. PALA MAL. 44 M. L. J. 123 : 32 M. L. T. (P. C.) 41 : 25 Bom. L. R. 220 : L. R. 4 P. C. 46 : 4 Lah. 32 : 27 C. W. N. 802 : 38 C. L. J. 126 : 18 L. W. 341 : 9 O. & A. L. R. 488 : 72 I. C. 187 : 50 I. A. 115. (P. C.).

— O. 2, R. 2—Causes of action—Splitting of—Different Cause of action—No bar.

O. 2, R. 2, C. P. C. requires that every suit shall include the whole of the claim arising from the one and the same cause of action and not that every suit shall include every claim and every cause of action which the plaintiff may have against the defendant. Consequently if the cause of action in the subsequent suit is different from that in the first suit the subsequent suit is not barred. The whole question for investigation, therefore is, whether the cause of action in the subsequent suit is the same as that in the first suit. (*Coutts and Das, JJ.*) MT. BHAGJOGNI v. SAKHI MAHTON. 1923 Pat. 234 : 1923 P. 575.

— O. 2, R. 2—Cause of action—Splitting—Mortgage—Payments in instalments—Whole amount payable on default of single instalment—Failure to pay—Suit for unpaid instalments only—Effect.

Under a mortgage executed in 1902 the principal sum borrowed was Rs. 1,200 and the sum was payable in annual instalments of 100 Rupees each. On default of payment of any one instalment the whole or the balance was to be paid at once. In the years 1903 and 1904 the mortgagors paid Rs. 44 only. In 1905 the plaintiffs filed a suit to recover the amount of the first two instalments and obtained a decree. In 1917 plaintiffs (mortgagees) filed a suit for recovery of the remaining instalments with interest. Held that the suit was barred by O. 2, R. 2, C. P. Code. 20 Bom. L. R. 773 : 37 A. 400 : 43 A. 671 foll. 39 M. 981 diss.

C. P. CODE (1908), O. 2, R. 2.

(*Macleod, C. J. and Crump, J.*) SHRINIVAS v. CHANBASAPU GOWDA. 72 I. C. 230 : 25 Bom. L. R. 203 : 1923 Bom. 201 (2).

— O. 2, R. 2—Causes of action splitting of—Prior suit for redemption of portion of mortgaged property—Subsequent suit for possession of remainder.

Where in a suit for redemption of a portion of the mortgaged property the plaintiff succeeds and obtains a decree he is debarred from bringing a fresh suit for recovery of possession of the remaining portion of the mortgaged property. (*Shah, A. J. C. and Crump, J.*) BHADU DASI KHADE v. PATLU MALU SABLE. 73 I. C. 862 : 1923 Bom. 63.

— O. 2, R. 2—Causes of action—Splitting up of—Suit for profits—Subsequent Suit for partition—Co-shareis

So long as a tenancy in common continues it is open to one tenant to file a suit for partition irrespective of any suit or suits which had been filed between them for a share or the profits during the continuance of the tenancy in common. The cause of action for the suit for partition subsists so long as the co-tenancy continues. (*Macleod, C. J. and Crump, J.*) TIMMAPPA v. MANJAYA. 25 Bom. L. R. 491 : 73 I. C. 424 : 1923 Bom. 440.

— O. 2, R. 2—Different causes of action—Suit for specific performance—Dismissal—Subsequent suit for recovery of earnest money—No bar.

Plf's. suit for specific performance of a contract of sale of immoveable property in his favour was dismissed and he subsequently brought a suit for recovery of earnest money from the defendant. Held that the claim for the recovery of the earnest money was based on a different cause of action from the claim for specific performance and that O. 2, R. 2, C. P. Code was no bar to the subsequent suit. 27 M. 380 referred to. (*Lindsay, J.*) MUNNI BABU v. KJER KAMTA SINGH. 45 A. 378 : 21 A. L. J. 265 : 72 I. C. 86 (2) : 9 O. & A. L. R. 429 : L. R. 4 A. 176 : 1923 A. 321.

— O. 2, R. 2—Distinct Causes of action—Contract for sale of Goods—Delivery by insolvents—Effect of—Distinct contracts.

*Prima facie* each order and delivery of goods is a separate transaction and a separate cause of action, unless they are successive claims arising under the same obligation within the explanation at the end of O. 2, R. 2, C. P. Code. The question is really dependent on the contract between the parties. If all the goods were delivered under a single contract it would be within the explanation unless there was an express stipulation that each delivery or each month's deliveries should be deemed to be a separate contract. The validity of such a clause has been recognised. There are numerous definitions of the expression "Cause of action" and courts have held that the meaning of the expression as used in S. 20 C. P. C. must be gathered from the previous legislation in India and not from the definitions of the expression adopted in certain English decisions. Likewise the meaning of the expression as used in O. 2, R. 2. should be gathered from that rule and the authorities on that rule or on the sections of

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the previous Codes replaced by that Rule, and it should not be assumed that the expression has the same meaning in that rule as it has either in English decisions or in decisions on questions relating to the law of Limitation. (*Heald and Lentaigne, JJ.*) K. E. A. K. AHMED SAHIB AND CO. v. M. K. PAKIR MAHOMD KOWTHER.

2 Bur. L. J. 169

———O. 2, R. 2—Distinct causes of action—Suit for share—Test on. See (1922) DIG. COL. 247. ABDUR RASHID v. MT. QUDRAT-UN-NISSA.

70 I. C. 817.

———O. 2, R. 2—Instalment bond—Prior suit for some instalments—If bars subsequent time.

An instalment bond gave the creditor option to enforce full payment on a single default being committed or to waive it. The creditor first sued for some instalments which had fallen due and subsequently for the balance. *Held*, O. 2, R. 2 did not bar the second suit. (*Hallifax, A. J. C.*) KESHO RAO v. SULKIA.

19 N. L. E. 170.

———O. 2, R. 2—Misjoinder of defendants—Effect.

A good test to see whether two suits which were filed separately ought to have been filed as one is to see if they could have been filed as one without a misjoinder of defendants. (*Duckworth and Po Han, JJ.*) STANDARD ELECTRIC AND MOTOR WORKS v. PICTURE PALACE.

2 Bur. L. J. 218.

———O. 2, R. 2—Mortgage with possession and lease in favour of mortgagor executed on the same day—Interest equal to rent—Prior suit for rent—Subsequent suit for mortgage money not barred.

The defendants executed a usufructuary mortgage and a lease of the same property on the same day and in the lease it was stated that the defendants took the mortgaged property from the plaintiffs on a rent of Rs. 187-8-0 per mensem for six months. Plaintiff first sued for rent and then for mortgage money and it was contended that the second suit was barred by O. 2, R. 2.

*Held*, that although the mortgage-deed and the lease were executed on the same day and rent was equal to the amount of interest yet in view of the facts that the mortgage-deed contained no reference to the lease and that the mortgagees were not restricted in their choice of tenants the mortgage and the lease were two distinct transactions and the institution of the former suit, which was based on the lease, is therefore no bar to the subsequent mortgage suit. 3 Lah. 1 Full (*Martineau and Campbell, JJ.*) RALIA RAM v. AMIR CHAND.

4 Lah. 52 : 5 Lah. L. J. 239 : 74 I. C. 122 ; 1923 Lah. 203.

———O. 2, R. 2—Two mortgages—Suit on later one—It bars subsequent suit on former one. See C. P. CODE, O. 34, R. 1.

69 I. C. 897.

———O. 2, R. 2—Occupancy rights in a number of plots—Suit by Zemindar regarding some only—Effect.

Where a tenant claimed occupancy rights in a number of plots and subsequently the zemindar after filing suit regarding some only of the plots

## C. P. CODE (1908), O. 2, R. 2

compromised with the tenant and granted him occupancy rights in the same, he is thereafter precluded from making a similar claim regarding the other plots. (*Fremantle, S. M.*) JUTWAR SINGH v. KIRAT SINGH.

L. R. 4 A. 368 (Rev).

———O. 2, R. 2—Prior suit for possession—Subsequent suit for redemption.

Where mortgagors have obtained a decree for redemption and have failed to execute it, another suit to redeem will lie for the same reason that the cause of action is not the same.

In 1904 the plaintiffs sued for possession ignoring a mortgage to which the plaintiffs objected *ab initio*. In that suit they were attempting to avoid it and had they prayed for redemption they would have *ipso facto* admitted their liability to redeem the mortgage ; in other words, such a prayer would have cut at the roots of their claim. Subsequently they sued for redemption. *Held* that the cause of action in the present suit was the mortgage now admitted as binding on the plaintiffs plus a refusal of the mortgagees to accept redemption on the terms offered by the plaintiffs. The second suit was not barred. (*Le Rosignol and Martineau, JJ.*) JAIMAL v. GANESHI MAL. 4 Lah. 187 : 5 Lah. L. J. 296 : 70 I. C. 528.

———O. 2, R. 2—Rent—Cesses—Separate suits for—Maintainability.

In a prior suit the lessor had sued the lessee for rent and obtained a decree. Subsequently the lessees had neglected to pay the cesses due on the land and the lessor was compelled to pay the same. In a subsequent suit by the lessor for recovery of the cesses so paid. *Held* that the subsequent suit was not barred by O. 2, R. 2, C. P. Code. (*Chatterjee and Cuming, JJ.*) MAHENDRA NATH BOSE v. ABINAS CHANDRA BOSE.

27 C. W. N. 521 : 1923 Cal. 615.

———O. 2, R. 2—Suit for partition—Property situate in different jurisdictions—Separate suits maintainable. See C. P. C. S. 11 (4).

(1923) M. W. N. 294.

———O. 2, R. 2—Suit for specific performance—Failure to ask for possession—Effect.

*Per Krishnan, J.*—Quære whether a plaintiff suing for a conveyance is not entitled to ask for possession as of right and the failure to ask for it in the first case is a bar under O. 2, R. 2.

*Per Venkatasubba Rao, J.*—The true principle in such a case is that if the claim to possession in the second case is based on the contract, O. 2, R. 2 bars the suit ; but if it is based on the conveyance obtained in the first suit, it is not barred. (*Krishnan and Venkatasubba Rao, JJ.*) SUNDARA RAMANUJAM NAIDU v. SRVALINGAM PILLAI.

45 M. L. J. 431 : 18 L. W. 333.

———O. 2, R. 2 (2)—Two suits filed on same date—Suit bearing subsequent number filed later.

It must be presumed until the contrary is proved that two suits presented on the same day were presented and admitted in the order in which their members appear on the register. (*Duckworth and Po Han, JJ.*) STANDARD ELECTRIC AND MOTOR WORKS v. PICTURE PALACE.

2 Bur. L. J. 218.



## C. P. CODE (1908), O. 2, R. 3.

—O. 2, R. 3, 6—*Joinder of Causes of action—suit for rescission of contract and return of earnest money—specific performance—If can be claimed in the alternative.*

Rr. 3 to 6 of O. 2 allow a plaintiff to unite in the same suit several causes of action against the same defendant and to order separate trials if necessary. The Court can in a suit for rescission of contract and return of earnest money also try an alternative claim for specific performance arising out of the same facts.

The scope and effect of the Judicature Act pointed out (*Das and Macpherson, JJ.*) CHANDRIKA PRASAD v. HIRA LAL. 75 I. C. 433 : 1923 Pat. 357.

—O. 2, R. 3—*Pre-emption—Joinder of several causes of action against vendee—if allowed.*

A suit for pre-emption is against the vendee, the vendors being only *pro forma* defendants. A plaintiff pre-emptor can bring a single suit for pre-emption against the same vendee with respect to four different sales. (*Abdul Raoo, J.*) PAIRA RAM v. KESHO NATH. 73 I. C. 892.

—O. 2, R. 3—*Scope.*

Two reliefs i.e. for setting aside an order of the execution Court and for a declaration that property could be attached in execution of the decree, can be joined in the same suit, the parties being the same. (*Stuart, J.*) SHAMBU DIYAL SINGH v. ISWAR SARAN. 75 I. C. 597 : 1923 A. 306.

—O. 2, R. 6—*Appellate Court—Powers of—Trial court not objecting to trial.*

In a case of a joinder of causes of action, where the trial court does not think fit to act under O. 2, R. 6, the appellate court ought not to interfere with the discretion. (*Abdul Raoo, J.*) PAIRA RAM v. KESHO NATH. 73 I. C. 892.

—O. 3, R. 1—*Power of attorney—Validity—Objection not raised in trial court—Effect—waiver.*

Where the defendant in the court below failed to take the objection that a power of attorney constituting a recognised agent was not valid, he must be deemed to have waived the same. The objection cannot be allowed to be raised for the first time in appeal. (*Scott-Smith, J.*) GOPAL SINGH v. BHAGA. 69 I. C. 365.

—O. 3, Rr. 1 and 2—*Recognised agent—Pleader duly appointed—Pleaser appointed by person having power of attorney—Execution petition signed by such agent if valid. See (1922) DIG. COL. 250 THIRUVENKATASWAMI IYENGAR v. PAVADAI PILLAY. 70 I. C. 281.*

—O. 3, R. 2—*Power of attorney—Special power—Suit filed by Mukhtear—Irregularity—Immaterial defect—C. P. Code, S. 99.*

Plaintiff instituted a suit for recovery of possession of land from defendants and the plaint was filed by a Mukhtear holding a special power of attorney from plaintiff, and not a general power of attorney as required by O. 3, R. 2 (a) as amended by the Rules made by the High Court of Bombay. The defendants objected that the suit was not properly instituted but the courts below overruled the plea and decreed the suit, *Held* on second

## C. P. CODE (1908), O. 3, R. 4.

appeal, that the irregularity if any, was cured by S. 99, C. P. Code, and that the decree of the court below should be affirmed, (1886) P. J. 63 foll. (*Shah, A. J. C. and Crum, J.*) GANPATHY NANA POWAR v. JIWANABAI. 47 Bom 227 : 1923 Bom. 44 (1).

—O. 3, R. 2 (a)—*Bombay High Court Rules—Scope of.*

O. 3, Rule 2, Cl. (a) as altered by the rule made by Bombay High Court enables a person holding a general power of attorney from a party not resident within the local limits of the jurisdiction of the Court within which limits the appearance is made, authorizing him to appear and act, on behalf of the party, to so appear and act. (*Shah and Crump, JJ.*) ACHUT SITARAM v. TARACHAND. 72 I. C. 1003 (1) : 1923 Bom. 41 (1).

—O. 3, R. 4—*Applicability.*

The acceptance of a power of attorney must be in writing (*Scott-Smith and Zajar Ali, JJ.*) THE FIRM MATHRA DAS v. THE FIRM RAMA LAL. 1923 Lah. 402.

—O. 3, R. 4—*Pleader—Vakalat—Acceptance—Omission of pleader's name in vakalat—Effect of—Presentation of plaint if proper.*

Where a vakalatnama executed without the pleader's name appearing upon it is accepted by the particular pleader who was engaged by the party and a plaint was presented by that pleader *Held* that the provisions of O. 3, R. 5 of C. P. C. were sufficiently complied with and that the presentation of the plaint was proper. Once the party has delivered the vakalatnama to a pleader without putting a name on it he must be deemed to have impliedly authorised the pleader to fill up the necessary details and to appear for him. Even where a court returns a plaint for presentation to a proper court the original vakalatnama will continue to be in force even after the return of the plaint. O. 3, R. 4 provides that the authorisation must be in writing not that it must be in any particular form, nor that it must show the pleader's name in the main body of the document. As long as it is a writing which states that the party authorises the pleader to act for him and is signed by the party and the pleader, there is no relaxation of the provisions of the rule in accepting it. Even if there is any defect in the vakalatnama by reason of the omission to mention the name of the particular pleader authorised to appear, such defects can be cured by amendment. (*Halifax, A. J. C.*) MAHARASHTRAYA JNAN KOSH MANDAL v. BHJULAL. 6 N. L. J. 100 : 71 I. C. 436 : 19 N. L. R. 36 : 1923 Nag. 182.

—O. 3, R. 4—*Vakalatnama—Signature by person authorised to instruct—Validity.*

The rules as regards appointing pleaders are salutary and strict rules made with a view to prevent fraud. But in a case where no fraud has been committed and one person signs for another with the full knowledge and acquiescence of the latter, the irregularity is a formal one not affecting the merits of the case and is cured by S. 99, C. P. Code, (*Miller, C. J. and Kulwant Sahay, JJ.*) BANWARI RAI v. CHETHRU LAL RAI. 74 I. C. 1033.

G. P. CODE (1908), O. 5, R. 12.

—O. 5, Rr 12, 14 and 17—*Purdanashin lady—Service of summons—Mode of.*

A pardanashin lady executed a power of attorney in favour of her husband but there was no power given to accept service of summons on her behalf. The summons was served on the husband.

*Held*, that there was no proper service under O. 5 R 12 as the husband was not an agent duly authorised to accept service of summons. As a pardanashin lady is not able to accept service personally, she comes under the expression "cannot be found" under O. 5, Rr 14 and 17, and service of summons can be effected by serving it on any adult male member of the family, or affixing it on the outer door of the house in which the lady ordinarily resides. (*Jwala Prasad and Ross, JJ.*) *Mr. NAIMUNNISA v JAGMOHAN LATI.*

4 Pat. L. T. 89 : 72 I. C. 910 : 1923 P. 433

—O. 5, R. 13—*Ex parte decree—Application to set aside—Non-service of summons.* See (1922) DIG COL 251 *ROMESH CHANDRA CHAKRABUTTY v. DURGA CHARAN CHAKRABUTTY.*

70 I. C. 292

—O. 5, R. 17—*Minor—Evasion of service by guardian—Service on minor.*

Where the guardian of a minor was evading service and the notice was consequently served on the minor personally, the guardian must be deemed to have received information and the minor cannot be allowed to plead that the service was irregular. (*Fremantle, S. M.*) *HAR CHARAN v. DURGA BUX SINGH* L. R. 4 A 210 (Rev.).

—O. 5, R. 17—*Service by affixure—Temporary absence of defendant—Duty of Court.*

Mere temporary absence of the deft. does not justify the serving officer in affixing a copy of the summons on the door of his house. Before that can be done all due and reasonable diligence to find him must be used, and where it cannot be said that this was done service by affixure is improper. (*Scott-Smith, J.*) *NIHALA v. KHAZAN SINGH,* 73 I. C. 34 (1)

—O. 5, R. 17—*Service by affixure—Temporary absence—Only one attempt—Effect.*

Service by affixure should not be made the very first time notice is sought to be served. If it is done and a decree is passed *ex parte*, it is sufficient cause within the meaning of O. 9, R 13 to set aside the decree. Temporary absence at the time of the process server's call does not mean he cannot be found within the meaning of O. 5, R 17 (*Dalal J. C.*) *MATHURA SINGH v. SHEO MOHAN PRASAD,* 9 O. and A. L. R. 437 : 74 I. C. 792 : 10 O. L. J. 337.

—O. 5, Rr 17 and 19—*Service of summons—Affixure to outer door—Propriety of—Return of process server.*

The petitioner at the hearing of an application to set aside an *ex parte* decree alleged that the summons had not been affixed on the outer-door of his house as stated in the return but the court refused to enquire into the matter and dismissed the petition. *Held*, that the disposal of the petition was irregular and the court must enquire and come to a conclusion on the evidence.

G. P. CODE (1908), O. 6, R. 14.

(*Kumaraswami Sastri, J.*) *KARUTHAN AMBALAM v. DORAISWAMI AIVANGAR.* 1923 Mad. 27.

—O. 5, R. 20—*Copy attached to tree near house*

Provided the tree to which the copy of summons is attached was reasonably near the hut, that would probably be sufficient. (*Batten, J. C. and Hallifax, A. J. C.*) *PANJAB RAO v. BAIRAM.*

69 I. C. 549 : 1923 Nag 13.

—O. 5 R. 20—*Substituted service—When to be ordered.*

Under O. 5 R 20 substituted service should be ordered only when the court is satisfied that the defendant is evading service or that summons cannot be served in the ordinary way. Where the plaintiff knew all along that deft had left a certain place two or three years before suit it cannot be said he was evading service at that place. (*Chevis J.*) *RAM KISHAN v. MULA.*

69 I. C. 467.

—O. 6, R. 4—*Fraud—Particulars—Duty to disclose—Procedure.*

Where the defendant pleads fraud in his defence in a vague position it is the duty of the pleader for the plaintiff to apply to the Court to order the defendant to deliver further and better particulars of the charge of fraud. When settling issues it is the duty of the Judge himself to require the defendant to specify with particularity the nature of the fraud alleged. Subordinate Judges should be watchful to see that in all cases the parties have pleaded their cases so plainly, fully and clearly that each side knows the nature of the case which has to be met, and this rule is one of general application. Frequently the result of ordinary particulars of nebulous claims and defences will be to make it manifest that the claim or defence has no substance. A subordinate judge should, when ordering particulars to be given, order the party in default to pay a specified sum of costs to the other side for the costs occasioned by the application; such payment to be made on or before the delivery of the particulars. If the order is disobeyed and if the plaintiff is in default he should have his action stayed; and if the defendant is in default, his defence should be struck out.

Particulars having been furnished the Judge should be careful at the trial to exclude all evidence which is not fairly covered by the original paragraph and particularly should give that as his reason. (*Mears, C. J. and Piggott, J.*) *GAURI SHANKER v. MANKI KUNWAR.* 21 A. L. J. 571 : L. R. 4 A. 464 : 45 A. 624 : 74 I. C. 466 : 1924 A. 17.

—O. 6 R. 6—*Condition precedent—Allegation and denial—Pleadings.*

It is for the defendant, if he contends that there was a condition precedent and that it has not been duly performed to state specifically what the condition was and to plead its non-performance, otherwise its due performance will be presumed. (1914) 1 Ch 920 Rel. (*Ross, J.*) *MURLI MANOHAR v. RAJA NAND SINGH.* 72 I. C. 1.

—O. 6, Rr 14, 15—*Signing and verification—Defects.*

C. P. CODE (1908), O. 6, R. 16.

Where the manager of a Bank gives a power of attorney to one of the Directors, who happens to be a Pleader to institute a suit and the plaint is filed as signed by him and verified by the Accountant of the Bank, there is nothing irregular. Defects of this category are merely technical and can be allowed to be amended. (*Pipon, J. C.*)  
**NATHU RAM v. THE LYALLPUR BANK**  
 69 I. C. 422

— O. 6, R. 16, 17—*Suit for rescission of contract—Amendment asking for specific performance in the alternative—If to be allowed.*

In an action for rescission of a contract and for return of earnest money, the plaintiff can be allowed an amendment claiming specific performance as an alternative relief, arising out the same facts. The court has always the power to strike out matters which tend to prejudice, embarrass or delay the trial, if the occasion arises during the trial.

Scope and effect of the Judicature Act pointed out. (*Das and Macpherson, JJ.*) **CHANDRA PRASAD v. HIRA LAL** (1923) Pat. 357 : 75 I. C. 433.

— O. 6, R. 17—*Amendment—Change of cause of action. See (1921) DIG. COL. 228.*  
**THIRUMALASSERI. SREEDHARAM VALIA RAJAH v. NARAYANAN NAMBU DRIPAD.** 71 I. C. 270

— O. 6, R. 17—*Amendment at last stage*

Where defendants based their defence on a definite plea that they were holding under a completed sale, and it was that plea that was put in issue and had been decided against them. They cannot be allowed to plead at such a late stage as second appeal. *Held*, an agreement to sell. It has been repeatedly pointed out that pleadings must be strictly construed, and parties must be restricted to what they allege in their plaint or in their written statements. (*Broadway, J.*) **PALU v. RASILU** 1923 Lah. 675.

— O. 6, R. 17—*Amendment—Limitation—Correction of description of parties.*

Where no substitution or addition of a new plaintiff was made by an amendment but only the description of the plaintiff was corrected, there is no question of limitation that arises (*Kotwal, A. J. C.*) **BAKARAM v. RAMCHANDRA MAHARAJ.** 71 I. C. 39 : 1923 Nag. 96.

— O. 6, R. 17—*Amendment of plaint—Limitation.*

A court can allow a plaint to be amended, even though at the time of the amendment a new suit on the same cause of action would be barred. (*Mookerjee and Rankin, JJ.*) **SATCHIDANANDA DUTT v. NRITYA NATH MITTER**

27 C. W. N. 1007 : 50 Cal 878

— O. 6, R. 17—*Amendment of plaint—Revision.*

Though orders have been set aside by the High Courts on revision where the Lower courts have acted with material irregularity, each case must be decided on its own merits, and no hard and fast rule can be laid down that an amendment must as a general rule be allowed wherever a refusal to amend would be likely to result in hardship to the plff. The test to be applied is whether the amendment would or would

C. P. CODE (1908), O. 6, R. 17.

not occasion injury to the opposite party such as cannot be recouped by costs, and leave to amend should generally be refused if it would. (*Moti Sagar, J.*) **SHAMS UD-DIN v. DEVI DAS.**

1923 Lah. 505.

— O. 6, R. 17—*Amendment when allowed.*

The powers of amendment under the new Code are much wider than under the old one. But it is an accepted principle that amendment will not be allowed if it converts the suit into one which is not only different from but is inconsistent with the plaint as originally framed.

Where the amendment meets the ends of justice by allowing the whole question in dispute to be decided between the parties and avoid unnecessary litigation, then it ought to be allowed. (*Pipon, J. C.*) **GHULAM HAIDAR KHAN v. SARDAR ALI KHAN.** 73 I. C. 748.

— O. 6, R. 17—*Amendment—Wrong numbers of fields.*

An appellate court can amend the wrong numbers of fields given in the memorandum of appeal in an execution suit. (*Burn, J. M.*) **SUMERA v. TULSHI RAM.** L. R. 4 A. 365 (Rev.)

— O. 6, R. 17—*Appellate court—Powers of—Bona fide mistake—Effect.*

Ordinarily an appellate court will not allow amendment if the plaintiff has elected to go to trial on an issue whether the frame of the suit is correct notwithstanding the objection of the defendant that it offends S. 42, Specific Relief Act. But where it is framed *bona fide* believing consequential relief is not open to him, the appellate court can allow an amendment of the plaint. It is not an inflexible rule that no amendment can be allowed if plaintiff had notice in the trial court of the objection to the frame of the suit. (*Mullick and Bucknill, JJ.*) **SHEJPURJAN RAI v. MAHARAJA BHADUR KESHO PRASAD SINGH.** 2 Pat 919.

— O. 6, R. 17—*Change in cause of action—No amendment to withdrawal—Effect.*

The plaintiff sued for money on a promissory note, which he alleged had been executed by the defendant in consideration of certain sums due. The defendants denied having executed the promissory note, but he was suspected to have substituted a forged promissory note for the one which he had written. The Finger Print Bureau at Allahabad were of the opinion that the finger printed in the document did not agree with those of the defendant. The trial Court held that the plaintiff is entitled to sue on the oral settlement made before the promissory note was given, and on the basis of that settlement it had given the plaintiff a decree for the full amount claimed. On appeal by defendant, the plaintiff had nowhere stated that he wished to change the basis of his suit and fall back on the oral settlement, nor had he asked to be allowed to amend his plaint. The suit had been passed through solely on the promissory note. *Held*, when it has been found that the promissory note sued upon is a forgery, the claim must necessarily fail. (*Martineau and Zafar Ali, JJ.*) **RAJINDAR SINGH v. TEK CHAND.** 1923 Lah. 688.

C. P. CODE (1908), O. 6, R. 17.

—O. 6, R. 17—*Character of suit changed.*

Amendment altering the character of the suit entirely, was under section 53 of the Old Code, expressly forbidden. But section 135 and rule 17 of order 6 of the present Code make no express restriction on the discretion of the Court, provided it is judicially exercised (*Hallifax, A. J. C.*) SHEONARAIN v. RAM PRASAD

74 I. C. 317: 1923 Nag. 241.

—O. 6, R. 17—*Late stage—Opportunity already given—Prejudice to deft.*

Where in the written statement the defts. raised a plea that the suit was badly framed in as much as possession had not been asked for and an issue was raised on this contention of the defts. but yet the plff. never thought of applying for the necessary amendment of the plaint; and the trial Judge allowed the plff. an opportunity of amending plaint and yet the plff. refused to amend, and it was only after the whole case was concluded and the plff. probably had suspicions as to the bent of the Judge's mind for amendment. Held the Court below acted quite rightly in refusing the amendment 9 S. L. R. 174; 26 C. 845 Foll. Where an order for amendment would operate prejudicially to the defts. so far as their evidence of possession is concerned, the Court will refuse to allow amendment of plaint (*Kincaid, J. C. and Raymond, A. J. C.*) MANOHER DAS v. RAMDAS.

75 I. C. 549: 1923 S. 17.

—O. 6, R. 17 and O. 23, R. 1—*Nature of suit and plaintiffs' title changed during suit amendment or withdrawal not necessary.*

Plaintiffs sued the defendants on the basis of a certain transfer which was challenged by the defendants as void in law. The suit was dismissed but during the pendency of appeal Plaintiff's transferor died and plaintiffs being his heirs put forth a new plea that they claimed not as transferees but as heirs; held that in view of justice, plaintiffs should succeed even though they have not asked for amendment or withdrawal under O. 23, and though the nature of suit has undergone a change thereby. (*Daniels, J.*) INDR DEO RAI v. RAM CHARITTER RAI.

74 I. C. 971:

1923 A. 560

—O. 6, R. 17—*Plaint—Amendment in second appeal.*

Where the plffs. had full opportunity to amend their plaint in the courts below, but never did so and there was nothing to prevent the plffs. from suing in the alternative in the first instance and basing their suit upon two alternate grounds and no explanation was put forward as to why the plaint was not framed in this manner, an opportunity to amend the plaint in second appeal by introducing an entirely new cause of action was refused. (*Motisaragar, J.*) KIRPA v. MT. CHINTI.

1923 Lah. 530.

—O. 6, R. 17, O. 7, R. 6—*Plaint—Failure to set up acknowledgment as saving limitation—Effect.* See (1922) DIG. COL. 255, UTTAM CHAND v. MT. THAKUR DEVI.

69 I. C. 412.

—O. 6, R. 17—*Pleadings—Amendment—Amendment ordered after conclusion of trial—Irregularity—Gross negligence.*

Y D—18

C. P. CODE (1908), O. 6, R. 17.

In a suit for a declaration that a decree obtained against a minor was not binding on him on account of the gross negligence of the guardian *ad litem* in the conduct of the prior suit, the plaint did not allege and the deft. did not ask for, particulars of the alleged negligence. The parties however went to trial and it was found on the evidence that negligence had been established. Subsequently the court ordered an amendment of the plaint. Held that the case having been tried out and a finding of negligence arrived at, no amendment was necessary. (*Krishnan and Venkatasubba Rao, JJ.*) VEERAPPAN v. MENNAPPAN.

70 I. C. 335: 1923 Mad. 245.

—O. 6, R. 17—*Pleadings—Amendment—description of the defendant—Limited Company.*

Where a suit for damages for loss of goods sent by the defendant Railway Company was entitled "The Agent, Railway Company" as defendant and the Railway Company objected to this description held that the addition of the word "Agent" to the name of the Railway Company in the description of the defendant merely amounted to a misdescription and the plaintiff should be allowed to amend the plaint. If it can be said, in the interests of justice, that there has been a misdescription of a party in the title of a plaint the necessary amendment ought to be allowed, if otherwise the rights of the parties would be prejudiced. 64 I. C. 125 Dissented from. (*Macleod, C. J. and Crump, J.*) THE SARASPU MANUFACTURING Co. v. B. B. & C. I. RY. CO.

47 Bom. 785: 25 Bom. L. R. 513: 73 I. C.

1027: 1923 Bom. 452.

—O. 6, R. 17—*Pleadings—Amendment—Duty of Court to allow.*

It is the manifest duty of a judge to try to put an end, once for all, to all questions that can arise in relation to a particular transaction. Where an amendment is necessary for the purposes of settling all matters in controversy and works no injustice, nor takes by surprise the opposite party, the judge should make such amendments. (*Mears, C. J. and Banerjee, J.*) NUR MAHOMED v. NATWAR LAL.

45 A. 220: 71 I. C. 452:

1923 A. 112

—O. 6, R. 17—*Pleadings—Amendment—Promissory note—Suit upon—Decree on original claim.*

The fact that plaintiff sued upon a document as a promissory note is no bar to his suing upon the transaction referred to in the document as one of his causes of action and of using the document merely as evidence of the transaction upon which the suit rests. There can be no possible object in forcing the parties into fresh litigation merely by reason of a technical error in the plaint which can be corrected and the correction of which can allow the real dispute between the parties to be judicially settled. (*Pipon, J. C.*) SAYAD SIRKANDAR SHAH v. BHAI RAM CHAND SANT RAM.

71 I. C. 968.

—O. 6, R. 17—*Signing and verification of plaint—Technical defects—If can be cured by amendment.* See C. P. CODE, O. 6, Rr. 14, 15.

69 I. C. 422.

C. P. CODE (1908), O. 6, R. 17.

—O. 6, R. 17 and O. 7, R. 7—*Specific performance—Pleading—Proof—Variance between.*

The plaintiffs came into Court on the allegation that the negotiation with the debts culminated in a contract on the 26th September 1917 and that such contract was made by an agent on behalf of the first defendant. No doubt, the document was not annexed to the plaint. But it was produced at the trial and was made the foundation of the case for the plaintiffs. That case completely broke down. *Held* that the plaintiffs cannot, in such circumstances, be permitted to abandon the case they made in the plaint and invite the Court to examine whether a completed agreement may or may not be spelt out of the antecedent correspondence. The Court would not in a case of this description, permit the plffs. to depart from the case made in the plaint, as the Court discourages, as a rule, variance between pleading and proof. The test applied in such cases is, whether if the variance were permitted in favour of the plffs., debts would be taken by surprise and be prejudiced thereby. (*Mookerjee and Chotener, JJ.*) GONESH RAM v. GANPAT RAI. 72 I. C. 651

—O. 7, Rr. 1 and 6—*Limitation as regards Suit—Plaintiff to prove he is in time* See LIM. ACT, ART. 44. 38 C. L. J. 218

—O. 7, R. 6—*Statement of grounds of exemption—Necessity for.*

In a case where a plaint filed in time is returned to be presented to the proper court, it is not necessary for the plaintiff to add a statement showing the ground on which exemption from limitation is claimed. The endorsement of the first court that it was returned for prosecution to the proper court, is enough for the purpose of the rule (*Abdul Raoof and Fajide, JJ.*) SUKHBIR SINGH v. PIARE LAL. 1923 Lah. 591

—O. 7, R. 7—*Prayer for general relief—Power of Court to grant reliefs not asked for in the plaint.*

Under O. 7, R. 7 C. P. Code a prayer for general relief is unnecessary and a Court may always give general or other relief, as it may think just, to the same extent as if it had been asked for. All that is necessary is that the necessary foundation of facts must be laid in the plaint. (*Miller, C. J. and Foster, J.*) SATYATARAN CHAUDHURY v. JYOTI PRASAD SINHA DEO. (1923) Pat. 153 : 1923 P. 386.

—O. 7, R. 7—*Suit on hundi—Hundi not properly Stamped—Decree on original consideration.*

Plff. had a right to get some money for goods sold. That transaction was liquidated in part by delivery of the hundis. The hundis were found to be inadmissible in evidence for want of stamp and that, through the default of the debtor. *Held* that the plff. was at liberty to sue for the original consideration. (*Le Rossignol and Broadway, JJ.*) NATHU RAM v. DOGAR MAL. 4 Lah. 198 : 75 I. C. 555.

—O. 7, R. 10—*Absence of jurisdiction—Return of plaint—Dismissal of suit improper* (1922) DIG. COL. 256 RAM JAS SINGH v. BABU NANDAN SINGH. 70 I. C. 98.

C. P. CODE (1908), O. 7, R. 11.

—O. 7, R. 10—*Scope of.*

Where, on application of the plaintiff, the plaint was returned to be presented to the proper Court and in revision the High Court by order refused to interfere, but the lower appellate Court in appeal set aside the order of the trial Court returning the plaint *held* it would be impossible to restore the plaintiff to his prior position and it is not desirable that any further interference should be made on revision with the progress of the hearing and the order of the trial Court must be confirmed. (*Kanhaiya Lal, J. C.*) KHUNAI TEWARI v. MT. DIL KUNWAR. 1923 Oudh 38 (2).

—O. 7, R. 11—*Cause of action arising after plaint filed—Suit for money.*

Where in a suit for money, the real cause of action arose only after the institution of the suit, the court should not reject the plaint and drive the plaintiff to filing a fresh suit, but pass a decree there itself (*Martineau and Zafar Ali, JJ.*) KANSHI RAM v. JAIMAL SINGH. 75 I. C. 562 : 1923 Lah. 590.

—O. 7, R. 11 and S. 149—*Extension of time—Limitation.*

Under O. 7, R. 11 (c) read along with S. 149 C. P. C. a Court has power in its discretion to allow a plaintiff further time in which to make good a deficiency in court fee and if such deficiency is made good within the time prescribed the fact that in the meantime limitation had expired would not affect the suit. (*Ryves, J.*) RAM DIAL v. SHER SINGH. 45 A. 518 : 21 A. L. J. 387 : L. R. 4 A. 251 : 74 I. C. 358 : 1923 A. 538 (1).

—O. 7, R. 11—*Provisions of, mandatory Deficient court fee—Procedure—Objection when to be raised.* (1922) DIG. COL. 256, RADHA KANTA SAHA v. DEBENDRA NARAIN SAHA. 27 C.W. N. 566 : 38 C. L. J. 74 : 70 I. C. 101.

—O. 7, R. 11 and O. 9, R. 9—*Rejection of plaint—Non payment of Court Fee—Application for restoration—Proper remedy.*

Where a plaint has been rejected by a Court for non-payment of Court fees and the order has been signed by the Court, the order operates as a decree and the Court has no power to restore the suit under O. 9, R. 9, C. P. Code or under its inherent powers under S. 151, C. P. Code. The proper remedy of the plaintiff is by a way of an application for review under O. 47, R. 11 of C. P. Code. (*Das and Kulwant Sahay, JJ.*) RAMESH-WARDHARI SINGH v. SADHU SARAN SINGH. 2 Pat. 504 : 4 Pat. L. T. 261 : 73 I. C. 629 : 1923 P. 354.

—O. 7, R. 11—*Rejection of plaint—Powers of appellate Court.*

An appellate court has the same powers of rejecting a plaint under O. 7, R. 11 of the C. P. C. as the court of 1st instance. It is the duty of the plaintiff to show in his plaint the grounds on which he claims exemption from limitation in respect of a claim which is *prima facie* barred by limitation. If he fails to do so the appellate Court is not bound to give an opportunity to specify those grounds. (*Kotwal, A. J. C.*) VITHOBA YADEO v. SURYABHAN. 69 I. C. 554 (1).

C. P. CODE (1908), O. 7, R. 14.

———O. 7, Rr. 14 and 18 (2)—Filing of documents—Documents produced by plaintiff in answer to case set up by defendants—Necessity for filing before first hearing. See (1922) DIG. COL. MANBODH MISSIR *v.* BHAIRO MISSIR.

4 Pat. L. T. 322

———O. 8, Rr. 2 and 4—Defence—How to be pleaded.

It is the duty of defendants to particularise in their defence all points either of law or fact which they desire to take—Evasive denials are deprecated and the points of defence must be stated specifically and clearly. (*Ghose and Pantou, JJ.*) SARIFUN MANDALIN *v.* FERADOUL KHAN, 1923 Cal. 578.

———O. 8, R. 2—Limitation under special law—If to be allowed to be raised in appeal.

A point of limitation under the provisions of Sch. III, Art. 2 of the Bengal Tenancy Act cannot be allowed to be raised for the first time in appeal as the determination of that question depends upon the facts as to when service of notice of deposit was made on the landlord. O. 8, R. 2 requires the defendant to raise a question of special limitation (*Ghose, J.*) SHEIKH HAJI SADAKALI KHAN *v.* JANAKINATH SINGHA ROY. 69 I. C. 194.

———O. 8, R. 5—Ex parte procedure—Proof of claim—Duty of Court—C. P. Code O. 9, R. 5.

O. 9, R. 6, C. P. Code lays down when the Court may proceed ex parte but there appears to be no explanation in the Code what ex parte procedure is. In respect of the issues, it is the accepted practice that none are framed, though the plaintiff is always called upon, expressly or impliedly but in quite general terms to prove his case. Under O. 8, R. 5 where the defendant does not appear at all he must be taken to have admitted all the allegations in the plaint. Therefore ordinarily in an ex parte case no issue arises at all and there is nothing for the plaintiff to prove. But by the proviso to O. 8, R. 5 it is left to the discretion of the Court to select some of the facts which under the rule itself must be regarded as admitted and to say that the plaintiff must prove them in spite of the implied admission. The Courts do in practice almost invariably, though often tacitly, direct that the main points alleged in the plaint are to be proved otherwise than by the implied admission of the defendants and only the minor points are to be taken as proved by that admission. But when the Court accepts certain allegations in the plaint as proved by the implied admission of the defendant and selects others as requiring proof by the plaintiff it is bound to tell the plaintiff clearly what the points are that have been so selected and the only way to do this is to state them as issues. In the majority of ex parte cases it is so clear to everybody what the points selected as requiring proof otherwise than by the implied admission are that it is unnecessary to state them at all, and this would seem to be the state of things for which the last paragraph of rule 1 of O. XIV provides. But if there is any room for doubt about the matter, then the Court is bound to inform the plaintiff specifically which points he has to prove and which can be taken as proved

C. P. CODE (1908), O. 9.

(*Batten J. C. and Halijav, A. J. C.*) MT. BHURIBA *v.* ISHAK HUSSAIN. 69 I. C. 619. 1923 Nag. 83

———O. 8, R. 6—Set-off—Counter claim—Equitable-off—Difference between—Suit for dividend—Right to set off damages.

A set-off and counter claim are governed by rules of procedure, and a person can only plead by way of set-off or counter claim that which is permitted by those rules. A set-off can be pleaded as a defence and can only be raised where the claim to set off one against the other whether by plaintiff or defendant exists in the same right. A set-off can also be the subject matter of a separate action or a counter claim. In a suit by a share holder for recovery of dividends declared by the company it is not open to the directors to claim by way of set off damages due from plaintiff in respect of alleged breaches of contract. (*MacLeod, C. J. and Coyajee, JJ.*) VITHALDAS GULABDAS SETH *v.* THE HYDERABAD SPINNING AND WEAVING CO., LTD. 47 Bom. 182 : 1923 Bom. 24.

———O. 8, R. 6—Set off—Counter claim—Distinction—Claim for unliquidated damages—Omission to plead—Amendment.

Under O. 8, R. 6, C. P. C., it is not open to a defendant to claim a set-off in respect of unliquidated damages for alleged breaches of contracts. But the C. P. Code does not exclude what is called an equitable set-off provided the defendant's cross-demand arises out of the same transaction as the plaintiff's claim. 2 M. H. C. R. 296, 303 foll.

Under R. 118 of the Bom. High Court Rules a defendant may set up by way of set-off or counter claim, against the claims of the plaintiff any right or claim whether such set-off or counter claim sounds in damages or not. Nothing which was not a good set off before the passing of the said rule can be a good set off under the said rule the set-off must still be for an ascertained sum or it must arise out of the same transaction as the plaintiff's claim. A counter claim, however, need not arise out of the same transaction. Set off is a ground of defence and it should be pleaded in the written statement. Counter claim does not afford any defence to the plaintiff's claim : it is a weapon of offence which enables a defendant to enforce a claim against the plaintiff as effectually as in an independent action. The above distinction between a set off and counter claim has an important bearing on the question of limitation, for if the statute of limitations is pleaded to a defence or set off, the plaintiff, in order to establish his plea, must prove that the set-off was barred when the plaintiff commenced his action ; it is not enough to prove that it was barred at the time when it was pleaded. In the case of a counter-claim, it is enough for the plaintiff to prove that the counter claim was barred when it was pleaded. (*Walker v. Clemen's* (1850) 15 Q. B. 104 ; *McGowan v. Middleton* (1838) 11 Q. B. 464 ; 7 A. 204. 42 M. 873 Rel. (*Mulla, J.*) NAJAN AHMED HAJI ALI *v.* SALEMAHOMED PEERMAHOMED.

1923 Bom. 113.

———O. 9—Applicability of. (1922) DIG. COL. 258. MAHANT DAMODAR DAS *v.* RAJKUMAR DAS. 69 I. C. 637.

## C. P. CODE (1908), O. 9.

—O. 9—Applicability—Dismissal for default—Application to set aside—Dismissal for default—Effect. See C. P. CODE, S. 141.

19 N. L. R. 119.

—O. 9, R. 4—Application—Notice of to deft.

On an application under O. 9, R. 4 of the Code notice to a deft. is unnecessary. 10 A. L. J. 399 foll. (*Daniels, J. C.*) RAMJI LAL v. KESHO RAM. 1923 Oudh. 55.

—O. 9, R. 4—Application to sue as pauper—Dismissal for default—Fresh application.

The dismissal for default of an application to sue in forma pauperis does not bar a fresh application under O. 9, R. 4. (*Pe Han, J.*) MAUNG AUNG TUN v. MA E KIN. 2 Bur. L. J. 217.

—O. 9, R. 4 and O. 21, R. 100—Dismissal of application for default—Restoration.

An application under O. 21, R. 100 is not an application in execution, the proceedings being in the nature of a summary suit. Although the provision of O. 9, R. 4 does not apply to an application under O. 21, R. 90 it can well apply to proceedings under O. 21, R. 100. (*Das and Adam, JJ.*) SHEO NANDAN CHAUDHURY v. DEBI LAL CHAUDHURY. 4 Pat. L. T. 93 : (1923) Pat. 78 : 71 I. C. 484 : 1 Pat. L. R. 134 : 2 Pat. 372 : 1923 P. 239.

—O. 9, R. 6 and O. 17, R. 2—Scope of—Procedure. See (1922) DIG. COL. 259. MAHANT DAMODAR DAS v. RAJ KUMAR DAS. 69 I. C. 837.

—O. 9, R. 6—O. 17, R. 3—Setting aside of a decree—Revision.

A suit for rent was adjourned from time to time but on the day fixed for hearing when the defendant was absent, it was decided on evidence produced by plaintiff and the Court remarked in the judgment that it was to be an ex parte decree. On defendant's application the decree was set aside. Held in revision, the order being manifestly just there was no reason to interfere in revision. (*Simpson and Wazir Hasan, A. J. C.*) CHANBHARJA BAKSH v. KALKA PANDE. 72 I. C. 394 : 1923 Oudh 18.

—O. 9, R. 8—Appeal—Claim partly rejected.

An appeal lies from an order dismissing a suit for default where part of the claim is rejected. (*Lord Dunedin*) KANHAIYA LAL v. NATIONAL BANK. 45 M. L. J. 497 : 4 Lah. 284.

33 M. L. T. 349 (P.C.) : 25 Bom. L. R. 1248 : 75 I. C. 7. 50 I. A. 162 : 1923 F. C. 114.

—O. 9, R. 8—Appearance—What amounts to.

Where the party and his pleader appear, but the pleader asks for a pass over to consult his leader, and when the case is later called on, no one appears and is dismissed for default, it must be held the plaintiff had not appeared within the meaning of the rule. 3 P. L. J. 355 and 5 P. L. J. 17 foll. (*Coults and Adam, JJ.*) BASDEO NARAIN SINGH v. HARAK NARAIN SINGH. 1923 P. 156.

—O. 9, R. 8—Date fixed for appearance of guardian ad litem—Dismissal for default.

Where a suit is adjourned to a certain date for the appearance of the guardian ad litem, a

## C. P. CODE (1908), O. 9, R. 8.

dismissal for default on account of the absence of plaintiff is not justified. (*Macpherson, J.*) THAKUR PATHAK v. RAGHO PATHAK.

73 I. C. 559.

—O. 9, R. 8—Dismissal for default—Part of plaintiff's evidence on record.

Where a portion of the plaintiff's evidence is already on the record, but on the adjourned hearing the plaintiff is absent, the court cannot dismiss the suit for default but must pass judgment on the merits. (*Fremantle S. M. and J. M.*) MT. KALAWATI v. HAR PRASAD. L. R. 4 All. 390 (Rev.)

—O. 9, R. 8—Dismissal for default—Plff. dead on the date of hearing.

Where an order purported to be passed under O. IX R. 8, Civil Procedure Code, but in fact the plff. was dead on that date though neither the Court nor any of the parties was aware of it, Held that the order passed was a nullity. (*Daniels, A. J. C.*) TIRLOCHAN PRASAD SINGH v. BHAGWATI. 9 O. & A. L. R. 70 : 73 I. C. 230.

—O. 9, R. 8 and 13—Dismissal of suit for default after framing of issues—Appeal—Remand—Propriety of. See (1922) DIG. COL. 260 VELAYUTHA MUDALIAR v. SUNDARESAM PILLAI.

72 I. C. 482.

—O. 9, R. 8—Plaintiff absent—Dismissal—Remedy.

Where the Court, on the day of hearing when an application was made for adjournment as the plaintiff was ill, rejected the application and dismissed the suit, Held the proper course was to apply for a review of the order or apply for an order to set aside the order of dismissal and not to apply in revision. (*Macleod, C. J. and Crump, J.*) PANDURANG VEDURAM v. MOHAN CHHATRA BHUI. 1923 Bom. 395.

—O. 9, R. 8 and O. 17, R. 2 and 3—Scope of—Failure to appear—Procedure.

O. 17, C. P. Code deals generally with adjournments. Under O. 17, R. 2 where on any day to which the hearing of the suit is adjourned, the parties, or any of them fail to appear, the Court may dispose of the suit under O. 9, C. P. Code. In all the cases which come under O. 9, C. P. Code the party against whom a decree or order is passed in default or his appearance, can apply to the court to have the *ex parte* decree or order set aside on the ground that he can show sufficient cause for his non-appearance. Ordinarily if a case appears on the board on an adjourned date for hearing and there is default of appearance on the part of both or either of the parties, the court must refer to O. 9, C. P. Code so as to ascertain the proper procedure to be followed and there is no necessity whatever to have any recourse to O. 17, R. 3.

Where the hearing of a suit had not commenced and the plff. did not appear on the adjourned date, the suit should be dismissed under O. 9, R. 8 C. P. Code and not under O. 17, R. 3 C. P. Code. In the case of a dismissal under O. 17, R. 3 C. P. Code the remedy is by way of appeal or review and in the case of a dismissal under O. 17, R. 2 the party can apply to set aside the dismissal under O. R. 9 or R. 13, C. P. Code.

C. P. CODE (1908), O. 9, R. 9.

Courts should exercise extreme caution when on an adjourned date the parties or any of them fail to appear. They should in the first place have recourse to O. 17, R. 2 rather than O. 17, R. 3, and even in cases where O. 17, R. 3 can be considered to apply, that is to say where the case has been part heard and an adjournment granted, it would not be in accordance with Justice to refuse a party who had failed to appear on the adjourned date at the time fixed, the chance of having the suit restored. 20 B. 730, 743 foll. (*Macleod, C. J. and Shah, J.*) RATANBAI SHIVLAL v. SHANKAR DEOCHAND LOHAR. 1923 Bom. 27.

—O. 9, R. 9—Applicability—Application for final decree for foreclosure

An application for a final decree in a foreclosure suit which is dismissed for default, can be restored under O. 9, R. 9 if sufficient cause is shown for the absence of the party. The application is not a proceeding in execution and O. 9, R. 9 applies. An order restoring the application will rarely be interfered with in revision (*Ashworth and Simpson, A. J. C.*) BABU RAM v. MT. RAM DULARI DEBI 26 O. C. 194 : Oudh 1924 30.

—O. 9, R. 9 and S. 151—Applicability to execution proceedings—Strong grounds necessary. See (1922) DIG. COL. 261. NAGESWAR PRASAD v. JAI NARAIN. 73 I. C. 73.

—O. 9, R. 9—Applicability—Instructions only to ask for adjournment—Dismissal—Effect. See C. P. CODE O. 17, R. 2 AND 3. 1 Pat. L. R. 281.

—O. 9 R. 9—Applicability of—Rejection of plaint for non-payment of Court Fee—No power to restore. See C. P. CODE, O. 7, R. 11. 4 Pat. L. T. 261.

—O. 9, R. 9—Application under S. 158 of the B.T. Act—Dismissal for default—Subsequent application for assessment of rent—Not barred. See B. T. Act, S. 158. 2 Pat. 192.

—O. 9, R. 9—Application for restoration itself dismissed for default—Restoration—C. P. C. S. 151.

There is no rule in the Code that enables the Court to restore an application made under Order IX Rule 9 which has been dismissed for want of prosecution. Even S. 151 does not apply in such a case. (*Macleod, C. J. and Crump, J.*) MANKE v. WALWEKAR. 1923 Bom. 386.

—O. 9, R. 9.—Dismissal of an application against order dismissing an application under O. 9, R. 9 for default—Revision.

An application lies to restore a former application which is dismissed for default. At the same time when that application is rejected, no appeal lies from the order of rejection. O. 43, R. 1 (c) shows that an appeal lies from an order under O. 9, R. 9, rejecting an application from an order to set aside the dismissal of a suit. This cannot be interpreted to mean that an appeal lies from an Order under R. 9, O. 9 rejecting an application for an order to set aside the

C. P. CODE (1908), O. 9, R. 13.

dismissal of an application, but a revision lies. (*Scott-Smith, J.*) LOK NATH v. MR. SATTAN BAI 73 I. C. 821 : 1923 Lah. 302 (2).

—O. 9, R. 9—Dismissal for default—Fresh suit when barred.

The operation of O. 9, R. 9, C. P. Code is confined to those cases only where a second suit is brought for the same object and on the same cause of action as the suit, which was dismissed. (*Kankaiya Lal and Sulaiman, JJ.*) BALAKISHAN v. RAGHUBAR DAYAL 45 A. 81 : 74 I. C. 991 : 1923 A. 409.

—O. 9, R. 9—Dismissal for default—Restoration—Grounds for.

When a suit was called for hearing the plaintiff who was present in Court left the Court precincts to fetch his pleader who was engaged in another Court. In the meantime the case was called and the names of the parties were called out by the Court peon. The plaintiff who was present and who must therefore have appeared went away to fetch his pleader. When the plaintiff and his pleader both arrived it was three quarters of an hour after the case had been called and dismissed for default. Held that in the circumstances of the case the suit should be restored for re-hearing on condition of the plaintiff paying into the Court the costs of the defendant within a prescribed time failing which his application should stand dismissed. (*Ryves, J.*) BEHARI LAL v. MAQSOOD ALI. 71 I. C. 283 : 1923 A. 189.

—O. 9, R. 9—Execution proceedings.

On the 15th January, 1921, one D applied under S. 47 for cancellation of a sale. The application was struck off in default on the 28th May, 1921. On the 11th June, 1921 D moved the Court to restore his application which was restored on the 9th July, 1921, held following 21 A. L. J. 155 that the order of the Munsif of the 9th July must be set aside. (*Rafique, J.*) BHIKAM KHAN v. DAN SINGH. 74 I. C. 7 : 1923 A. 544 (1).

—O. 9, R. 9—Illness of brother—If sufficient cause—Other grounds if can be urged under.

Illness of a brother was held not sufficient cause to set aside a dismissal for default.

In an application for restoration, it is not open to attack the order on the ground that the proper course was to reject the plaint under O. 7, R. 11, as that is a matter for appeal. (*Miller, C. J. and Kulwant Sahay, JJ.*) RAMBHANJAN SINGH v. PASHUPAT KAI. 2 Pat. 784 : 74 I. C. 847

—O. 9, R. 9—Party appearing after a few minutes.

Where a party appears a few minutes after the case has been called on and dismissed during his absence, he should be made to pay the costs of the application to restore the suit and his suit should be restored and heard on merits. (*Macleod, C. J. and Crump, J.*) IRAPPA v. NINGAPPA. 1923 Bom. 480.

—O. 9, R. 13—Appearance—What amounts—Sufficient cause. See (1922) DIG. COL. 262. MAHANT DAMODAR DAS v. RAJ KUMAR DAS. 69 I. C. 837.



C. P. CODE (1908), O. 9, R. 13.

———O. 9, R. 13—*Applicability*

There can be no *ex parte* proceedings against a defendant who has entered appearance and filed his statement. (*Lindsay and Sulaiman, JJ.*)

RAM CHARAN LAL v. KAGHUBIR SINGH.

21 A. L. J. 495 : L. R. 4 A. 294 : 45 A. 618;  
75 I. C. 387 : 1923 A. 551.

———O. 9, R. 13—*Applicability*—Defendant absent but pleader present—If duly instructed—Taking no part in proceedings. See C. P. CODE, O. 17, RR. 1, 2.

25 Bom. L. R. 1222.

———O. 9, R. 13—*Application for setting aside decree dismissed for default*—*Appeal against the order dismissed for non-prosecution*—*Whether a second application allowable.*

An application under O. 9, R. 13 to set aside an order passed in a preceding application of the same nature lies. Proceedings under O. 9, R. 13 may go on *ad infinitum*. 44 Cal 950 Foll. Where an appeal against an order under O. 9, R. 13 is dismissed for non-prosecution, a second application under O. 9, R. 13 to restore the *nis*. application may be allowed subject to terms. (*Wahnsley, J.*) BHOLA NATH DE v. KRISHIMHA PRASAD ROY. 1923 Cal. 552.

———O. 9, R. 13—*Application to set aside ex parte decree*—*Date of acknowledgment*—*Proof of*—*Limitation.*

The petitioner obtained an *ex parte* decree on the 22nd May 1922 as against the opposite party On the 18th July 1922 the opposite party applied for setting aside the *ex parte* decree under Order 9, Rule 13. The application was on the face of it barred by limitation and it was necessary for the opposite party to establish that his application was made within thirty days from the date he became aware of the *ex parte* decree against him. (*Das and Bucknill, JJ.*) MODE NARAIN SINGH v. BIKRAM SINGH. 4 Pat. L. T. 545 : 1924 P. 36.

———O. 9, R. 13—*Application to set aside ex parte decree*—*If bars suit to set aside decree*—*Fraud.*

An in fractions application to set aside an *ex parte* does not in any way bar a subsequent suit to have the decree set aside on the ground of fraud such as by non-service of summons. The questions arising in such a suit are not the same as what arises on an application under O. 9, R. 13, the issues are different and the prior decision is not *res judicata*. (*Das and Macpherson, JJ.*) MAHARANI JANKI KUR v. BABU BHAKUR KAL. 1923 Pat. 336 : 75 I. C. 343 (2).

———O. 9, R. 13—*Ex parte decree*—*Appeal from*—*Grounds for*—*Reversal of decree on the ground that ex parte procedure was not justified.*

Where an appeal is preferred against an *ex parte* decree, the appellate court has jurisdiction to reverse the decree of the lower court merely on the ground that such court was wrong in proceeding to decide the case *ex parte*. 33 M. 54 foll. (*Ashworth, C. J.*) FARZAND ALI v. EXADASHI. 26 O. C. 10 : 10 O. L. J. 36 : 9 O. & A. L. R. 832 : 73 I. C. 591 : 1923 Oudh 177

———O. 9, R. 13—*Ex parte decree*—*Application to set aside*—*Appeal*—*Effect of.*

C. P. CODE (1908), O. 9, R. 13.

A suit was decreed *ex parte* and the defendant filed an application under O. 9, R. 13 and also subsequently preferred an appeal. The application for re-hearing was kept pending till the disposal of the appeal. The appellate court dismissed the appeal but observed that the application for re-hearing under O. 9, R. 13 deserved consideration by the trial court, which however, held that after the appellate court had confirmed the *ex parte* decree, it had no jurisdiction to set it aside under O. 9, R. 13, and further that there was no sufficient cause for restoration.

Held that after the *ex parte* decree had been affirmed by the appellate court, it merged in the appellate decree and the trial court had no jurisdiction to entertain the application under O. 9, R. 13, although it had been filed before the filing of the appeal. (*Bucknill, J.*) MT AJODHYA KUAR v. DURGA PRASAD. 1923 Pat. 145 : 71 I. C. 383 : 4 Pat. L. T. 115 : 1923 P. 331.

———O. 9, R. 13—*Ex parte decree*—*Application to set aside*—*Knowledge*—*Proof of.* See LIM ACT, ART. 164.

25 Bom. L. R. 74.

———O. 9, R. 13—*Ex parte decree*—*Application to set aside*—*Non payment of process-fee*—*Dismissal of application*—*Appeal.*

Where an application to set aside an *ex parte* decree is dismissed for failure to pay process fee this is in substance a dismissal for default and an appeal lies from the order 21 C. L. J 628 : 36 I. C. 798, 37 I. C. 835 Rel. (*Harrison, J.*) BAHADUR SINGH v. WASAWA SINGH. 69 I. C. 713.

———O. 9, R. 13—*Ex parte decree*—*Application to set aside*—*Sufficient cause for non-appearance.*

On an application to set aside an *ex parte* decree the question to be considered is whether the defendant honestly intended to be present at the hearing of the suit and did his best to do so. Once the court is satisfied that he did try to be present in court in time and would have got there in time but for the intervention of an accident for which he was in no way responsible, it is the duty of the court to set aside the *ex parte* decree, mulcting in proper cases the defendant in costs. The fact that by some human possibility the defendant could have been present in time does not affect his right to have the *ex parte* decree set aside. (*Sir Walter Schwabe, C. J. and Wallace, J.*) ARUNACHELLA IYER v. SUBBARAMIAH. 46 Mad. 60 : 1923 Mad. 63.

———O. 9, R. 13—*Ex parte decree against one defendant*—*Appeal by the other impleading the ex parte defendant*—*Application for setting aside*—*If maintainable.*

Where a decree is passed *ex parte* against one of two defendants, the mere fact that an appeal is pending at the instance of the respondent impleading him as a respondent, does not take away his right to apply under O. 9, R. 13 for setting aside the decree case law reviewed. (*Sulaiman, J.*) MIRZA ABDULLA BEG v. RAMZAN KHAN. 21 A. L. J. 901 : L. R. 5 A. 8.

———O. 9, R. 13—*Ex parte decree*—*Decree set aside*—*Resitution*—*Right to, against original plaintiff and his representatives.* See C. P. CODE S. 144 AND O. 9, R. 13. (1923) Pat. 1.

C. P. CODE (1908), O. 9, R. 13.

—O. 9, R. 13—*Ex parte decree—Minor defendant not represented—Setting aside decree—Duty of Court.*

In an application under O. 9, R. 13, C.P. Code, the only point which the Court has to consider is whether the defendants were prevented by any sufficient cause from appearing. If the minor defendants were not represented there is sufficient cause for their non-appearance and the Court could set aside the *ex parte* decree. (*Daniels, J.*)  
PEARE LAL v ASHRAF KHAN. 71 I. C. 456.  
L. R. 4 All. 137 : 1923 A. 213.

—O. 9, R. 13—*Ex parte decree when justified—Suit disposed of on day fixed for arguments on a preliminary question—Legality of.*

Where on the day fixed for hearing arguments on the question of jurisdiction the Court finding the defendant absent, heard the plaintiff's evidence and passed an *ex parte* decree, *Held*, that an *ex parte* decree ought not to have been passed under the circumstances as the date was not fixed for the decision of the case. The fact that an appeal had been preferred from the *ex parte* decree does not prevent the Court from setting aside the *ex parte* decree or a court of appeal from reversing an order of the first Court refusing to set aside the *ex parte* decree. (*Abdul Raof, J.*)  
FIRM OF SETH KHUDA BAKHS V. GHULAM QADIR.  
72 I. C. 900 (2)

—O. 9, R. 13—*Ex parte order—Setting aside.* See (1922) DIG. COL. 264. RADHABAI v. ANANT PANDURANG.  
70 I. C. 762

—O. 9, R. 13—*Ex parte procedure.*

Where the vakil of the defendant had asked for an adjournment, and on the same being refused took no further part in the proceedings, an *ex parte* decree should be passed. (*Mears, C. J. and Piggott, J.*) KRISHNA DASS v. RAM UGRAH SINGH.  
21 A. L. J. 500.  
L. R. 4 A. 423 : 74 I. C. 845 : 1923 A. 549

—O. 9, R. 13—*Final decree ex parte—Partition suit—Decree passed without notice to defendant—Setting aside.*

When a court adjourns a pending suit it is its duty to give notice of the adjourned date to the parties or their pleaders. Where after the preliminary decree in a partition suit the court appointed a commissioner for division by metes and bounds and on his report being received passed a final decree without notice to the defendant, the *ex parte* decree is bad and should be set aside. (*Piggott and Walsh, JJ.*) DURGA PRASAD v. HET RAM.  
1923 A. 79 (2).

—O. 9, R. 13—*Heir if entitled to apply.*

Heirs of a defendant against whom an *ex parte* decree is passed before his death, have a right to apply to set aside the *ex parte* decree. 21 All. 274 doubted. (*Walsh and Ryves, JJ.*) MT BANOO v. LALA HARDWARI LAL.  
1923 A. 30.

—O. 9, R. 13—*Mortgage—Ex parte final decree—Setting aside.* See (1922) DIG. COL. 265. ANNAJI v. FAKIRA.  
6 N. L. J. 27.

—O. 9, R. 13—*Proceedings under—No decree passed—Effect—If bar right of appeal after decree.* See C. P. CODE O. 41, R. 22.  
45 M. L. J. 805.

C. P. CODE (1908), O. 11, R. 12.

—O. 9, R. 13—*Scope of.*

Where a person on going to court on the day fixed for hearing, found the Judge had gone to some camp, and on going there found his case had been dismissed for default, it was a proper case for restoration. (*Martineau, J.*) RAMAL DAS v. IMAM BAKHS.  
1923 Lah. 431 (2)

—O. 9, R. 13—*Scope of S. 151—Inherent power.*

The appellate Court is not competent to set aside an *ex parte* decree under Order 9 Rule 13—unless it was satisfied the defendant was prevented by some sufficient cause from appearing on the 4th August. A Court has no power apart from the provisions of Order 9, Rule 13 to set aside an *ex parte* decree made by itself, there being no inherent power to do so. 53 I. C. 847 Foll. (*Martineau, J.*) JAGAN NATH v. ABDUL HAKIM.  
73 I. C. 660 : 1923 Lah. 147 (1)

—O. 9, R. 13—*Service by affixure at the first attempt—Ex parte decree—If sufficient cause to set aside.* See C. P. CODE, O. 5, R. 17  
90 and A. L. R. 437.

—O. 9, R. 13—*Setting aside decree—Harsh conditions.*

A court should not as a condition precedent to setting aside an *ex parte* decree require the deposit of a large sum of money, as it will work hardship on the defendant. (*Dalal, J. C.*) INDAR SINGH v. GURDAYAL SINGH.  
74 I. C. 86.

—O. 9, R. 13—*Summons not duly served.*

It is not legally necessary to give the defendant notice of an application by the plaintiff for a final decree in a mortgage suit. The summons mentioned in rule 13 of Order 9 is the first summons issued to the defendant giving him notice of the suit filed and the failure to appear mentioned in the same rules means failure to appear at any time during the suit and not absence at some of the hearings, even if they are all the hearings after the first at which the plaintiff may have made a number of applications of various sorts. That rule does not therefore apply to the case of a defendant who is merely not served with notice of some application made in the course of the suit. (*Batten, J. C. and Halifax, A. J. C.*) PANJAB RAO v. BALIRAM.  
69 I. C. 549 : 1923 Nag. 13.

—O. 9, R. 13—*Transfer without notice.*

Where a suit is transferred without notice to defendant, the *ex parte* decree passed in the case must be set aside. (*Moti Sagar, J.*) GANGA RAM v. GUJAR MAL.  
1923 Lah. 444.

—O. 11, R. 12 and 14—*Order for production of documents—Affidavit of documents—Procedure.*

An order for production of documents under O. 11, R. 14, C. P. C. must follow an order as to affidavit of documents under O. 11, R. 12, C. P. Code. In the absence of an order compelling defendants to file an affidavit of documents, the Court cannot on the plaintiff's application compel the defendants to produce certain account books alleged to be with them. (*Das and Kulwant Sahay, JJ.*) BAIDYANATH v. BHOLANATH ROY.  
1923 Pat. 143 : 1 Pat. L. R. 233 : 1923 P. 337.

C. P. CODE (1908), O. 11, R. 15.

—O. 11, Rr. 15 and 18—*Inspection of documents—Documents referred to in the plaint—Not material to the case.*

Under indent forms signed by the defendants in favour of the plaintiffs, the defendants agreed to purchase from the plaintiffs the goods mentioned in the indents at the prices noted therein and to pay for the goods at the current rate of exchange on delivery of the shipping documents, but on arrival of the goods the defendants refused to take delivery unless the plaintiffs agreed to fix the rate of exchange at two shillings to a rupee. The plaintiffs declined, and sued to recover the value of the goods according to the indent prices. Plaintiffs in the plaint incidentally referred to the invoices received from England for the purpose of showing that they had received advice of the goods they had purchased and that they would make out their own invoices and send the same to the defendants. The defendants without filing their written statements took out a summons asking for an order against the plaintiffs for inspection of the original invoices.

*Held*, the defendants had not made out a case for inspection of the invoices, as under their contract with the plaintiffs they had nothing to do with the prices which the plaintiffs paid in England, the said invoices not being necessary for either the plaintiffs' or the defendants' case. *Quilter v. Healty* (1883) 23 Ch D 42 Referred to. (*Macleod, C. J.*) L. AND I. RAPAPORT v. KALLIANJI HIRACHAND. 1923 Bom. 73.

—O. 12, R. 6—*Judgment on admissions—When to be passed.*

Final judgment ought not to be passed upon admissions in a pleading or an affidavit unless the admissions are clear and unequivocal. It must further be remembered that the power of the court to pass judgment on admissions is discretionary and its exercise cannot be claimed as a matter of right. 23 C. W. N. 1017 Foll. (*Mookerjee and Rankin, JJ.*) GALSTAN v. E. D. SASSOON AND CO. LTD. 27 C. W. N. 783.

—O. 13, Rr. 1 and 2—*Evidence—Production of—Documents filed at late stage—Admissibility—Power of court.*

Under O. 13, Rr. 1 and 2, C. P. Code, unlike the corresponding provisions of S. 138 of the Old Code, there is an absolute prohibition of the reception of documents not produced at the first hearing, unless good cause is shown for their non-production at that stage. The Court may however admit the evidence in the interests of justice if the court is of opinion that the reception of the evidence will enable the person tendering it to win a case which he will otherwise lose and that the loss on the case would be an excessive penalty for failure to produce the evidence in time. (*Ashworth, A. J. C.*) SHANKAR LAL v. MAHRUB SHAW. 70 I. C. 278 : 1923 Oudh 59.

—O. 13, Rr. 1 and 2—*Production of documents at late stage—Admission—Discretion of court.*

Though it is left to the discretion of the trial court to admit in evidence documents produced at a late stage still in such matters of procedure the Court should lean to an interpretation which

C. P. CODE (1908), O. 17, R. 1.

advances justice rather than to a contrary interpretation. Where certain documents had been exhibited in a case under O. XXI, R. 100, C. P. Code between the parties to the present litigation and there was therefore, no ground for supposing that they had been fabricated and they evidently had an important bearing on the question at issue in the trial, *Held* that the Court below, erred in the exercise of its discretion in rejecting these documents. (*Ross, J.*) JAGDIP PANDEY v. Mt. TAIBUNNISSA. 72 I. C. 397 (1).

—O. 13 R. 9—*Application for return of documents—Nature of* See (1922) DIG. COL. 267 GIRIJANANDA KALI MITTER v. EMPEROR. 24 Cr. L. J. 202 : 71 I. C. 666.

—O. 16, R. 1—*Right of parties to summon witnesses—Discretion of Court—Adjournment of the case.*

Under O. 16, R. 1, C. P. Code a Court has no discretion in the matter of an application for Summonses on witnesses if such application be made before the day of hearing. The hearing may not be concluded on the date fixed and an adjournment may take place in the usual course of the progress of the trial and the Court cannot refuse to allow any of the parties to reap the benefit of such an adjournment in the matter of giving evidence. 5 N. L. R. 181 : 9 W. R. 530 Ref. There is nothing in the C. P. Code which expressly or impliedly, declares that witnesses must necessarily be summoned before the day fixed for the first hearing of the suit. (*Batten, J. C. and Hallifax, A. J. C.*) BHAGCHAND v. MUSAJI. 1923 Nag 58.

—O. 16, Rr. 2, 3 and 4—*Witness—Government or Municipal servant—Costs of.*

Government servants and persons in Municipal or private service cited as witnesses in civil suits are not entitled as part of their expenses to the payment of the salary which they would earn in their ordinary employment for the time which they spend in attending Court.

As to the servants of the Municipal bodies and private employers, *Held* the Court below was right in supposing the question depends on the provisions of rules 2, 3 and 4 of O. 16 of the Civil Procedure Code, and on the rules made by the High Court under clause (3) of rule 2. (*Richardson and Walmsley, JJ.*) IN THE MATTER OF REFERENCE UNDER RULE 1, O. 46, C. P. C.

38 C. L. J. 149

—O. 16, R. 4—*Orders for payment of expenses of witnesses—Execution—Sale of land.* (1922) DIG. COL. 268, MAHOMED WARISH SADA-GAR v. RAHAMAN ALI MEAH. 70 I. C. 123.

—O. 16, R. 19—*Insolvency proceeding—Power of Insolvency Court to examine witnesses resident more than 200 miles.* See PRESIDENCY TOWNS INSOLVENCY ACT, S. 36. 27 C. W. N. 370.

—O. 17, Rr. 1 and 3—*Adjournment—Due diligence.*

Had due zeal and diligence been shown there would have been no difficulty about appellant's presenting and obtaining order on an application for transfer to the District Court before which

## C. P. CODE (1908), O. 17, R. 1.

similar cases were pending before it closed for vacation; *Held* no adjournment could be granted. (*Broadway and Harrison JJ.*) *FITZ HOLMES v. THE BANK OF UPPER INDIA LTD.* 4 Lah. 258; 1923 Lah. 548.

—O. 17, Rr. 1, 2—*Defendant absent but pleader present—No action by pleader—Nature of decree passed*

Where a decree was passed against a defendant when he was absent at the hearing and his pleader though present took no part at all in the proceedings, then unless it is determined that he appeared by a pleader duly instructed, the disposal would be *ex parte* in which case on sufficient cause shown he can apply to have it set aside. If the defendant is not able to show that the pleader was not duly instructed then it is not an *ex-parte* decree. (*Shan, A. C. J. and Crump, J.*) *MOTILAL RATANCHAND MARWADI v. NANDRAM DALPATRAM* 25 Bom. L. R. 1222.

—O. 17, Rr. 2 and 3—*Adjourned date of hearing—Pleader applying for adjournment—Refusal—Procedure.*

Where on the day fixed for hearing the plaintiff appeared by a pleader who asked for an adjournment which was refused. *Held* that the proper procedure for the court was not to dismiss the suit for default but to proceed with the case and write a judgment. O. 17 R. 2, C. P. C. was not applicable to the case but O. 17, R. 3, did apply. 41 M. 256 Ref. (*Odgus, J.*) *VISVANATHA ASARI v. SAMI ASARI.* 18 L. W. 209; (1923) M. W. N. 802; 73 I. C. 982; 1924 Mad 43.

—O. 17, Rr. 2 and 3—*Adjournment of suit for production of witnesses—Default—Pleader moving for withdrawal and on refusal for adjournment—Declining to proceed as having no instructions and leaving Court—Order of dismissal—Construction.*

Adjournment of a suit was granted to plaintiffs for producing witnesses; but on the adjourned date they were absent and their pleader applied for permission to withdraw the suit with liberty to file a fresh suit which was refused. A further adjournment was then asked for and being refused, the pleader said he had no instructions to do anything further in the case, and left the court. An order was made dismissing the suit and on an application for restoration being made the question arose whether the dismissal was under O. 17, R. 2 or O. 17, R. 3.

*Held*, per *Walsh, J.*:—Under whatever form, the Judge may make an order disposing of a case or however he may misunderstand what he is doing or whatever mistaken language he may use in disposing of the case, the court has to look at the actual facts as things were at the time and decide under which rule the order was made.

Where a party does not personally appear even though his counsel originally instructed is there, if he has failed to supply his counsel with materials or funds, and the counsel states he has no further instructions, although the situation may be drawn into the express words of O. 17, R. 3, it ought to be treated as a default by the plaintiff for want of appearance under O. 17, R. 2, for the counsel no longer represents him and in

## C. P. CODE (1908), O. 17, R. 3.

that sense the Counsel is not present, while the plaintiff himself is absent. *Held* on the facts of the case, the dismissal was under O. 17, R. 3.

Per *Piggott, J.*—The plaintiffs not being present and the pleader having said he had no instructions to do anything further in the case left the court, a point had been reached at which it was literally true that the plaintiffs were absent neither appearing in person nor by counsel authorised to act on their behalf. The dismissal was under O. 17, R. 2 and an application for restoration lay. (*Walsh and Piggott, JJ.*) *LALA JANGPAL SINGH v. RAJA KUSHALPAL SINGH.* 70 I. C. 942; 1923 A. 153.

—O. 17, R. 2—*Applicability of.*

O. 17, R. 2 applies to the case where the hearing of a suit has been adjourned and on the adjourned date the parties or any of them fail to appear. In such a case, O. 17, R. 2 enables the court if it so chooses to deal with the case as being one under O. 9 or to make such other order as it thinks fit (*Lindsay and Sulaiman, JJ.*) *RAM CHARAN LAL v. RAGHUBIR SINGH.* 45 A. 618; 21 A. L. J. 495; L. R. 4 A. 294; 75 I. C. 387; 1923 A. 551.

—O. 17, R. 2—*Dismissal—Effect of.*

O. 17 R. 2 applies to adjourned hearings and under it the court can proceed under O. 9, R. 8 to dismiss the case. In such a case a fresh suit is barred. (*Fremantle, M.*) *GUPTAR MURAO v. BHAIYA MAHADEO PRASAD SINGH.* L. R. 4 A. 177 (Rev.)

—O. 17, Rr. 2, 3—*Instructions only to ask for adjournment—Dismissal—If can be set aside.*

Where on the day fixed for hearing the vakil of the plaintiff had duly instructions to ask for an adjournment and not to go on with the case, but the same was not granted and the suit dismissed, the order was one passed under O. 17, R. 2 and not under O. 17, R. 3. An application for restoration under O. 9, R. 9 is maintainable. (*Mullick and Macpherson, JJ.*) *SYED SHAH MUHAMMAD MAUDOOD v. MAHARAJAH SIR RAMESHWAR SINGH.* 1 Pat. L. R. 281; 74 I. C. 693; 1923 F. 530.

—O. 17, R. 3 and O. 9, R. 6—*Absence of defendant on date of hearing—Procedure. See C. P. CODE, O. 9, R. 6 ETC.*

1923 Oudh 18; 73 I. C. 394.

—O. 17, R. 3—*Absence of defendant—Decision on evidence—Rights of parties.*

Where the defendants and his witnesses fail to appear on an adjourned hearing date and a decree is passed against him on the basis of the evidence on record, the court acts under O. 17 R. 3. The remedy of the defendant is by way of appeal and not to apply for restoration. (*Fremantle, S. M. and Burn, J. M.*) *MAHOMED AHMAD v. MD ASHFAQ HUSAIN.* L. R. 4 A. 377 (Rev.)

—O. 17, R. 3—*Adjournment of suit—Procedure.*

*Held* following 51 P. R. 1915 that where a party to a suit has paid the process fee for summoning witnesses the Court and its officers are responsible for effecting service, and an adjournment caused by the non-attendance of witnesses

C. P. CODE (1908), O. 17, R. 3.

for want of service is an adjournment in the ordinary course and does not amount to time granted to one party within the meaning of O. 17, R. 3, C. P. Code. O. 17, R. 3 merely authorises the Court to proceed to decide the suit forthwith and it does not authorise its dismissal summarily. (*Scott-Smith and Campbell, JJ.*) KARAM CHAND v. JINDA RAM 71 I. C. 862.

—O. 17, R. 3—*Applicability of—Process fee paid within adjourned day—Omission to serve witnesses—Procedure.*

The hearing of a case was adjourned for a fortnight to enable plaintiff to summon his witnesses. Within a week of the hearing the plaintiff paid process fee but the officer of the Court finding the time to be short did not take out the summonses. On the day fixed for the hearing the Court dismissed the suit under O. 17, R. 3, C. P. Code. Held that having regard to the negligence of the officer of the Court there was no room for the application of the stringent provisions of O. 17, R. 3 C. P. Code. (*Shadi Lal, C. J. and Brasher, J.*) LILA RAM v. RAMZAN. 69 I. C. 665.

—O. 17, R. 3—*Scope—Ex parte decree.*

Where time was not granted to the appellant at his request for the production of evidence, O. 17, R. 3, has no application. An *ex parte* decree may be passed even in a case in which the court acts under O. XVII, R. 3. (*Abdul Raoof, J.*) MURLI DHAR v. DUNI CHAND AND GOKAL CHAND. 69 I. C. 368 : 1923 Lah. 281 (1).

—O. 17 R. 3—*Witnesses—Failure to attend.*

Where a party fails to get his witnesses attend on the date of hearing, the case should be decided under O. 17, R. 3 and not dismissed summarily. (*Chandrasekhara Aiyar, C. J. and Ramaswamy Iyengar, J.*) MUNNOH RAO v. MUNINANJAPPA. 1 Mys. L. J. 46.

—O. 18, R. 2—*Written arguments—Judgment.*

A case was adjourned to a certain date for arguments, but the parties were not ready and the judge gave them liberty to put in written arguments. By that time a new Judge came in and after a local inspection, he delivered judgment. Held, the parties had sufficient opportunity to argue the case and the judgment was not vitiated. (*Harrison and Zafar Ali, JJ.*) HARI MAL v. DEVI DITTA MAL. 4 Lah. 364.

—O. 18, R. 13—*Decision based on local inspection.*

A judgment should not be based solely on the result of a personal local inspection made by the Judge. (*Abdull Raoof and Campbell, JJ.*) TIRATH RAM v. MD, ABDUL RAHIM. 73 I. C. 616 : 1923 Lah. 546.

—O. 19, R. 3—*Affidavits—What to contain.*

Every affidavit should clearly express how much is a statement of the deponent's knowledge and how much a statement of belief, in which case the grounds of belief must be stated. Failure to distinguish between the two would be taken to mean they are swearing to facts within their own knowledge, which will entail all its necessary

C. P. CODE (1908), O. 20, R. 7.

consequences. (*Muller, C. J. and Kulwant Sahay, J.*) CHANDRIKA PRASAD SINGH v. HIRA LAL. 73 I. C. 721.

—O. 20, R. 3—*Judgment dictated to shorthand writer—Amendment.*

O. 20 R. 3 of the C. P. Code, as amended by the Madras Rules does not authorise the judge to revise the transcript and to substitute fresh words for the words, which fell from his mouth to any extent he may deem necessary. Where a judgment is dictated to a shorthand writer the revision contemplated cannot be of the effective part of the judgment and must be of the nature referred to in S 152, and one relating to "clerical and arithmetical mistakes arising from any accidental slip or omission" (*Oldfield, J.*) HARI KRISHNA PILLAI v. ARUR PANDITHER. 18 L. W. 105 : (1923) M. W. N. 354 : 72 I. C. 688 : (1923) Mad. 663.

—O. 20, R. 4—*Judgment—Materials for—Personal inspection by Judge*

Where a judicial officer decides a dispute solely on knowledge gained by him on personal inspection and without any reference to the evidence in the case, the judgment is liable to be set aside in revision. (*Woodroffe and Ghose, JJ.*) ABDUL HUG v. MAHOMED DIN. 1923 Cal 311.

—O. 20, R. 4—*Judgment of Small Cause Court—Contents of.* See (1922) DIG. COL. 272. KOMAPPA KURUP v. VELAYI CHETTICHAR. 70 I. C. 791.

—O. 20, R. 4—*Judgment of Small cause—Courts—Reasons for—Practice.*

As a matter of practice, however, it is usual, except in comparatively unimportant cases of every day occurrence such as those for the recovery of petty debts, to set out the particulars of the suit and to give reasons for the decisions arrived at, thus enabling the High Court, in revision, to satisfy itself that the decree or order was according to law without the necessity of perusing the whole record. This practice should be followed. The words "need not" were not meant to be read as "shall not" in O. 20, R. 4 C. P. Code. The matter is largely within the discretion of judges of Small Cause Courts, but their discretion should be exercised with due regard to the circumstances of each case. (*May Oung, J.*) MAUNG SA v. MA U. MA. 1 Rang. 274 : 1923 Rang. 252 : 2 Bur. L. J. 108.

—O. 20, R. 4—*Judgment of Small Cause Court—What to contain.*

A judgment of a Court of Small Causes should contain the points for determination and the decisions thereon. (*Dalal, J. C.*) BHUDAR SINGH v. SHAIKH SAHAMAT. 9 O. & A. L. R. 414.

—O. 20, R. 7—*Date of decree—Judgment written and signed—Not delivered in open Court—Effect of.*

A judgment written and signed on a particular date but not delivered in open Court till some time later must be deemed to have been delivered on the day on which it was pronounced in open Court. The decree should bear the date on which the judgment was actually pronounced in open Court and not when it was written and signed.

C. P. CODE (1908), O. 20, R. 11.

For purposes of limitation for appeal time should be calculated from the date on which the judgment was actually pronounced in Court (*Miller, C. J. and Mullick, J.*) SAGARMAL MARWARI v. LACHMISARAN MISIR. 1 Pat. 771 : 1923 P. 129.

—O. 20 R. 11—*Decree for instalment—Grounds for lenient treatment.*

The burden of proving that the defendant is entitled to the indulgence of a decree in instalments rests upon him. Where he has resisted the suit on frivolous grounds and has subsequently to the institution fraudulently disposed of the property and the interest agreed upon between the parties was moderate held that there was no ground for passing a decree for payment of the amount by instalments, (*Pipon, J. C.*) GELA RAM v. JHANGI RAM. 71 I. C. 303.

—O. 20, R. 11—*Ground.*

The fact that the estate of the defendants has been brought under the management of the Court of Wards, is not a reason for allowing instalments. (*Martineau and Moti Sagar, JJ.*) WALI DAD KHAN v. MANI RAM. 73 I. C. 800 : 1923 Lah. 256.

—O. 20 Rr. 12 and 18—*If exhaustive as to cases of preliminary decree.*

The cases mentioned in O. 20 of the C. P. Code are not exhaustive of the orders which may form the basis of final decrees. (*Mookerjee and Rankin, JJ.*) RAJA PEARE MOHAN MOOKERJEE v. MANOHAR MOOKERJEE. 27 C. W. N. 989 : 38 C. L. J. 255 : 74 I. C. 373.

—O. 20 R. 12—*Mesne profits—Calculation of—Confirmation of decree on appeal. See (1922) DIG. COL. 245.* RAJA SASIKANTA ACHARYA v. SARAT CHANDRA RAI. 70 I. C. 6.

—O. 20 R. 12 (1) (c)—*Nature of application under—Limitation Art. 181—Applicability*

An application for mesne profits to be ascertained under the inquiry under order XX rule 12 (1) (c) is not an application made under the Code of Civil Procedure nor an application in execution. It is an application to the Court to proceed from the stage of preliminary decree to a final decree and Art 181 of the Limitation Act does not apply (*Pratt and Marten JJ.*) THANA ZALAJI SHET MARWADI v. DHANA JAWHRI. 1923 Bom. 268.

—O. 20, R. 14—*Applicability of—Preemption decree—Vendee not entitled to possession.*

Where the vendee is not entitled to present possession the provisions of O. 20 R. 14 C. P. Code are not applicable. (*Lindsay and Daniels, JJ.*) RAGHUBIR SINGH v. JODHA SINGH. 45 A. 482 : 21 A. L. J. 417 : L. R. 4 A. 223 : 73 I. C. 646 : 1923 A. 507.

—O. 20, R. 14—*Decree silent as to standing crops—Plaintiff entitled to them on paying money into Court.*

Where a decree was passed for possession but there was no mention as to crops in the decree.

Held that the defendant could have removed the crops before the pre-emption money was paid into Court. After it was paid he had no right to

C. P. CODE (1908), O. 20, R. 18.

them. As soon as the plaintiff paid the pre-emption money he became the owner of the land with its legal incident, the crops attached to it (*Kotwal, A. J. C.*) BAPU v. VITHOBA. 1923 Nag. 327.

—O. 20, R. 14—*Extension of time for payment.*

A Court has discretion to extend the time for payment of pre-emption money in Court. Where the date fixed for payment happened to come in vacation, the money was allowed to be deposited on the day the Court opened. 13 A. 189 and 10 A. L. J. 421 Ref. (*Rafique and Lindsay, JJ.*) GIRDHARI SINGH v. BHUPAL SINGH. 45 A. 456 : 74 I. C. 745 : 1923 A. 516.

—O. 20, R. 14—*Failure to deposit money by mistake.*

When the decree-holder in a pre-emption suit fails by mistake to deposit the full price in Court the judgment-debtor is entitled to apply for possession of the property by restitution if he is already dispossessed and the contention that the mistake was made by an official of the court is unsound where it cannot be said with certainty which of the officials of the Court had made the calculation and whether it was made under the authority of the Court. (*Abdul Raoof, J.*) MEHR DIN v. BRIJ LAL. 1923 Lah. 250.

—O. 20, R. 14—*Pre-emption decree—Costs not directed to be deposited—Effect.*

Where the decree directs pre-emption on depositing a certain amount in court and though costs are awarded, the same is made in a separate order, costs need not be deposited along with the pre-emption amount. (*Kanhaiya Lal, J. C.*) NILKANTH v. MAHABIR SINGH. 26 O. C. 345 : 74 I. C. 558 : 9 O. & A. L. R. 207.

—O. 20, R. 18—*Suit for partition—Preliminary and final decrees—Determination of mesne profits—Difference between old Code and new—Interlocutory order—Order ascertaining sharers and their rights—Appeal.*

Under the C. P. Code of 1882 there was but one decree in a suit for partition, the decree passed after the report of the commissioners making the actual division. The order ascertaining the several parties interested in the property to be divided and their several rights therein, though treated as a decree in practice and styled as such, was not a preliminary decree but was only an interlocutory order. On an interlocutory application made by plaintiff in a suit for partition under the Code of 1882, for appointment of a commissioner and for the taking of other necessary steps in the suit in pursuance of the order ascertaining the several parties interested in the suit property and their several rights therein, the court passed an order negating the plaintiff's right to profits in his share of the properties on the ground that the preliminary decree did not award to him such profits though he had prayed for them in the plaint. Held that the order was not appealable, being an interlocutory order and that the plaintiff was not therefore precluded in his appeal from the final and only decree in the suit from contesting its validity. (*Oldfield and Venkatasubba Rao, JJ.*) T. RAMASWAMI AIYAR v.

C. P. CODE (1908), O. 21.

T. SUBRAMANIA AIYAR. 46 Mad. 47 :  
74 I. C. 804 : 1923 Mad. 147.

— O. 21—Applicability of—Sale under administrative order. See (1922) DIG. COL 273.  
FIRM OF KAHNA MAL BANARSI DASS v. FI M OF  
KAHUG MAL NATHU MAL. 69 I. C. 718.

— O. 21, R. 1 (2)—Applicability—Mortgage decrees.

O. 21, R. 1 (2) is not applicable to mortgage-decrees. (*Spencer and Devadoss, JJ*) AMBI v. VALIA THAMBURATI. 45 M. L. J. 687 :  
18 L. W. 686 : 33 M. L. T. 101 (H. C.)  
(1923) M. W. N. 753 : 75 I. C. 666.

— O. 21, R. 1 (2)—Deposit in court—When takes effect.

Where judgment-debtor without notice of the assignment of the decree or of the petition put in by the assignee for execution deposits the money into court, then it amounts *pro facto* to a complete discharge. (*Miller, C. J. and Kulkant Sahay, J.*) TATA IRON AND STEEL CO. LTD. v. BAIDYANATH LAIK. 2 Pat. 754.

— O. 21, R. 2—Adjustment not certified—Effect.

Even where an adjustment of a decree is not certified the judgment debtor can prove discharge. (*Spencer and Venkata Subba Rao, JJ.*) KALAGARA SRIRAMA ROW v. BAPAYYA. 18 L. W. 453.

— O. 21, R. 2—Adjustment—what is—Power to amend decree.

The adjustment in O. 21, R. 2 means some kind of satisfaction or payment of the decree. No order of amendment of the decree can be passed in proceedings under O. 21, R. 2.

In execution, a money decree cannot be converted into payment in instalments in pursuance of an arrangement of parties. (*Dalai, J. C*) NAWAB HAIKEN MIRZA v. KAILASAH NARAYAN DAS. 9 O. & A. L. R. 889.

— O. 21 R. 2 and 16—Assignment of decree—Rights of assignee—Recognition of assignment—Payment by judgment debtor not certified to Court—Recognition of.

Whether attachment proceedings are already commenced at the instance of the decree holder or not the assignee or transferee of the decree cannot continue any proceedings previously commenced, nor can he institute any fresh proceeding's for the execution of the decree unless he makes an application under O. 21, R. 16 to the Court which passed the decree. That application will be heard by the Court not as a Court executing the decree, but as a Court which passed the decree, and until an order is made by the Court which passed the decree that execution may proceed at the instance of the transferee, it is not open to the transferee to execute the decree, nor is there any Court which is executing the decree. The provisions of O. 21, R. 2 (3) would not be applicable as that only enacts that a payment or adjustment, which has not been certified or recorded as aforesaid should not be recognized by any Court executing the decree. When an application is made to the Court which passed the decree by a transferee or assignee of the decree from the original decree holder under O. 21, R. 16 the

C. P. CODE (1908), O. 21, R. 2.

application is made to the Court as a Court which passed the decree and not as a Court which is executing the decree; and it is open to the judgment debtor to plead that the claim has already been satisfied even though the formalities prescribed by O. 21 R. 2 (1) and (2) have not been followed, 35 M. 659; 40 M. 296 Ref. (*MacLeod, C. J. and Crump, J.*) RAGHUNATH v. GANGARAM. 47 Bom. 643 : 25 Bom. L. R. 474 : 1923 Bom. 404.

— O. 21, R. 2—Execution—Arrangement pending appeal that original decree should be inexecutable in part—Whether a bar to execution of appellate decree.

An arrangement made pending an appeal that the original decree (which is the subject of appeal) should be inexecutable in part is one that cannot be pleaded in bar of execution of the appellate decree. 43 M. 725; 40 M. 233 dist. (*Olfield and Venkatasubba Rao, JJ.*) RAMANATHAN CHETTIAR v. VENKATACHELLAM CHETTIAR. 44 M. L. J. 599 : (1923) M. W. N. 297 : 17 L. W. 635 : 32 M. L. T. (H.C.) 401 : 72 I. C. 836 : 1923 Mad. 619.

— O. 21, R. 2—Failure to certify satisfaction—Application in execution—Effect—Right to sue for damages for breach of contract. See CONTRACT 1 Mys. L. J. 109.

— O. 21, R. 2 and O. 34, Rr 2 and 3—Mortgage-decree—Private adjustment notified by judgment-debtor—Recognition by court.

O. 21, R. 2, P. C. applies even to a final decree in a mortgage and such a decree, like any other, is capable of adjustment. Where the judgment-debtor has given information to the court that the decree has been adjusted the court is bound under O. 21, R. 2 (2) to issue a notice to the decree-holder to show cause why the adjustment should not be regarded as certified. (*Halifax, A. J. C.*) LACHMAN SINGH v. MARDAN SINGH. 1923 Nag. 20.

— O. 21, R. 2—Payment to third party under terms of compromise decree—If within mischief of section

The words of O. 21, R. 2 are very general and there is nothing in them to limit the payment to the decree holder only—Where a compromise decree directed the payment of money to a third party and the payment was not certified to court the same cannot be relied upon in execution. (*Ryves and Gokul Prasad, JJ.*) MAHADEO PRASAD v. HAMIDAN. 45 A. 304 : 21 A. L. J. 97 : L. R. 4 A. 117 : 71 I. C. 457 : (1923) A. 271 (1).

— O. 21, R. 2—Satisfaction of decree—Failure of decree holder to certify—Remedy of judgment-debtor—Damages.

Where a decree-holder whose decree has been satisfied by payment out of Court fails to certify satisfaction to the court and executes the decree and realizes the money due under it, the judgment debtor may sue for recovery of the money paid out of Court as on a failure of consideration or for damages for breach of an express or implied promise to certify payment. (*Maung Kiri, J.*) MAUNG MYO v. MAUNG KHA. 70 I. C. 115 : 1923 Rang. 88.

C. P. CODE (1908), O. 21, R. 2.

—O. 21, R. 2—*Uncertified adjustment. Power of Court to take cognizance.*

Where an adjustment is not certified to the Court which passed the decree within the time allowed by law under O. 21 R. 2 of the C. P. Code the Court is justified in refusing to take cognizance of the alleged adjustment. (*Kanhaya Lal, J. C. and Simpson, A. J. C.*) HARIHAR PRASAD v. BABU SHANKAR DAYAL. 10 O. L. J. 351.

—O. 21, R. 2—*Uncertified payment—Execution against surety of judgment-debtor.*

A surety for the judgment-debtor is bound so long as the judgment-debtor is bound. The judgment-debtor is bound so long as any payments which he may have made are not certified to the Court and consequently the surety cannot set up such payments in bar of execution against him. (*Woodroffe and Ghose, J.*) ONKARMAI AGARWALA v. NRITYA GOPAL CHAKI. 1923 Cal. 313 (1).

—O. 21, R. 2—*Uncertified payment—Not to be recognised by executing Court—Remedy of judgment-debtor.*

Where a payment by the judgment debtor is not certified under O. 21, R. 2 C. P. Code, the Court executing the decree could take no cognizance of that payment, but if the creditor by taking out a dawkast recovered the amount again that would not bar the judgment-debtor from seeking to recover the amount which he had paid to his creditor without its being certified (*Macleod, C. J. and Crump, J.*) GANESH MAHADEV v. YESHWANT. 25 Bom. L. R. 247: 1923 Bom. 253 (1).

—O. 21, R. 2 (cls. (2) and (3))—Application for certifying payment—Where to be made—Procedure. See (1922) DIG. COL. 276 JADUNANDAN SINGH v. SHEONANDAN PRASAD SINGH. 1 Pat. 644.

—O. 21, R. 2 (cls. 2 and 3)—*Fraud by decree-holder.*

The provisions of clause 3 of R. 2 of O. XXI are not to be rendered nugatory by the application of the general provisions of S. 47 of the Code. The decree-holder is bound to certify an adjustment, and the judgment-debtor is also given a right to apply to the Court to certify an adjustment. If the adjustment be not certified, it is entirely the fault of the judgment-debtor, and he does not deserve the consideration of the Court if he fails to take the very ordinary precaution of seeing that payment or adjustment made by him is certified to the Court.

Even if it is established that the conduct of the decree holders is fraudulent, the judgment debtor is not entitled to obtain an extension of the time within which an application is to be made to the Court under Cl. 2 of R. 2 of O. XXI. (*Robinson, C. J. and Macgregor, J.*) P. R. P. L. CHETTY FIRM v. G. LON POW AND MA KIN, AND MA PON. 1923 Rang. 103.

—O. 21, Rr. 6, 11 and S. 39. *Transfer of execution—Fresh application when necessary.*

Where a decree has been transferred to another Court for execution, there is nothing in the law which compels the decree holder to make a second application for execution in the court

C. P. CODE (1908), O. 21, R. 11.

to which the decree has been transferred, if an application has already been made to the court which passed the decree. Where it is not known whether the application in the first court was only for transfer or whether it was for execution, the fact that notice was issued under O. 21, R. 22 so that it must have been in form and substance one for execution. (*Mullick and Foster, JJ.*) DUTT v. TARAPRASANNA ROY CHAUDHURI. 2 Pat. 909 : (1923) Pat. 280 : 5 Pat. L. T. 11 : 74 I. C. 753.

—O. 21, Rr. 11 to 14, 17—*Application for execution—Particulars to be stated in—Return for amendment and for payment of court fee—Application in accordance with law.*

O. 21, Rr. 11 to 14 of the Civil Procedure Code gives the particulars which the law requires to be stated in an application for execution. If the application conforms with those rules and is presented upon a properly stamped paper, it must be taken to have been properly presented in accordance with law. O. 21, R. 17 prescribes the course which the Court shall take when the application does not conform to the requirements of Rr. 11-14 and provides that the Court shall ascertain whether such of the requirements of those rules as are applicable to the case have been complied with. If they have not been complied with, the Court is empowered either to reject the application or allow the defect to be remedied within a time to be fixed by it. It further provides that where an application is amended under the provisions mentioned, it shall be deemed to have been an application in accordance with law and presented on the date when it was first presented. It may be inferred from this that where the application is returned on the ground that the requirement of the rule have not been complied with and is not amended within the time fixed, it cannot be regarded as having been presented in accordance with law. It is nowhere stated, however, that where the application conforms with the prescribed requirements and is returned for some other reason it shall not be deemed to have been presented in accordance with law. No provision is found for the payment of any Court-fee on the amount claimed in excess of that covered by the Court-fee paid together with the plaint, or for supplying a copy of the record-of-rights, and assuming these were matters which the Court might require to be done, the failure to do them, cannot affect the validity of the application as such.

The authorities are not uniform on the question whether additional Court-fee is payable on interest which has accrued on the decretal amount since the date of the suit and for which no Court-fee has been paid with the plaint. But assuming, without deciding that it was within the competency of the Court to require payment of the additional Court-fee before it would order execution to proceed in respect of the additional amount claimed, such a fee was in no sense a Court-fee payable on an application for execution. It was, if payable at all, a Court-fee payable on the plaint in respect of a part of the subject-matter in dispute which could not be estimated at that time when the plaint was presented, and which it is not usual to exact at that time. The failure to pay this fee would, at the most, entitle the Court to



C. P. CODE (1908), O. 21, R. 11.

hold its hand and refuse to allow execution to proceed or dismiss the application if the fee should not be paid within the time ordered, but its non-payment cannot invalidate an application for execution properly stamped in accordance with the requirements of the Court Fees Act and containing the particulars required by the provisions of O. 21, Rr. 11 to 14. (*Miller, C. J. and Kulwant Sahay, J.*) BHAGWAT PRASAD SINGH v. DWARKA PRASAD SINGH 2 Pat. 809 : (1923) Pat. 229 : 4 Pat. L. T. 513 : 1 Pat. L. E. 453 : 74 I. C. 174 : 1924 P. 23.

—O. 21, Rr. 11 and 17—Concurrent execution—Permissibility of—Amendment

O. 21, R. 11 of the C. P. Code is no bar to the maintenance of concurrent execution. It is open to the Court to allow the amendment of the application for execution already filed by the addition of other properties to the list of the properties sought to be attached and O. 21, R. 17 does not bar any such amendment. 27 C. L. J. 398 Ref. 17 Cal. 631 dist. (*Mullick and Kulwant Sahay, JJ.*) RAM SUMRAN PRASAD v. BABURAM BAHADUR. (1923) Pat. 61 : 4 Pat. L. T. 99 : 71 I. C. 741 : 2 Pat. 328 : 1933 P. 224.

—O. 21, R. 11—Execution application—Formalities for—Omission to mention date of prior application—Omission to state existence of cross decree.

Material defects would vitiate an application for execution. Where there had been two prior applications for execution but the date of disposal of the first application for execution was alone stated but not that of the second, though the numbers of execution cases were stated with regard to both the previous applications held that the omission of the date of the disposal of the second previous application for execution was not a material defect. The omission to mention the existence of cross-decrees however may be a material defect. (*Chatterjee and Panton, JJ.*) PROSANNA KUMAR CHAKRABUTTI v. JOTINDRA NATH BOSE. 71 I. C. 1054.

—O. 21, R. 11 (2)—Execution application—Joint decree holders—Verification—Mode of.

Where there are a number of decree-holders, some of whom are not acquainted with the facts of the case all the law requires is that the application should be verified by some person proved to the satisfaction of the Court to be acquainted with the facts of the case. It would be straining the language of the rule too far to say that where there are more applicants than one the verification should be signed even by those who are not acquainted with the facts of the case or that where one or more acquainted with the facts of the case verify their verification is not sufficient (*Miller, C. J. and Kulwant Sahay, J.*) BHAGWAT PRASAD SINGH v. DWARKA PRASAD SINGH. 2 Pat. 809 : (1923) Pat. 229 : 4 Pat. L. T. 513 : 1 Pat. L. E. 453 : 74 I. C. 174 : 1924 P. 28.

—O. 21, R. 15—Adjustment of rights of decree-holders—Discretion—Joint decree—Discharge given by one of the decree-holders.

C. P. CODE (1908), O. 21, R. 16.

O. 21, R. 15 of the C. P. Code allows a wide discretion to the Court, which has authority to make such adjustments of the rights of the decree holders *inter se* as it may think equitable and proper. A decree for costs passed in a partition suit in favour of several plaintiffs can only be executed by all the decree holders jointly or by some only of the decree-holders subject to the provisions of O. 21, R. 15, C. P. Code. It is not competent to one of several joint decree-holders to grant full discharge of the decree out of Court or to certify to the Court complete satisfaction of the decree without the concurrence of all the decree holders. (*Piggott and Walsh, JJ.*) UMRAO BEG v. MUKHTAR BEG 45 A. 401 : L. R. 4 A. 516 : 21 A. L. J. 308 : 74 I. C. 687 : 1923 A. 494.

—O. 21, Rr. 15 and 16—Decree—Transfer of portion of decree—Validity—Condition that transferor should continue execution—Right of transferee to be brought on the record and to execute the decree—C. P. Code, O. 22, R. 10, See (1922) DIG. COL. 250, MUTHIAH CHETTIAR v. LODD GOVINDA DOSS KRISHNA DOSS. 69 I. C. 337.

—O. 21, R. 16—Applicability—Award filed in court.

The provisions of O. 21, R. 16 are applicable to an award filed in court, and the assignee of such an award can apply for execution of the same and the recognition of his rights. (*Greaves, J.*) GLADSTONE WYLLIE & Co. v. JOOSUB PEER MAHOMED. 27 C. W. N. 666.

—O. 21, R. 16—Benamidar—Right to execute—Decree for money against several persons—Meaning of.

O. 21, R. 16 C. P. Code is a bar to execution of a decree by a benamidar for one of the judgment-debtors. The expression "decree for money against several persons" is not restricted to a personal decree for money against two or more defendants. (*Baker, O. J. C.*) NANHELAL v. MANGILAL. 19 N. L. R. 151.

—O. 21, R. 16—Transfer of decree for execution to Revenue Court—Recognition of assignment—Power to execute.

Under O. 21, R. 16 of the C. P. C the heirs of a deceased decree holder may apply for execution to the Court that passed the decree, and under S. 42 of the C. P. C. they can do so equally to any Court to which that decree has been transferred for execution. It may also be that the right to apply for execution in these circumstances includes the right to carry on an execution already initiated by the deceased decree holder. But both these things can be done only in a Civil Court. The Thasildar as Revenue officer has certain powers in the execution of a decree by ejectment, but he cannot execute such a decree in favour of any one but the person named in it. When it is ordered to give possession of a holding to a certain person who is then alive, he has no more power to give possession to any body else whom he considers to be the heir of that person than a *mazkuri* would have in the same circumstances. (*Hallifax, A. J. C.*) MT. KRISHNA BAI v. DEBI SINGH. 71 I. C. 409 : 1923 Nag. 195.

C. P. CODE (1908), O. 21, R. 16.

———O. 21, R. 16—*Transfer by operation of law—Assignment if necessary.*

Lands were given in trust, and the trustee obtained a decree for rent against certain tenants. before the decree could be executed, the trust was declared invalid and thereupon the owner of the properties applied to execute the decree. *Held*, he must be deemed to have become an assignee of the decree by operation of law and could execute decree without a formal assignment from the ex-trustee. (*Jwala Prasad and Foster, JJ.*) GOBIND SINGH v. MAHARAJA KUMAR GOPAL SARAN NARAIN SINGH. 4 Pat. L. T. 731 : 2 Pat. L. R. 27.

———O. 21 R. 16—*Proviso—Decree for money against assets if included—Assignment benami for one of the judgment-debtors.* See (1922) DIG. COL. 278. SADAGOPA AYYENGAR v. SELLAMMAL. 72 I. C. 861.

———O. 21 R. 17—*Amendment—Power of court—Amendment after 12 years, but application within time—Effect.*

O. 21 R. 17 does not take away the power of court to amend an application for execution at any time before its disposal. An application so amended is one in accordance with law and must be decreed to have been presented at the date of the original presentation itself.

An application for execution was filed within 12 years of the decree but it required an amendment, which however was made at a time when the decree was more than 12 years old. *Held* nevertheless, S. 48 did not bar the application. (*Spencer and Devadoss, JJ.*) VEMURI PITCHAYYA v. RAJA YARLAGADDA. 45 M. L. J. 651 : 18 L. W. 739 : 33 M. L. T. 125 (H. C.)

———O. 21, R. 17—*Execution application—Amendment—Inclusion of prayer for attachment of properties not included.*

Where an execution application has been registered under O. 21, R. 17, C. P. C. no amendment is possible thereafter. An application to file fresh list of properties against which execution is also prayed for, is not an amendment of the execution petition. (*Miller, C. J. and Kutwant Sahay, J.*) CHAURASI MAHASARICK v. BHAGAN SAHU. 2 Pat. 787 : (1923) Pat. 209 : 74 I. C. 144 : 1924 P. 20.

———O. 21, R. 17—*Scope of—Power of Court to allow amendment.* See (1922) DIG. COL. 278. CHOWDHURI CHINTamani MAHAPATRA v. SRIMATI MONMOHINI DEBI. 69 I. C. 200.

———O. 21, R. 19—*Applicability—Pre-emption decree—Costs if can be set off.*

A vendee against whom a decree for pre-emption has been passed subject to a certain amount being deposited is not a person who can recover the purchase money from the plaintiff unless he chooses to deposit it. He cannot compel the plaintiff to exercise his rights under the decree for pre-emption and the case does not fall under O. 21, R. 29. Hence costs awarded cannot be set off against the amount to be deposited as pre-emption money. (*Kanhaiya Lal, J. C.*) NILKANTH v. MAHABIR SINGH. 26 O. C. 345 : 74 I. C. 558 : 9 O. & A. L. R. 207.

C. P. CODE (1908), O. 21, R. 22.

———O. 21, R. 19—*Cross claims under a decree—Decree in favour of a plaintiff for a smaller amount as her stridhanam—Decree for larger amount in favour of defendant against plaintiff as heiress of her mother—Execution of decree for smaller amount by her Stridhanam heir of plaintiff*

Where the plaintiff obtained a decree against the fourth defendant for a sum of money which she was entitled to as her own Stridhanam, and under the same decree she was liable to the fourth defendant for a larger amount in respect of her mother's estate as her mother's heiress, and the plaintiff's husband as the legal representative of the plaintiff to her Stridhanam sought to execute the decree for the smaller amount against the 4th defendant while the heir in respect of the plaintiff's mother's estate was the first defendant, the plaintiff's brother, *Held*, that the decree was inexecutable in the hands of her husband and that O. 21, R. 19 C. P. C. applied and consequently the decree was satisfied to the extent of the smaller amount 40 Bom. 60 Referred to. (*Oldfield, and Venkata Subba Rao, JJ.*) VENKATANARAYANA v. PURVADA NARASIMHA ROW. 44 M. L. J. 590 : 17 L. W. 643 : 32 M. L. T. (H. C.) 341 : 1923 M. W. N. 474 : 72 I. C. 865 : 1923 Mad. 638.

———O. 21, R. 19—*Jurisdiction.*

Where both parties claim to be entitled to recover a sum of money from each other under O. 21 R. 19 C. P. Code execution can be taken out only for so much money as remains after deducting the sum due to the judgment-debtor.

Where the claim sprang from a compromise entered into between the parties, the object of which was to put an end to all disputes between them and it was never contemplated that another action should be brought in respect of any of the matters which formed the subject-matter of the settlement:

*Held* the execution Court has jurisdiction, though the decree merely declares the rights of the parties *inter se* and does not direct any act to be done. (*Shadi Lal, C. J. and Abdul Qadir, J.*) HAJI MAHOMMED TAQI v. HAJI ABDUL RAHMAN. 1923 Lah. 151.

———O. 21, R. 21—*Mortgage decree—Purchase in execution without permission of Court—Voidable and not void.*

A purchase of the mortgaged property in an execution sale by the mortgagee decree-holder without the permission of the Court under O. 21 R. 72 C. P. Code is not void but merely voidable.

Per *Suhrawardy, J.* The defendant in possession could plead the voidable character of the purchase by the mortgagee irrespective of the question of limitation. (*Walmsley and Suhrawardy, JJ.*) SARADINDU CHAKRAVARTI v. GOSTA BEHARI PRAMANIK. 27 C. W. N. 208 : 75 I. C. 196 : 37 C. L. J. 403 : 1923 Cal. 302.

———O. 21, R. 22, 90 *Death of Judgment debtor after attachment and order for sale, but before sale, Legal representative not brought on record—Effect.*

Where after attachment and order for sale the judgment-debtor dies but without his legal

## C. P. CODE (1908), O. 21, R. 22.

representative being brought on record, the sale takes place, it is not null and void on that account. The case where want of notice under O. 21 R. 22 constitutes a material irregularity is quite different. (*Spencer and Krishnan, JJ.*) MINOR DORAISWAMY v CHIDAMBARAM PILLAY.

18 L. W. 577 : 45 M. L. J. 413 :  
33 M. L. T. (H. C.) 25 : (1923) M. W. N. 817 :  
75 I. C. 46.

—O. 21, Rr. 22 and 23—Execution of decree—Attachment without notice.

The issue of an attachment before the service of the notice issued under O. XXI, R. 22 of the Code of Civil Procedure, is in the absence of any sufficient cause justifying an apprehension that the property sought to be attached would be removed or transferred, a mere irregularity and the execution proceeding is not thereby rendered invalid. If there was any reason for the issue of an attachment before an order was passed under O. 21 R. 23 of the Code, it should have been recorded at the time. The failure to record the reason does not, however, *per se* render the attachment invalid. (*Kanhaiya Lal, J. C.*) GIRWAR SAHAI v. MANGAL.

26 O. C. 288 ;  
9 O. and A. L. R. 92 : 73 I. C. 241.

—O. 21, R. 22—Notice under—Instalment decree—Notice under O. 21 R. 66—Sufficiency of.

Where an application for execution on default of payment of an instalment under a compromise decree is made more than one year after the date of the decree, a notice to the judgment debtor must be given as acquired by O. 21, R. 22, C. P. C. The *terminus a quo* is the date of the decree and not the date of default in paying the instalment which gave the right to execute the decree. Where however a notice is served under O. 21 R. 66 C. P. C. the object aimed at by O. 21, R. 22 is carried out. The omission to issue a notice statedly under O. 21, R. 22 C. P. C. does not vitiate the proceedings especially if the omission has not resulted in any injury to the judgment-debtor. (*Shadi Lal, J.*) KORALAL v PUNJAB NATIONAL BANK, LTD.

5 Lah. L. J. 67.

—O. 21, R. 22—Notice—When necessary—Object of.

O. 21, R. 22 requires the decree holder to issue only one notice upon the judgment debtor or his legal representative. The object of the rule is merely to protect the judgment debtor or his legal representative from being lulled into a sense of security. Once a notice is served, the rule does not contemplate that a fresh notice should be served for every execution application made more than one year after the last order against the judgment debtor. (*Mullick and Bucknill, JJ.*) MAHADEO SINGH v. DHOBISINGH

2 Pat 916.  
4 Pat. L. T. 721 : (1923) Pat. 283 : 74 I. C. 838.

—O. 21, R. 22—Notice under, when necessary—Omission to give notice, effect of.

Under O. 21 R. 22, the executing court is required to issue the notice therein required only in cases where the application is made more than one year after the date of the decree.

*Quære*: Whether the omission to issue the notice in cases in which it has to be issued renders the

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sale null and void. (*Miller, C. J. and Adami, J.*) BALDEO SINGH v. MEGHU SINGH, 74 I. C. 202.

—O. 21, R. 22—Omission to issue notice—Failure to record reasons for—Illegality or irregularity. See (1922) DIG. COL. 279. KASIVISVANATHAN CHETTY v. SOMASUNDARAM CHETTY  
70 I. C. 611.

—O. 21, R. 22—Transfer of property which is the subject of decree—Rights of transferee—Execution of decree. (1922) DIG. COL. 278. THAKURI GOPE v. MALIK MOKHTEAR AHMAD.  
69 I. C. 959.

—O. 21, R. 29, S. 151—Stay of execution on ground of fraud.

The executing Court had no power to stay the execution under order XXI rule 29, of the Civil Procedure Code if at that time no suit was pending before it against the decree holder on the part of the judgment debtor. But the Court has an inherent power under section 15 the Civil Procedure Code to stay execution on the ground the *ex parte* decree was obtained by fraud. (*Scott Smith, J.*) FITZTHOLMS v. WARYAM SINGH.  
75 I. C. 419 :  
(1923) Lah. 514.

—O. 21 R. 30—Decree for money Attachment when necessary.

In the case of a decree for money when it is provided that if it is not paid by a certain date, specific immovable property should be sold, no attachment is necessary under O. 21 R. 30, it is only in cases of decrees for money which do not affect any specific immovable property, that the rule applies. (*Miller, C. J. and Kulkarni Sahay, J.*) JAGANNATH SAO v. DEBI PRASAD DHANDHANIA,  
2 Pat. 768 : 73 I. C. 598.

—O. 21, R. 32 (5)—Decree for demolition of a structure—Execution—Subsequent erection of a new wall—Power of executing court to order demolition of new wall.

The provisions of O. 21 R. 32 (5) C. P. C. apply only where a decree for an injunction has not been obeyed. Consequently where a decree for the demolition of a particular wall has been executed and the wall demolished accordingly, the decree cannot be put in execution again so as to require the demolition of a new wall subsequently erected. The remedy of the decree-holder is by a fresh suit. (*Martineau, J.*) MALUKA v. SUNDAR SINGH.  
5 Lah. L. J. 70.

—O. 21 R. 33—Decree for restitution of conjugal rights—Detention of females in jail.

Though the tendency of modern legislation is against sending women to jail in civil matters, in a case where a husband has obtained a decree for restitution of conjugal rights which the wife refuses to obey, but she persists in leading an immoral life with another, she must be detained in jail in execution of the decree. (*Moti Sagar, J.*) JAGAN NATH v. BASANT RAM.  
75 I. C. 24 :  
1923 Lah. 595 (2).

—O. 21, R. 33—Decree for restitution of conjugal rights—Failure to comply with—Effect.

The tendency of modern legislation is against sending women to jail in civil matters. Where a

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decree for restitution of conjugal rights is disobeyed, the wife is not entitled to make a claim against the husband for maintenance. The Courts should sparingly exercise their power of sending women to jail. (*Abdul Raouf, J.*) MT AMIR BIBI v. NUR MAHOMED 73 I. C. 716.

— O. 21, Rr. 35 and 36—*Applicability—Decree-holder—Enjoyment of property delivered in execution—Disturbance by person without any right—Suit for damages.*

Where a decree-holder, who has obtained delivery in execution of a decree for possession of immovable property, is disturbed in his peaceful enjoyment thereof by a person who, according to the decree-holder himself, has no right legitimately derived from any competent person to do so, his remedy is either in criminal prosecution or in a suit for damages. The person disturbing cannot be regarded as tenant against whom there can be an order for delivery under O. 21, R. 35 C. P. Code. (*Oldfield and Venkatasubba Rao, JJ.*) IBRAHIM SAHIB v. KONAMMAL, 70 I. C. 755 1923 Mad 25

— O. 21, Rr. 35 and 95—*Delivery of possession—Formal delivery—Judgment-debtor in possession—Interruption of adverse possession.*

Where the judgment-debtor is in actual possession and actual possession must be given in execution in accordance with O. 21 R. 35 C. P. C. Where merely formal possession of immovable property is given to a purchaser at an execution sale it cannot prevent limitation running in favour of the judgment-debtor where the latter remains in actual possession, and the property is not in the occupancy of a tenant or other persons entitled to occupy the same. 43 A. 520. 36 B. 373 referred to. (*Scott Smith, J.*) SARDARKHAN v. ABDULLAH KHAN. 71 I. C. 385.

— O. 21, Rr. 35 and 36—*Symbolical possession—Delivery of, in a case where actual possession ought to be delivered—Effect on parties.*

Though symbolical possession is delivered where actual possession should have been given, still so far as the judgment debtor and other persons bound by the decree are concerned, it operates as delivery of actual possession. 24 C. 715, 17 M. L. J. 593 Rel. (*Adami, J.*) MAHARAJA PRATAP UDHI NATH SAHAI DEO v. BALIANI SUNDARBANS KOER. 71 I. C. 999; 24 Cr. L. J. 279; 1923 P. 76

— O. 21, R. 35—*Symbolical possession—Delivery—Warrant—Effecting of.*

The provisions of the code as to how symbolical delivery is to be effected must be strictly complied with. Failure to affix a copy of the warrant for delivery of possession to the place vitiates the symbolical delivery. (*Moti Sagar, J.*) NIDHI RAM v. PARSARAM, 74 I. C. 1; 1923 Lah. 693

— O. 21 Rr. 35 (2) & 96—*Symbolical possession—Delivery of—When permissible.*

There can be no symbolical possession as between the parties to a decree where the property is immovable property which is capable of immediate actual possession and comes within the scope of the direction in Order 21, R. 35 (1), C. P. C. Either the decree-holder is put in

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possession or not. Symbolical possession is the term properly applied where the property is of a kind which can be taken possession of in execution only under O. 21 R. 35 (2), 36 and 96. Formal delivery under the provisions of O. 21 R. 35 (1) is actual delivery. 10 N. L. R. 60 followed (*Batten, J. C.*) PANDURANG v. SAMPAT. 6 N. L. J. 157. 72 I. C. 318. 1923 Nag. 237

— O. 21, Rr. 43, 53 and 78—*Money—If moveable property.*

Money is not a "movable property" within the meaning of order 21, Rule 78. Rule 53 lays down the procedure to be followed in execution when a money decree is attached and it has long been settled law that a money decree cannot be sold in execution. (*Heald and Lentaigue, JJ.*) MAUNG LUN BYE v. MAUNG PO NYUN 2 Bur. L. J. 151; 1 B. 360; 1924 Rang. 21.

— O. 21, R. 50—*Decree against firm—Execution against partners—Liability of deceased partner or his estate—death of partner before suit.*

O. 21, R. 50 sub rule (4) is really intended to make clear the implication of sub-rule (1). It does not in any sense affect the provisions of sub rule (2) of that rule. The meaning of sub rule (4) is that a decree against a firm as such will not affect a partner who has not been served with a summons to appear and answer so far as his other property is concerned. O. 21, R. 54 (2) is wide enough to cover the case of a deceased partner. (*Shah, A. J. C. and Crump, J.*) JIVRAJ LALOOBHAI PATEL v. BHAGVANDAS GORDHANDAS. 1923 Bom. 66.

— O. 21, R. 54—*Attachment of immovable property—Requisites of—Omission to post order of attachment in Collector's office—Effect of.*

The omission to post a copy of the order of attachment of immovable property in the office of the Collector as required by O. 21 R. 54 (4) does not render the attachment invalid if all the other formalities prescribed by O. 21, R. 54 have been observed. 4 M. 844 followed, (*Hallifax, A. J. C.*) JODHAN v. KAPILNATH 69 I. C. 563; 1923 Nag. 78.

— O. 21 R. 54 67—*Non compliance.*

Under O. 21, R. 54 and 67, a copy of the proclamation order must be affixed on a conspicuous part of the property. Where *prima facie* from the serving officer's report this was not done, *Held*, it is a material irregularity. (*Campbell, J.*) WISH NATH v. RAHMAT ULLAH 1923 Lah. 671.

— O. 21 R. 54—*Revenue Suit—Rent payable in shrotriem village.*

Rent payable in the case of shrotriem villages is revenue within the meaning of O. 21, R. 54, C. P. Code. (*Oldfield and Devadoss, JJ.*) RANIDI-MARRI GANAMMA v. KETIREDDI, 46 Mad. 786; 1923 M. W. N. 463; 75 I. C. 369; 43 M. L. J. 263.

— O. 21, R. 54—*Valid attachment.*

In order to constitute a valid attachment the proclamation described in the second portion of R. 54 of O. XXI must be carried out. (*Broadway and Harrison, JJ.*) MULA RAM v. JIWINDA KAM. 4 Lah. 211; 5 Lah. L. J. 200; 72 I. C. 452; 1923 Lah. 423.

C. P. CODE (1908), O. 21, R. 56.

———O. 21, R. 56—*Sale proclamation—Fixing of valuation—Effect of.*

A Court has no jurisdiction to fix the valuation on a sale proclamation before the day fixed for hearing the parties as to the proper valuation. (*Coutts and Ross, JJ.*) *SUKHRAJ BAHADUR v. DEBI BUKSH.* 1923 P. 102 (1)

———O. 21, R. 57—*Attachment—Execution—Struck off—Effect on attachment.*

It is not an easy matter to decide whether property remains under attachment when the darkhast is struck off. Strictly speaking if the darkhast is struck off the attachment would go with it. It seems contrary to the ordinary meaning of words that when a darkhast which is issued to attach property is dismissed, still the attachment continues. Having regard to the conduct of the judgment creditor it was held in this case that there was no subsisting attachment at the time of the transfer. (*Macleod, C. J. and Coyaee, J.*) *GANPATI BHATTA v. DEVAPPA.* 1923 Bom. 30 (2)

———O. 21, R. 57—*Dismissal of execution application—Cessation of attachment—Agreement to give time to decree-holder—Effect of.*

A decree-holder in execution of a decree attached the properties of the judgment-debtor but subsequently accepted a payment made by him towards the satisfaction of the decree and agreed to give time for payment of balance of the decree amount. Thereupon the Court dismissed the application after recording the part-payment. Held that the effect of the dismissal of the execution application was to put an end to the attachment and that the dismissal was due to default of the decree-holder. No doubt the Court has no power to dismiss an application for execution unless there is default on the part of the decree-holder but, as has been held, default means a failure to do what one is legally bound to do. (*Das and Bucknill, JJ.*) *JAIRIS INA v. BIBI SOGHRA.* 4 Pat. L. T. 418 : 71 I. C. 881 : 1923 P. 446.

———O. 21, R. 57—*Execution transferred to Collector—Dismissal of application—Attachment—Effect on.*

Where the execution proceedings have been transferred to a Collector, he has power to dismiss the application under O. 21, R. 57, C. P. Code and thereupon the attachment ceases. (*Hallifax, A. J. C.*) *SHANKER RAO v. MANIK RAO.* 1923 Nag. 18.

———O. 21, R. 58—*Attachment of equity of redemption.*

On attachment and the sale of the judgment-debtor's share in the equity of redemption, the auction purchaser would acquire the right, title and interest of the judgment debtor and nothing more. If the judgment-debtor was one of the three mortgagors, the auction purchaser would step into his shoes and have all the rights as one of the three mortgagors. (*Brown, A. J. C.*) *MAUNG SO v. DEVIGYAN.* 70 I. C. 530 : 1923 Rang. 119 (2).

———O. 21, R. 58—*Claim case—jurisdiction to try suit after sale is held.*

C. P. CODE (1908), O. 21, R. 58.

It is obvious that after a sale is held in execution the attachment is *ipso facto* determined and the court had no longer any jurisdiction to try the claim case. (*Mullick and Bucknill, JJ.*) *MT PUHUPDEI KUAR v. RAMCHARITAR BARHL.* 4 Pat. L. T. 544 : 74 I. C. 87.

———O. 21, R. 58 and 63—*Claim by mortgagee—Adverse order declining to adjudicate—Suit for enforcing mortgage—Limitation—Conversion of mortgaged property into money—Effect of.*

Property mortgaged to plaintiff was attached and brought to sale in execution by the defendant. On the day fixed for the sale, the plaintiff preferred a claim petition that the sale proceeds should be kept in court deposit to satisfy his mortgage and not be paid over to the defendant. The Court dismissed the application holding that as the sale had taken place it had no jurisdiction to hear the petition. In a suit by the plaintiff to enforce his mortgage and recover the mortgage money from the defendant the latter pleaded that the suit was barred by Arts. 11 and 62 of the Lim. Act. Held, by the Chief Justice (agreeing with Spencer, J.) (1) that there was no order negating the claim of the plaintiff and his suit was not therefore barred by art. 11 of the Limitation Act and (2) that the suit was one to enforce a mortgage and was governed by art. 132 and not by art. 62 of the Lim. Act, though the mortgaged property had been converted into money as a result of the court sale. 41 M. 985 (F. B.) dist. 41 C. 654 (P. C.) Rel. (*Sir Walter Schwabe, C. J.*) on a difference of opinion between. (*Spencer and Krishnan, JJ.*) *ABDUL KADIR SAHIB v. SOMASUNDARAM CHETTIAR.* 70 I. C. 648 : 1923 Mad. 76.

———O. 21, R. 58 and 63—*Claim petition—Order on, notifying claim to intending bidders without investigating it—Propriety—Claim to moiety of property attached—Order directing sale of defendants' right and notification of plaintiff's claim in sale proclamation—If an order against claimant—Suit for recovery of share from purchaser—Limitation Act, Art 11—Applicability.*

Plaintiff preferred a claim to property attached in execution of a decree obtained against another stating that the judgment debtor was entitled only to a share in the said property and that he was entitled to the other moiety. The claim was disposed of by an order which, after reciting plaintiff's contention ran as follows: "Whatever right the defendant has will pass by the sale. The petition does not require any further investigation. The claim put forward by the petitioner will be noted in the sale proclamation."

The sale was held and the decree holder himself became the purchaser. In a suit brought by the plaintiff for the recovery of his half share of the property from the decree holder purchaser held (1) that the order on the claim petition was an improper one; (2) that it was not, however, an order against the claimant (plaintiff) within the meaning of O. 21, r. 63, C. P. C., and the suit instituted more than a year from the date thereof was not barred under Art. 11 of the Limitation

C. P. CODE (1908), O. 21, R. 58.

Act. (*Spencer and Venkatasubba Rao, JJ.*) KACHIN-AMTHODI PARAMBIL SAHARABI v. KACHINAMTHODI PUTHIA PURAYIL SREEMAMUTTI'S SON ALI

44 M. L. J. 141 : 17 L. W. 182 : 72 I. C. 857 : 1923 Mad. 295

—O. 21, R. 58—*Claim—Rejection of—Revision.*

In this case certain house property was attached in execution of a decree. The objector claimed that the property in question had been purchased by him from the judgment-debtor on the 3rd August 1921, before the passing of the decree in execution of which it was sought to be sold. The Court below found that the *bona fides* of the sale-deed was doubtful and the judgment-debtor was really in possession of the said property in spite of the alleged sale. The Court rejected the claim. *Held* there was no reason in these circumstances for interfering in revision. (*Kanhaya Lal, J. C.*) SHYAM LAL v. RADHE SHYAM. 10 O. L. J. 139. 74 I. C. 546 : 1923 Oudh 208.

—O. 21 R. 58—*Scope of—Sale of property in execution—Effect of.*

O. 21, R. 58 confers a statutory right of suit and his right is not affected by the sale of the property in execution of the decree before the suit. 35 C. 202 referred, (*Jwala Prasad J.*) MT. MANIK v. RAMJAS AGARWALLA 1 Pat. L. R. 51 : 70 I. C. 332 : 1923 P. 152.

—O. 21, Rr. 58, 63—*Small Cause Court—Attachment before judgment of immoveable property—Claim petition—Power to adjudicate. See* PRO. SM C. C. ACT S. 17. 28 C. W. N. 16.

—O. 21, Rr. 58, 63—*Suit by defeated claimant—Limitation—Refusal to investigate claim.*

Where objections preferred by a claimant to the attachment and sale of certain property in execution of a decree were rejected without an investigation of the merits of the case and the property was ordered to be sold, which is incumbent upon the claimant to institute a suit within the period of limitation prescribed by Art. 11 of the Limitation Act 41 M 985 followed. (*Ryves and Gokul Prasad, JJ.*) GOBERDHAN DAS v. MAKUNDI LAL 45 A. 438 : 21 A. L. J. 342 : L. R. 4 A. 185 : 74 I. C. 1024 : 1923 A. 435.

—O. 21, Rr. 58, 63 and 100—*Usufructuary mortgagee—Right to object to attachment—Dispossession by auction purchaser—Application under O. 21, R. 100—Maintainability. See* (1922) DIG COL. 283 BISWANATH PATRA v. LINGARAJ PATRA. 70 I. C. 306.

—O. 21, Rr. 60 and 63—*Attachment—Revival of—Decree in claim suit.*

The order under O. 21, R. 60, C. P. Code releasing the property from the attachment is only provisional and the effect of the decree in a subsequent suit brought under the provisions of O. 21, R. 63 declaring the right to attach the property, is to maintain the attachment originally made. (*Heald, J.*) MAUNG SEIN v. MAUNG MAUNG. 2 Bur. L. J. 113 : 1923 Rang. 237.

—O. 21 R. 60—*Objection to attachment—Capacity dual—Procedure.*

C. P. CODE (1908), O. 21, R. 63.

If a person who has been impleaded in an execution proceeding as the heir of the deceased debtor objects to an attachment on the ground he is in possession as trustee, the objection should be decided under O. 21, R. 60 and the order there-in is conclusive subject to the suit under O. 21 R. 63. He is not in that capacity a representative of the judgment debtor, though the author of the trust may have been the judgment debtor himself, except when such trust is created after the suit or the decree passed therein. (*Kanhaya Lal, J.*) BHAGWAN DAS v. MT. MAHOMED BANO. L. R. 4 All. 447.

—O. 21 R. 62—*Execution proceedings—Objection by mortgagee—Claim upheld—Finality of order.*

In execution of a decree for money certain properties were attached and a mortgagee preferred a claim that the properties were subject to his mortgage. The attaching decree holder pleaded that the mortgage was fictitious and was not properly attested. The executing court found in favour of the mortgagee and directed the sale subject to the mortgage. In a suit by the mortgagee against the purchaser in execution *Held* that the order upholding the mortgagee's claim in execution proceedings was conclusive and that the purchaser could not plead that the mortgage was without consideration and was not properly attested. (*Kotval, A. J. C.*) GOVIND v. DHEKLU. 19 N. L. R. 15 : 1923 Nag. 282.

—O. 21, R. 62—*Failure to notify charge Effect.*

Where the decree holder brings certain properties to sale in execution of a mortgage decree, but fails to notify at that time a charge he has over the same, the purchaser takes free of the incumbrance. (*Fremantle, S. M.*) MIRZA EWAZ ALI BEG v. MT. HARI. L. R. 4 All. 353 (Rev)

—O. 21, R. 63—*Applicability—Suit for consideration.*

Where on a claim petition being dismissed, the objector whose title was negatived brought a suit against his vendor for return of money for failure of consideration. O. 21, R. 63 does not apply and hence the suit need not be brought within one year. (*Sulaiman J.*) RATI RAM v. BURHMAJIT. 21 A. L. J. 770 : L. R. 5 A. 28.

—O. 21, R. 63—*Attachment of debts objection by garnishee—Confirmation of attachment—Effect of—Sale of debt—Rights of purchaser.*

In execution of a decree against a judgment-debtor a debt alleged to be due to him by a third person was attached and the garnishee objected to the attachment stating that no debt was due to the judgment-debtor. The Court on enquiry confirmed the attachment and the garnishee did not take any steps to challenge the validity of the order. The decree-holder purchased the debt in Court-auction and brought a suit to recover the same. *Held*, that it was not open to the debtor to contend that there was no debt due by him to the judgment-debtor and that the order on the previous execution proceeding was final and conclusive. (*Schwabe C. J. and Wallace, J.*)

C. P. CODE (1908), O. 21, R. 63.

SUBBIER v. MOIDEEN PITCHAI. 44 M. L. J. 588 :  
17 L. W. 582 : (1923), M. W. N. 282 :  
31 M. L. T. (H. C.) 304  
72 I. C. 558 : 1923 Mad. 562.

—O. 21, R. 63—Attachment—Objections to—Dismissal of claim without investigation.

An order, which has been passed without investigation of the claim, comes within the category of an order made against the party in such a way as to render that order conclusive and thereby prohibit the institution of suit to establish the same rights after the period of one year allowed by the Limitation Act has expired. Order 21, Rule 63 of the Code of Civil Procedure 1908 is much wider in its scope than the corresponding S. 283 of the Code of 1882, and unlike that latter section covers cases in which there has been no investigation. Orders made under Rule 63 of Order 21 become final if not set aside by suit within one year. (*Duckworth and Po Han JJ.*) MAUNG PYA ON v. MA HLA KYE. 1 Rang. 481 : 2 Bur. L. J. 173

—O. 21, R. 63—Attachment—Removal of—Ex parte order—Effect of

Where an attachment has been removed by an order of court, the order is conclusive unless set aside by suit. It does not make any difference that the order of removal was made ex parte or that the proceedings were irregular. (*Pratt, J.*) MA THEIN TIN v. MA HTOO. 2 Bur. L. J. 60 : 70 I. C. 323 : 1923 Rang. 156.

—O. 21, R. 63—Burden on plaintiff.

In a suit instituted after the summary rejection of the claim under S. 278 of the Civil Procedure Code, 1882 (Order 21, rule 58 of the new Code) the onus of establishing that the transaction on which the suit is based was entered into in good faith lies on the plaintiff. (*Baker, J. C.*) MULLA FAIZ ALI v. MT. HARKUAR. 1923 Nag. 334.

—O. 21, R. 63—Claim petition—Order notifying claim to intending bidders without investigating it.—Not an order against claimant: See C. P. CODE O. 21 RR. 58 AND 63. 44 M. L. J. 141.

—O. 21, R. 63—Claim suit—Decree-holder if a necessary party.

Where a claim has been rejected and the properties have been sold and purchased by a stranger purchaser, the decree holder is not a necessary party to a suit by the claimant. 7 C. 608 Rel. (*Spencer and Ramesam, JJ.*) SUBBARAYA MUDALIAR v. KANDASWAMY MUDALI.

32 M. L. T. (H. C.) 124 : 70 I. C. 168 : 1923 Mad. 58.

—O. 21, R. 63—Debt—Attachment—Dismissal of claim—Finality of order.

Unless a suit is brought as provided by O. 21, R. 63, the party against whom the order is made cannot assert, either as plaintiff or as defendant in any other suit or as a party to any proceedings, the right denied to him by the order. The procedure laid down in Rr. 58 to 63 applies to a debt attached in execution of a decree, and an order made against the alleged debtor is binding upon him if he does not institute a suit for a declaration that no debt was due from him, within a year from the date of the order passed

C. P. CODE (1908), O. 21, R. 63.

against him. (*Shadi Lal, C. J.*) PIARA RAM v. GANGA RAM. 71 I. C. 45 (1).

—O. 21, R. 63—Dismissal of claim without investigation—Suit for declaration of title—Limitation—Limitation Act Art. 11, applicable. See LIMITATION ACT, ART. 11. 69 I. C. 522

—O. 21, R. 63—Dismissal of claim without investigation of the merits—Dismissal on the ground of delay—Suit to establish title—Limitation Act Art. 11 applicable. See LIMITATION ACT, ART. 11. 6 N. L. J. 66.

—O. 21, R. 63—Order in claim case—Finality of—Order without investigation—Revision.

Where an order has, after proper investigation been properly passed under order 21, Rules 59–63 Civil Procedure Code, the High Court should not even though the order be erroneous interfere in revision, since there is a remedy by a suit. It is a well known principle that interference in revision is to be avoided, where another remedy is available.

But where investigation has been refused, or an order passed without investigation, or where as here, the order passed after a proper investigation, is not a proper order passed in accordance with Order 21, Rules 59–63, Civil Procedure Code the High Court should and can interfere, if it is in the interests of justice, under S. 115 Civil Procedure Code (*Duckworth, J.*) PHOMON SINGH v. A. J. WELLS. 1 R. 276 : 2 Bur. L. J. 134. 1923 Rang. 195.

—O. 21, R. 63—Right of suit—Attachment of assets of deceased judgment-debtor—Claim—Rights of suit of decree-holder.—C. P. C. S. 47.

In execution of a decree the decree holder attached the assets of a judgment debtor who had died. A reversioner who was not a party either to the decree or to the execution proceeding preferred objections under O. 21, R. 58, C. P. C. and the objections were allowed. In a suit brought by the decree-holder for a declaration of the liability of the assets to attachment and sale in execution held that the suit was not barred by S. 47, C. P. C. (*Banerji, J.*) BANSIDHAR v. SHAM LALL. 71 I. C. 1012 : 1923 A. 292.

—O. 21, R. 63—Suit by defeated creditor—Form of—Representative suit—Necessity for.

A decree holder has a statutory right to sue under O. 21, R. 63 in his personal capacity as a decree holder respecting merely his own right to have the property attached under his decree. He is not obliged to take the general ground that as against all other creditors and all other persons a mortgage or sale is to be void. 42 M. 143 followed. (*Pipon, J. C.*) LOK NATH v. THAKAR DAS. 71 I. C. 20.

—O. 21, R. 66—Execution sale—Notification of incumbrances—Right of purchaser—Estoppel. See (1922) DIG. COL. 284. ROSHAN LAL v. LALLU. 44 A. 714.

—O. 21, R. 66—Failure to attend at the settlement of proclamation—Effect—If estopped

C. P. CODE (1903), O. 21 R. 66.

from raising plea of non-liability to attachment  
See C. P. CODE S. 11 EXP, IV.

(1923) M. W. N. 591.

———O. 21, R. 66—Failure to serve notice properly on judgment debtor—If vitiates sale.  
See C. P. CODE, O. 21, R. 90.

1 Mys. L. J. 105

———O. 21, R. 66—Notice for settling sale proclamation—Failure to appeal—Effect—Estoppel.

Where the judgment debtor had notice issued to him of the date for settling the sale proclamation and in spite of it did not attend or assist the court in fixing the valuation he is afterwards estopped from objecting to the valuation (*Mullick and Bucknill, JJ.*) MAHADEO SINGH v. DHOBI SINGH.

1923 Pat. 283 : 4 Pat. L. T. 721.

74 I. C. 838 : 2 Pat. 916.

———O. 21, R. 66—Order settling the order in which properties are to be sold—Nature of—If appealable. See C. P. CODE, S. 47.

18 L. W. 311.

———O. 21, R. 66—Sale proclamation—Order fixing the upset price—Appeal.

An order fixing the upset price in a sale proclamation is not appealable. 27 M. 250, 1917 M. W. N. 141. Relied on, (*Oldfield and Venkata Subba Rao, JJ.*) RAMANATHAN CHETTIAR v. VENKATACHELLAM CHETTIAR.

44 M. L. J. 599.

(1923) M. W. N. 297 : 17 L. W. 635 :

32 M. L. T. (H. C.) 401 : 72 I. C. 836 :

1923 Mad. 619

———O. 21, R. 66—Sale proclamation—Statement as to revenue assessed—Omission of—Effect.

Under O. 21, R. 66 of the C. P. Code the sale proclamation should contain the statement as to the revenue assessed upon the estate, that it is a material matter which would enable the judgment debtor to base an application for setting aside the sale if he could comply with the other condition that the Code provides (*Lord Buckmaster.*) BALIRAM SINGH v. RAI BAHADUR SETH NARSINGH DAS.

45 M. L. J. 403 : 18 L. W. 137 : L. R. 4

P. C. 197 : 75 I. C. 546 : (1923) P. C. 93 (P. C.)

———O. 21, R. 66—Settling sale proclamation—If a purely ministerial act.

Quære whether the decision of the Full Bench in 27 Mad. 259 which holds that settling a sale proclamation is a ministerial act, is still, good law? (*Schwabe, C. J. and Coleridge, J.*) KAVERIBAI AMMAL v. MEHTA & SONS.

46 M. L. J. 71 :

18 L. W. 615 : (1923) M. W. N. 894.

———O. 21, R. 66—Value of the land not stated in sale proclamation—Whether vitiates sale—Failure to serve sale proclamation—Effect of. See (1922) DIG. COL. 285. JASHIMUDDIN SARKAR v. MANMOHINI DASSYA.

70 I. C. 308.

———O. 21, R. 66—Valuation to be fixed by court.

The insertion of any valuation in the sale proclamation other than valuation fixed by the court is calculated to mislead intending bidders and is therefore wrong. A sale held under such circumstances can be set aside, (*Das and Macpherson, JJ.*)

C. P. CODE (1903), O. 21 R. 83.

DAMRUPAT SINGH v. RAMESHWAR SINGH.

73 I. C. 317 (1923) Pat. 208 :

1923 P. 445.

———O. 21, R. 69—Applicability of—Postponement of sale—Satisfaction of decree.

Where an execution sale is postponed on the ground that the decree has been satisfied O. 21 R. 69 C. P. Code has no application to such a case. (*Jwala Prasad, J.*) JAGDHARI RAI v. LANGAT GOPE.

4 Pat. L. T. 495 : 75 I. C. 676 (2) :

1923 P. 572.

———O. 21 Rr. 69 and 90—Execution sale—Adjournment—Sale without fresh proclamation—Sale set aside.

The court ordered stay of sale in execution of a mortgage decree "until further orders" and subsequently ordered the sale of the property without a fresh proclamation. Held that the sale ought not to have been held without a fresh proclamation and that it should be set aside. (*Pratt J.*) ABDUL HAKIM v. NGA NIGRI.

2 Bur. L. J. 54 : 75 I. C. 843 (1) :

1923 Rang. 154.

———O. 21, Rr. 72 and 84—Applicability—Execution Sale—Delay in deposit.

The wording of Order 21, rule 72, C. P. Code shows that the rule has no application to the holders of decrees other than those in execution of which the property is sold. Delay in making the deposit under Order 21, rule 84 is not more than a material irregularity which does not vitiate the sale unless it has caused substantial injury. (*Heald and Lentaigne JJ.*) MAUNG CHIT HLAING v. N. A. R. M. CHETTY FIRM.

2 Bur. L. J. 166

———O. 21 Rr. 72 and 90—Execution sale—

Purchase by decree-holder—Refusal of leave to bid—Effect of. See (1922) DIG. COL. 286. RADHA KRISHNA v. BISHESHAR SAHAY.

21 A. L. J. 23 :

27 C. W. N. 294 : 1 Pat. 733 : 37 C. L. J. 430 :

44 M. L. J. 718 : 25 Bom. L. R. 680 :

9 O. & A. L. R. 194 (P. C.)

———O. 21 Rr. 72, 86 and 92—Permission to decree-holder to bid on conditions—Failure to fulfil conditions—Powers of court to refuse confirmation of sale. See (1922) DIG. COL. 286, MT. JANAKBATI CHAUDHRAIN v. RAMESHWAR SINGH.

69 I. C. 872 : 1 Pat. L. R. 179.

———O. 21, R. 83—Applicability of—Mortgage decree—Private sale of property.

The provisions of O. 21 R. 83 C. P. Code do not apply to a sale of property directed to be sold in execution of a decree for sale in enforcement of a mortgage on such property, the reason being that in the case of a mortgage decree the right of sale does not depend on attachment in execution, but is conferred by the decree itself. (*Shadi Lal, J.*) KORALAL v. PUNJAB NATIONAL BANK, LTD.

5 Lah. L. J. 67.

———O. 21, R. 83 (3)—Power to extend time for redemption—Appeal.

An application for extending the time for redemption to enable the mortgagor to raise the amount by mortgage or private sale is expressly prohibited by the Code, and no appeal lies from an order of Court refusing to do it. (*Schwabe, C.*



C. P. CODE (1908), O. 21 R. 84.

*J. and Coleridge, J.* KAVERIBAI AMMAL v. MEHTA & SONS, 46 M. L. J. 71 : 18 L. W. 615 : (1923) M. W. N. 894.

—O. 21, R. 84—Sale when complete—Acceptance of bid—Effect of deposit.

The function of a Nazir or other officer appointed to conduct an auction sale is of a ministerial character. If he conducts it in the presence of the presiding officer and the latter forthwith declares under O. 21, R. 64 C. P. Code who the purchaser is and signs the formal order the sale is complete. If it is not held in his presence, it can be completed only by his order closing the bidding or an order accepting the bid under O. 21, R. 84. Where in anticipation of sanction the Nazir accepts the deposit required from the highest bidder, there is only in law an offer, and it is open to the Court to resume the auction. (*Das and Macpherson, J.J.*) JAIBHADAR JHA v. MATUKDHARI JHA 2 Pat. 548 : (1923) Pat. 190 : 4 Pat L.T. 498 : 1923 P. 525.

—O. 21, Rr. 85 and 92—Execution sale—Time for payment of the purchase money—Extension of—No objection—Confirmation of sale.

Though it is not open to the Court to extend the time for payment of the purchase price without the consent of the parties, still where an extension of time has been granted without objection on the part of the parties and the sale has been confirmed and the money drawn by the decree-holder, the sale cannot be set aside on account of the irregularity. (*Spencer and Ramesam, J.J.*) VARANAKOT ILLATH SUBRAMANYAM NAMUDURI v. VYKUNDA KAMMATHI.

69 I. C. 1001 : 1923 Mad. 48

—O. 21, R. 89—Applicability of—Partition suit—Award of arbitrators directing sale of properties and payment out of proceeds—Sale if can be set aside on deposit.

In a partition suit instituted on the Original side of the High Court the disputes between the parties were referred to arbitration under orders of the Court. The arbitrators made an award directing the sale of one of the properties which were the subject matter of the suit and the payment of the common debts as well as of certain sums to the plaintiff. A decree was passed in terms of the award and the Registrar of the High Court sold the properties in terms of the award. The defendants applied with the plaintiff's consent for setting aside the sale under O. 21, R. 89 C.P. C and it was contended that those provisions did not apply to the case. *Held* that the sale was in enforcement of a decree on the award and the provisions of O. 21, R. 89 C.P.C. were applicable. (*Woodroffe and Suhrawardy, J.J.*) NIRODE NATH BANERJEE v. AMULLYA DHONE. 27 C. W. N. 466

1923 Cal. 582.

—O. 21, R. 89—Application to set aside sale—Deposit of purchase money—No prayer to set aside sale—Request to withhold payment.

The judgment-debtor deposited the decree amount with the extra percentage under O. 21 R. 89 C. P. C., but in his application he prayed that it may not be paid to the decree holder pending disposal of an appeal. Subsequently on the objection of the decree-holder he withdrew the

C. P. CODE (1908), O. 21 R. 89.

prayer aforesaid. *Held* that the object of the deposit was to set aside the sale, and though there was no specific prayer to that effect, the objection to the payment of the decree-amount having been withdrawn, the court was bound to set aside the sale. 43 Bom. 735 ; 16 C. W. N. 904 *Ret. (Adami, J.)* RAM SIVENDRA NARAYAN OJHA v. AWADH BIHARY SARAN

4 Pat L. T. 295 : 71 I. C. 332 1923 P. 159.

—O. 21, R. 89—Auction purchaser—If a necessary party

Where a petition was put in to set aside an auction sale by depositing the decree amount in court, but the auction purchaser is not made a party to the same though his purchase is mentioned in the body of the petition, it is a sufficient compliance with the Code. Notice can issue to him as one of the parties affected by the sale, and it is not necessary he should be formally added as a party. (*Suhrawardy and Panton, J.J.*) RAJ CHANDRA DAS v. KALI KANTA DAS.

1923 Cal. 394

—O. 21, R. 89—Decree amount and 5 per cent. deposited a few days after the expiry of 30 days—Purchaser and judgment debtor willing to have sale set aside—Power of Court—C. P. Code, S. 151.

Where the decree amount and penalty of 5 per cent were deposited after the expiry of 30 days and all parties concerned were agreeable to the sale being set aside, the court can set aside the sale under S. 151 if not under O. 21, R. 89. (*Ilazul Hasan, A. J. C.*) KUBER SINGH v. BACHU RAM.

9 O. & A. L. R. 983

—O. 21, R. 89—Deposit in Court—Amount of deposit—Application to set aside sale.

The expression "any amount which may have been received by the decree-holder" in O. 21 R. 89 (b) C. P. Code means money actually received by the decree-holder and does not include payment of sale proceeds into Court. 23 B. 723 *foli (Macleod, C. J. and Grump, J.)* TOTA RAM v. CHHOTURAM

25 Bom L. R. 446 :

73 I. C. 454 (1) : 1923 Bom. 299 (2)

—O. 21 R. 89—Deposit—Legality of—Improper refusal to set aside sale—Interference in revision.

Two creditors A and B obtained a decree against a common debtor and A attached his properties, B applied for rateable distribution. A proclamation of sale was issued ordering the sale of the judgment debtor's property for the recovery of the decretal amount due to A. The judgment debtor paid A's decree in full and the appellate court stayed execution of the decree and sale. The court below in disregard of the order of the appellate court held the sale and the property was knocked down at a certain sum. The judgment debtor tendered to the Court within 30 days the amount due on B's decree with the addition of 5 per cent. The amount deposited was more than that specified in the sale proclamation but short of a few rupees so far as B's decree was concerned. *Held* that the deposit was good under O. 21 R. 89 and the sale should have been set aside. Where the lower court improperly refuses to set aside an execution sale under O. 21 R. 89.

C. P. CODE (1908), O. 21 R. 89.

C. P. C., the High Court can interfere in revision. (*Piggott and Walsh, JJ.*) ABUL NASAR RASHID-UD-DIN AHMAD v. LALTA PRASAD,

L. R. 4 A. 121 : 71 I. C. 1018 : 21 A. L. J. 162 : 1923 A. 318.

—O. 21 R. 89—*Execution sale—Setting aside on deposit—Right to apply—Person in whose favour there is an agreement to sell.*

A person in whose favour there is merely an agreement to sell the property sold in Court auction cannot apply to set aside the sale under O. 21 R. 89 C. P. C. Nor could a person who has purchased the property pending the attachment apply to set aside the sale. (*Odggers, J.*) ARUMALLA CHINA SUBBA REDDI v. VASIREDDI JAYARAMAYYA. 17 L. W. 680 : 1923 Mad. 659.

—O. 21, Rr. 89 and 92—*Execution sale—Setting aside—Deposit—Limitation—Parties to application—Notice.*

Order 21 Rule 92 C. P. C. nowhere speaks of the auction-purchaser being made a party. It provides that no sale can be confirmed or set aside unless notice of application has been given to all persons affected thereby, and the rule means that the Court is incompetent to make any order at all till such notice has been given. The duty of moving the Court to issue notices lies of course upon the applicant and all that the Court has to do is to give him reasonable opportunity for doing so. On default the Court may dismiss the application, and there is no obligation upon the Court to issue a notice of its own motion but without the assistance of the applicant. The law requires that the application to deposit should be made within 30 days of the sale. But it does not impose any period of limitation for the issue of notice. (*Mullick and Bucknill, JJ.*) MT. BIBI ZAINAB v. PARAS NATH. 4 Pat. L. T. 491 : 1 Pat. L. R. 361.

2 Pat. 800 : 75 I. C. 430 : 1924 P. 37.

—O. 21 R. 89—*Judgment-debtor—Right to apply—Objections to the sale.*

Where a judgment debtor who had preferred certain objections to the legality of an execution sale was allowed to utilise the provisions of O. 21 R. 89 C. P. C. subject to protest. Held that the procedure was irregular and that the objections were not maintainable. (*Piggott and Walsh, JJ.*) RAJA DUTT PRASAD SINGH v. SRI NARAIN.

21 A. L. J. 340 : L. R. 4 A. 195 : 74 I. C. 557 : 1923 A. 503.

—O. 21, R. 89—*Mortgagee a part Owner.*

A mortgagee who has purchased equity of redemption in one portion of the mortgaged property, can apply under R. 89, to set aside the sale held under his own decree (*Mullick and Macpherson, JJ.*) AULAD ALI v. ABDUL HAMID. 2 Pat. 715 : 74 I. C. 102 : 1923 P. 490.

—O. 21 R. 89—*Right to apply—Prior application to pay decree amount—Dismissal—Effect of—Not res judicata.*

Where a person claiming as legatee under a will applied to pay the decree amount to prevent a sale but the application was dismissed, it does not bar an application under O. 21, R. 89 C. P. Code to set aside the sale on depositing the

C. P. CODE (1908), O. 21 R. 90.

decree amount. The effect of the previous dismissal was merely to decide that the applicant had no right to raise the attachment on payment of the decree amount, (*Spencer and Venkata-subba Rao, JJ.*) DHANAMMAL v. VEERARAGHAVU NAIDU. 44 M. L. J. 325 : (1923) M. W. N. 162 : 72 I. C. 325 : 32 M. L. T. (H.C.) 175 : 18 L. W. 296 : 1923 Mad. 487 (2).

—O. 21, R. 90—*Absence of proclamation—Question gone into at prior stage—Effect.*

During the execution sale of a shrotriem village, objection was taken at one stage to absence of proclamation at the collector's office. The Court then held that there was proclamation in the village and that except with the case of ryotwari village, it was not necessary to publish it in the Collector's office. When the auction sale was sought to be set aside under O. 21, R. 29 the Court without going into the question applied its prior decision. Held, the question was not res judicata and the Court ought to take evidence and decide afresh publication in the Collector's office being necessary in the case of shrotriem villages also. (*Olufild and Devadoss, JJ.*) PAMIDI MARRI GANAMMA v. KETIREDDI.

46 Mad. 736 : 1923 M. W. N. 463 : 75 I. C. 369 : 45 M. L. J. 263.

—O. 21, R. 90—*Alteration in new Code.*

The effect of adding the words "or fraud" to O. 21, R. 90 is to take the applications setting up fraud in publishing or conducting a sale, out of the scope of S. 47 and bring them under the rule. (*Shadi Lal and Le Rossignol, JJ.*) JAGGAN NATH v. DAUD. 4 Lah. 243 : 75 I. C. 103 : 1923 Lah. 592.

—O. 21, R. 90—*Appeal—Failure to issue notice—Second appeal, if lies.*

Where an auction sale is sought to be set aside on the ground that no notice was served as required by O. 21 R. 22, but the Court finds no such notice was necessary the order does not fall under S. 47 and hence there is no second appeal. (*Mullick and Bucknill, JJ.*) MAHADEO SINGH v. DHOBI SINGH. 2 Pat. 916 : (1923) Pat. 282 : 4 Pat. L. T. 721 : 74 I. C. 888.

—O. 21, R. 90—*Auction purchaser—If can apply under.*

An auction purchaser cannot apply to have the sale set aside under O. 21, R. 90, as it does not cover the case of a person whose interest was affected by the very sale sought to be set aside. (*Mullick and Bucknill, JJ.*) KARTIK CHANDRA CHATTERJEA v. NAGENDRA NATH ROY. 74 I. C. 760 (2).

—O. 21, R. 90—*Execution sale—Absence of attachment—Sale not a nullity—Application to set aside.*

An execution sale held without attachment of the property or with a defective attachment is not void but merely irregular. An application to set aside the sale on that ground falls within S. 47, C. P. Code and not under O. 21, R. 90. (*Lentaigne, J.*) MA PWA v. MAHOMED TAMEL. 1 B. 533.

C. P. CODE (1908), O. 21 R. 90.

—O 21, R 90—*Execution sale—Application to set aside—Deposit of decree amount—Deposit subject to condition subsequently withdrawn—Effect.*

On the 22nd December 1920 a sale of a certain property took place in execution of a certain decree obtained by the opposite party as against the petitioners. On the 21st January 1921 the petitioners applied for setting aside the sale under the provisions of O. XXI, r. 90, Civil Procedure Code. On the 23rd January 1921 the parties entered into a compromise the terms of the compromise being that if the judgment debtor paid the sum of Rs. 2,695 to the decree-holders on or before the 23rd September 1921 the sale would be set aside, but that if the sum of Rs. 2,695 was not paid to the decree holders within the time allowed, the application for setting aside the sale would stand dismissed and the sale would be confirmed. On the 19th September 1921 the petitioners deposited the sum of Rs. 269 in Court and invited the Court to set aside the sale. The petitioners also applied to the Court that the money should not be paid to the decree holders until the decision of a regular suit which the judgment-debtors were about to institute against the decree holders. It appears that such a suit was in fact instituted on the 21st September 1921. On the 23rd September 1921 the decree holders filed a petition praying that the sale should not be set aside as the deposit made by the judgment-debtors was a conditional deposit which had in effect prevented them withdrawing the money from Court. *Held* the deposit was a conditional one. It is one thing to make that deposit subject to one condition; it is another to make the deposit and to apply to the Court that the party entitled to withdraw the money from Court should not withdraw it until a particular decision is reached in a particular case.

The judgment-debtors through their leaders intimated to the Court that they would not object to the money being withdrawn by the decree-holders, and, as a matter of fact, they took up that position before the decree-holders made any application for withdrawal of the money from Court. Consequently the deposit was valid. (*Da. and Macpherson J.J.*) SHAM SUNDAR SINGH v. MUSAHEB LAL

2 Pat. 534

72 I. C. 907 : 1923 P. 418.

—O. 21, R. 90—*Execution Sale—Attachment—Absence of—Material irregularity—Sale within 30 days of the proclamation—Effect of*

The failure to attach the property before sale although an irregularity under the C. P. Code does not render the sale null and void 18 C. 188; 34 C. 787, 21 A. 311 *Rel.* The object of the attachment is to bring the property under the control of the court with a view to preventing the judgment debtor from alienating it and the requirement that the order of attachment should be publicly proclaimed is merely one of the requirements of law for perfecting the attachment. The main object of the proclamation of the order is to give publicity to the fact that the sale of the particular property attached is in contemplation and to warn all persons against taking a transfer of it from the judgment-debtor to the prejudice of the rights of the decree-holder. It is difficult to

C. P. CODE (1908), O. 21 R. 90.

see why the absence of which is ordinarily in the interests of the decree-holder can prejudice the rights of the judgment debtor who has due notice of the sale. A court has jurisdiction to sell property without attachment.

Where property is sold within 30 days of the proclamation the irregularity does not render the sale void without proof of the substantial injury thereby to the judgment debtor 21 C. 66 *Rel.* (*Miller, C. J. and Mullick, J.*) RAJA WAZIR NARAIN SINGH v. BHIKHARI RAM.

2 Pat. 207 : 1923 P. 45.

—O 21, R 90—*Execution sale—Irregularity—Defect in attachment—Omission to attach*

The mere fact that there has been no attachment or that there is a defect in the attachment does not render an execution sale a nullity. It is a mere irregularity. 64 I. C. 420, 18 M. 437, 30 Mad. 255 *Ref.* (*Hallifax, A. J. C.*) SHANKER RAO v. MANIK RAO.

1923 Nag. 18

—O 21 R. 90—*Execution sale—Objection to—Objections which could have been raised at an earlier stage—Defects in publishing or conducting a sale—Application to set aside sale.*

Where the objections of a judgment debtor to a sale held in execution are such as had been or might have been taken in the proceedings for framing the proclamation of sale of which the judgment-debtor had notice, the Court will not set aside the sale on these grounds. Under O. 21, R. 67 read with O. 21, R. 54, C. P. Code, it is necessary that an execution sale of an enfranchised shrotriem village should be published at the Collector's Office.

The judgment-debtor applied to set aside an execution sale on the ground that the sale was not proclaimed in the village or published at the Collector's office. The Court dismissed the application holding that the same objections had been inquired into and decided against the petitioner at an earlier stage of the execution proceedings before the sale was concluded.

*Held* that there was no provision of law authorising the investigation of the objections in question before the conclusion of the sale and that the previous decision was not *resjudicata*.

The application was remanded for an enquiry on the merits (*Oldfield and Devadoss JJ.*) PAMIDIMARRI GANAMMA v. KETTIREDDI KRISHNA REDDI, 46 Mad. 736 : (1923) M. W. N. 463 : 75 I. C. 369 : 45 M. L. J. 263.

—O. 21, R. 90—*Execution sale—Setting aside—Fraud of decree-holder—Bona fide purchaser without notice—Plea of—When a bar to application.* See C. P. CODE, S. 47, 37 C. L. J. 145.

—O. 21, R. 90—*Execution sale—Setting aside—Remedy by suit—Decree against member of joint Hindu family—Sale of his share of the property in execution.*

Where in execution of a decree obtained against some members of a joint Hindu family property of the family is sold it is open to any other member of the family having an interest in the property and not being bound by the decree, to institute a suit to set aside the sale and recover possession of the property without

C. P. CODE (1908), O. 21, R. 90.

applying to set aside the sale under O. 21 R. 90 of the C. P. Code. (*Das and Kulwant Sahay, JJ.*) MEDNI PRASAD SINGH v. NAND KESHWAR PRASAD SINGH. 2 Pat. 386. 1923 P. 451

———O. 21, R. 90—*Failure to issue notice for preparing sale proclamation—Effect*

Failure to issue notice to the judgment debtor drawing up the proclamation of sale under O. 21, R. 66 is an irregularity in conducting or publishing a sale within the meaning of O. 21 R. 90. (*Shadi Lal and Le Rossignol, JJ.*) JAGGAN NATH v. DAUD. 4 Lah. 243. 75 I. C. 103. 1923 Lah. 592

———O. 21, R. 90—*Failure to serve notice properly under O. 21, R. 66—Effect.*

The failure to serve the notice under O. 21, R. 66, in the proper manner is not a material irregularity vitiating the sale. (*Subbanna and Rama swami Iyengar, JJ.*) RAMAYYA v. BHEEMA RAO. 1 Mys. L. J. 105.

———O. 21, R. 90—*Fraud—Auction sale—Limitation to set aside. See (1922) DIG. COL. 289.* RAM PERSHAD LAL v. CHAMARI SINGH. 70 I. C. 675.

———O. 21, R. 90—*Fraud—Execution sale—Setting aside—Auction purchaser not party to fraud—Limitation—Extension of time.*

It is open to a Court to set aside an execution sale on the ground of fraud even though it is not proved that the auction purchaser was a party to the fraud. 18 I. C. 715. *foi*; 24 W. R. 260 *dist.* Where a judgment debtor applying to set aside a sale proved fraud in the conduct of the sale and also the fact that he had been kept out of knowledge of the sale, *Held*, that S. 18 of the Limitation Act applied to his case and the onus was on the other side to show that the application was barred as having been filed more than 30 days after he had knowledge of the sale. The onus is on the party guilty of fraud to show that its effect had been removed 17 B. 341 *Rel.* 1 C. W. N. 67; 2 Pat. L. T. 401, 20 M. 10; 35 M. 1076 *Rel.* (*Ross, J.*) MAHABIR RAM v. RAM BAHADUR DUBEY. 4 Pat. L. T. 306. 72 I. C. 625. 1923 P. 430.

———O. 21, R. 90—*Material irregularity—Omission of Land Revenue in sale proclamation.*

It is wrong to hold that the omission of the land revenue is immaterial for the purposes of R. 90 which entitles the person injured to apply on the ground of a material irregularity. (*Lord Buckmaster.*) BALIRAM SINGH v. RAI BAHADUR SETH NARSINGHDAS. 45 M. L. J. 403.

L. R. 4 P. C. 197; 75 I. C. 546. 18 L. W. 137 1923 P. C. 93 (P. C.).

———O. 21 R. 90 66, and 67—*Material irregularity—Substantial injury—Setting aside sale.*

Where the alleged irregularity in the conduct of the sale did not directly produce any serious loss, there is no ground for setting aside the sale. 32 I. C. 990; 33 I. C. 692; 67 I. C. 885; 57 I. C. 892 *fol.* (*Broadway, J.*) NOOR MAHOMEDKHAN v. MALIK NOOR MAHOMEDKHAN. 5 Lah. L. J. 30. 71 I. C. 730; 1923 Lah. 213.

C. P. CODE (1908), O. 21, R. 91.

———O. 21, R. 90—*Order under—Appeal.*

An appeal is expressly provided by O. 43, R. 1 (1) against orders under O. 21 R. 90. (*Jwala Prasad and Foster, JJ.*) LACHMAN LAL v. PADAKATH SINGH. 4 Pat. L. T. 735.

———O. 21, R. 90—*Real purchaser not known—Effect of adding him after limitation.*

Where the person who bid at an auction sale did not disclose he was acting as an agent for another and as a result, the judgment debtor in applying to set aside the sale impleaded originally only the ostensible purchaser, but on knowing the facts impleaded the principal also but after the period of 30 days allowed by law, the application is not time barred. (*Stuart, J.*) MT. BHAGGO v. MATA PRASAD. 1923 All. 462.

———O. 21, R. 90—*Right to apply—Person claiming adversely to judgment debtor. See (1922) DIG. COL. 290.* MAUNG KUN v. MA NAN. 70 I. C. 900.

———O. 21, R. 91—*Execution sale—Setting aside—Concealment of encumbrances—Effect of*

If a purchaser at an execution sale has bought a property the title to which is defective or if he has been misled on account of fraud or omission on the part of the decree holder it is open to him to seek his remedy as the law allows. But there is no reason why a Court should interfere on behalf of the auction-purchaser and set aside the sale simply because an auction-purchaser has bought a bad title. Every man buys at an auction sale with his eyes open and the general principle that an auction purchaser cannot attack his own purchase except on the ground that the judgment-debtor has no saleable interest in the property must apply. (*Das and Bucknill, JJ.*) KEDAR NATH GOENKA v. MAHANATH JAGAN NATH DAS. 1 Pat. L. R. 73; 74 I. C. 134.

———O. 21, R. 91—*Execution sale—Setting aside—Suit at the instance of a third party—Revival of execution proceedings*

In execution of a money-decree two lots of property were sold and lot No. 1 was purchased by the decree holder. Subsequently a third person brought a suit against the decree-holder who was also the auction-purchaser of lot No. 1 and the judgment-debtor for a declaration of title to lot No. 1 and possession and obtained a decree the effect of which to set aside the sale in respect of that lot. The sale of lot No. 2 was also set aside at the instance of the judgment-debtor under the provisions of O. 21 R. 90 C. P. C. Afterwards the decree holder executed his decree for the entire decretal amount. The judgment-debtor objected that the execution petition was barred by limitation and that the amount covered by the sale of lot No. 1 could not be recovered as the only remedy open to the auction purchaser was to apply under O. 21, r. 91, C. P. C. to have the sale set aside.

*Held* that the effect of the decree in the suit was to set aside the sale and no formal order to that effect was required. The decree holder and the judgment debtor were both parties to the suit and therefore they are bound by the order. It is not necessary that the execution Court should formally cancel the order of satisfaction which

## C. P. CODE (1908), O. 21, R. 91.

was recorded after the sale of lot No. 1 before the decree-holder can proceed to recover the debt which has been revived in consequence of the decree declaring the sale of lot No. 1 to be invalid. (*Mullick and Buckmill, JJ*) RADHA KISHEN LAL v. KASHI LAL. 2 Pat. 829 : 1923 Pat. 342. 1 Pat. L. R. 358

O. 21, Rr. 91-93—If exhaustive—Remedy of auction purchaser dispossessed by successful claimant—Suit *lies*.

The provisions of O. 21, Rr. 91 to 93 are not exhaustive of the remedies open to an auction purchaser who after payment of full price is dispossessed by a claimant who succeeds in a suit brought under O. 21 R. 63 in establishing that the judgment debtor has no saleable interest in the property. The auction purchaser has a remedy by way of suit to recover his money. (*Harrison and Zafar Ali, JJ*) ASAD ULLAH KHAN v. KARAM CHAND. 4 Lah. 354.

O. 21, Rr. 91, 92—Suit for refund of purchase money—Absence of saleable interest—If *lies*.

An action purchaser cannot maintain a suit for refund of purchase money on the ground of absence of saleable interest in the judgment debtor. (*Rankin and B. B. Ghose, JJ.*) BANKA BEHARI DAS v. GURU DAS DHAR. 28 C. W. N. 20

O. 21, R. 92—Appeal against appellate order—If *lies*.

An order confirming or setting aside a sale is appealable under O. 43 R 1(j) and hence under S. 104, C. P. C., no second appeal lies in such a case. (*Shadi Lal C.J. and Le Rossignol, J.*) JAG GANNATH v. DAUD. 4 Lah. 243 : 75 I. C. 103 : 1923 Lah. 592

## O. 21, R. 92—Execution before Collector—Right of pre-emptor—Failure to appear before Collector—Order against—Effect

At an execution sale before the Collector, the same bid was made by two persons, but one of them in addition claimed to have a preferential pre-emption right. The Collector before confirming the sale directed the pre-emptor to appear before him, but as he failed to do so, confirmed the sale in favour of the other bidder. In a suit by the pre-emptor for possession, held under the rule corresponding to O. 21, R. 92 framed by the Govt. under Ss. 68 and 70 C. P. Code to deal with execution sales by Collectors, the order of confirmation was an order against the pre-emptor and hence final. (*Mears, C. J., Banerjee and Rafiq, JJ.*) BADRI SINGH v. TULSHI RAM. 45 A. 203 : 21 A. L. J. 53 : 1923 A. 186 (F. B.)

## O. 21, R. 92—Execution sale—Setting aside—Notice. See (1922) DIG, COL. 291. RAMJI DAS v. CHHAGAN LAL. 69 I. C. 745.

## O. 21, R. 92—Insolvency—Attachment and sale of property as belonging to insolvent—Defeated claimant—Right of suit.

Where a person whose claim to certain property sought to be sold as the property of the insolvent has been defeated, brings a suit to establish his right such a suit is not barred by O. 21

## C. P. CODE (1908), O. 21, R. 97.

R. 92 C. P. C. (*Harrison, J*) HARNAM v. GANPAT. 73 I. C. 367 : 5 Lah. L. J. 9 : 1923 Lah. 224

## O. 21, R. 92—No second appeal.

An order on an application seeking to set aside an auction sale on the ground of material irregularity and fraud is not open to second appeal. (*Abdul Raoof, J*) JAGAN NATH SETHI v. PIR MOHAMAD. 72 I. C. 788 : 1923 Lah. 287.

## O. 21, Rr. 93 and 91—Not retrospective—Right to sue for purchase money on sale turning out to be void—Difference between the old Code and new.

Under S. 315 of the C. P. Code of 1882 the purchaser at a sale in execution of a decree was competent to maintain a suit against the decree-holder for recovery of his purchase money when the judgment-debtor was found to have had no saleable interest in the property sold. The purchaser was not restricted to the special procedure in the execution department mentioned in S. 315. 40 A. 411, 22 B. 783, 37 C. 67; 40 M. 1009, Ref A suit to recover the purchase money would be governed by art. 120 of the Lim Act. *Semble*: The law is changed under C. 21, R. 93, C. P. C. and the remedy by suit is no longer available. 39 A. 114, 39 M. 803; 40 M. 1009, 43 A. 60 R. But the alteration in the law being of a substantial character is not retrospective and an auction purchaser whose right to obtain the purchase money was acquired before the coming into force of the new Code is not affected and his right is not extinguished. 35 A. 419, 23 M. L. J. 487; 39 M. 803, 18 L. W. 639 Rel. (*Mookerjee and Chatterjee, JJ.*) MAKAR ALI v. SARFADDIN.

50 Cal. 115 : 27 C. W. N. 183 : 70 I. C. 606 : 1923 Cal. 85

## O. 21, R. 95—Symbolical possession—Delivery of—Effect of as against judgment-debtor.

Delivery of symbolical possession instead of actual possession is effective against the judgment-debtor and gives rise to a fresh start of limitation against him. This principle avails also to persons claiming under the certified purchaser 5 C. 584, 16 C. 530, 4 C. 870, 24 C. 175 foll. 36 B. 373, 24 W. R. 418 not foll. (*Chatterjee and Pearson, JJ.*) BHULU BEG v. JATINDRA NATHSEN. 1923 Cal. 138.

## O. 21, R. 97—Delivery of possession—Second application for—Maintainability—Delivery on first application accepted by decree-holder as complete—Effect of.

The return of a warrant for delivery of immoveable property issued on an application made as against the judgment debtor for the execution of a decree for the possession of such property was that the delivery was complete, and this statement on the return was accepted by the decree-holder. The judgment-debtor had, during the pendency of the suit, granted a lease of a portion of the property. Alleging that he was not aware of the said lease when he accepted the delivery as complete, and that the lessee under the said lease prevented him from peacefully enjoying the property delivered, to him, the decree-holder applied again as against the lessee,

C. P. CODE (1908), O. 21, R. 98.

for removal of the obstruction and for the issue, if necessary, of a warrant of delivery. *Held* that the execution having been definitely closed by the delivery on the first application accepted by the decree-holder as complete, a second application by him for execution was in the absence of any allegation of fraud in the proceedings on the first application incompetent (*Oldfield and Venkatasubba Rao, JJ*) *IBRAHIM SAHIB v. KONAMMAL*.

70 I. C. 755 : 1923 Mad. 25.

— O. 21, R. 98—Applicability of—Presidency Small Cause Court—Order of ejectment—Obstruction—Power to remove. See PRES. SM. C. C. ACT, S. 48. 45. M. L. J. 66.

— O. 21, R. 100—Right to apply—Joint possession—Person claiming—Locus standi.

*Held* following 18 C. W. N. 695 and 3 M. 81 that claimant who has an interest in the land of which possession has been delivered in execution of a decree either as a member of a joint family or otherwise and who is affected by the delivery of possession can claim to be in possession of the property on his own account within the meaning of S. 331 of the C. P. Code of 1882 corresponding to O. 21, R. 100, C. P. Code (1908), 17 B. 715 not foll. (*Kotval, A. J. C.*) *A. K. SINGH v. RAM PRA SAG*. 1923 Nag. 52.

— O. 21, R. 101 & 103—Dismissal of claim petition—Effect—Adverse possession.

Where a claim petition was dismissed without investigation on the ground of delay, but there was a rider added that the petitioner's right would not be affected by the sale, the order is one against the claimant and must be challenged by suit within one year. The rejection of such a claim will estop the claimant from pleading adverse possession (*Odgers and Hughes, JJ*) *AISAMMA v. MOIDIN KUNHI BEARI*. 45 M. L. J. 690 : (1923) M. W. N. 633 : 18 L. W. 520

— O. 21, R. 103 (S. 331)—Order without investigation of the merits of the case—Effect of.

Where the claim put forward by an obstructor was not treated as a suit and no issues were framed nor evidence taken, but the matter was treated as an interlocutory proceeding, the decision could not be *res judicata* in any subsequent proceeding. 9 B. L. R. 936 followed (*Schwabe, C. J. and Wallace, J.*) *KOONAM VELLI UNNARA v. K. P. KUNHI RAMAN*. 44 M. L. J. 443 : 17 L. W. 322 : 32 M. L. T. (H.C.) 146 : 72 I. C. 582 : 1923 Mad. 514

— O. 21, R. 103—Scope of—Bar of suit—

O. 21, R. 103 applies only where an order under one of the rules 98, 99, or 101 has been passed. Where the order of the lower Court is not one passed under any of the said rules there is no disability arising under Rule 103. (*Martineau, J.*) *HARGOLAL v. CHANDU LAL*. 69 I. C. 557 (1) : 1923 Lah. 145

— O. 22, R. 2 and 3—Appeal—Death of one of the plaintiffs—Respondents—Legal representative not brought on record—Abatement.

Where several plaintiffs sued for a declaration that deft. was not the owner of the land in suit and obtained decrees in the court and pending a

C. P. CODE (1908), O. 22, R. 2.

second appeal, one of the plaintiffs-respondents died and his legal representatives were not brought on record, *Held* there was no abatement of the appeal as a whole and that the appeal could proceed against the surviving defendants. (*Le Rossignol and Zafar Ali, JJ.*) *LALBA RAM v. SHAMBU NATH* 5 Lah. L. J. 14 1923 Lah. 252.

— O. 22, R. 2 and 3—Appeal—Order made in execution proceedings—Death of one of the judgment-debtors—Legal representative not brought on record—Effect of.

Where in an appeal against an order in execution proceedings one of the judgment-debtors died and his legal representatives were not brought on the record, the order on appeal is a nullity so far as the deceased judgment-debtor was concerned and did not bind his legal representatives (*Broadway and Wilberforce, JJ.*) *MEHTA BARKAT KAI v. MT. GHULAM FATIMA*. 5 Lah. L. J. 1 : 70 I. C. 929.

— O. 22 R. 2 and 5—Death of appellant—Legal representative brought on record—Right of respondent to object at the hearing.

On the death of an appellant in a pending appeal, a person alleging himself to be the legal representative of the deceased applied to continue the appeal and was brought on record as such without notice to the respondent. At the hearing the respondent objected that the alleged legal representative was not the proper legal representative and that the appeal had abated, *Held* that the respondent was entitled to raise the objection at the hearing of the appeal. (*Krishnan and Ramesam, JJ.*) *PALCHUR MAHALAKSHAMMA v. VEMI REDDI*. 44 M. L. J. 60 : 32 M. L. T. (H.C.) 44 : 17 L. W. 8 : 69 I. C. 529 : 1923 Mad. 367.

— O. 22, R. 2 and 3—Legal representative—Right of to continue suit or appeal—Abatement.

When a party to a suit dies a legal representative is appointed merely in order that the suit might proceed and a decision be arrived at. It is the original party's rights and disabilities that have to be considered and the mere fact that the legal representative could not in his individual capacity have brought a suit for the relief claimed does not render the pending suit liable to dismissal as having abated. (*Broadway and Zafar Ali, JJ.*) *GULLI v. SAWAN*. 4 Lah. 72 : 74 I. C. 146 : 1923 Lah. 45.

— O. 22, R. 2—Purdanashin lady—Delay in bringing on record legal representative.

Where the respondent a purdanashin lady died and the appellant came to know of it only when the process server reported her death, it was a fit case for excusing the delay in bringing on record the legal representative. (*Das and Macpherson, JJ.*) *NATHSAHAI v. IMAM REZA*. 74 I. C. 912.

— O. 22, R. 2 and 3—Suit against dead man—Addition of legal representatives.

A suit against a dead man is a nullity, consequently any order made in the suit allowing amendment of the plaint by substituting the legal representative of the deceased as defendant and allowing the suit to proceed against him is a nullity. It is immaterial that the suit was brought

C. P. CODE (1908), O. 22, R. 2.

*bonafide* and in ignorance of the death of such person. 31 M. 86 Ket. (Mulla, J.) RAMPATAB BRU MOHANDAS v. GAURISHANKER.

25 Bom. L. R. 7.

—O. 22, R. 2—*Suit against several defendants—Liability of each ascertained—Death of some of the defendants—Abatement*

The plaintiffs sued the defendants 210 in number, to recover a war-loan bond for Rs 75,000 or in the alternative for Rs 75,000 with interest thereon. Plaintiffs' case was that the ticket, which won the second prize in the Burma War Loan Sweepstake, a War Loan Bond for Rs 75,000, which had issued in the name of the 1st plaintiff, had been wrongly made over by the Executive Committee of the Sweepstake to the defendants on their false representations that they were purchasers of the ticket in question, and that the defendants were liable jointly and severally to return the bond to the plaintiffs or to pay the money equivalent with interest to date, and that defendants Nos. 1 to 209 had transferred the bond to defendant No. 210. The trial Court dismissed the suit and pending an appeal by the plaintiffs some of the defendants died. Their legal representatives were not brought on record. On a question arising as to whether the appeal had abated, *Held* that the plaintiffs had a cause of action for the sum sued for against each of the defendants out of the proceeds of the bond which had been distributed and that the death of some of the defendants did not cause the suit to abate. (Irratt and McGregor, JJ.) MAUNG MU v. MAUNG KAN GYI. 1 R. 618.

—O. 22, R. 3—*Abatement of appeal—Limitation Act—Art 176—C. P. Code Amending Act 26 of 1920—Effect of.*

The provisions of Act 26 of 1920 curtailing the period of limitation for bringing on record the legal representative of a deceased appellant to three months from the date of his death apply also to cases where the death has taken place even before the passing of the Amending Act. (Kolwal, A.J.C.) NIMBA v. JANKI. 71 I. C. 176. 1923 Nag 166

—O. 22, Rr. 3 and 9—*Abatement of suit—Order setting aside—Bringing on record of legal representatives. See (1922) DIG. COL. 296* LAKSHMIBAI v. YESHWANT. 47 Bom 92; 75 I. C. 283.

—O. 22, R. 3—*Admission of a person as legal representative—Effect of.*

The admission of a person as a legal representative for the purpose of prosecuting the suit does not conclusively establish his right to do so if his legal position is one of the main issues in the suit itself. Similarly the decision that a person is a legal representative only to a limited extent does not preclude him from proving in the suit what his full rights are 27 B. 163 28 A. 109 followed (Batten, J.C.) MT. DHAPU v. RAMAUTAR 70 I. C. 209; 1923 Nag. 209.

—O. 22, R. 3—*Applicability—Mortgage suit—Death of plaintiff after preliminary decree—Bequest of interest to B Application by B. to be brought on record—Limitation.*

C. P. CODE (1908), O. 22, R. 4.

A died on 28-4-16 after obtaining a preliminary decree dated 30-3-16 obtained on a mortgage. The period of redemption expired on 30-7-16 B who claimed to succeed to A's interests under a will put in a petition on 26-5-19 to be brought on record and to be given a final decree.

*Held*, the suit had abated under O. 22, R. 3. The right to sue in O. 22, R. 3 includes in the case of mortgage suits the right to obtain a final decree after the passing of a preliminary decree. (Ayling and Venkatasubba Rao, JJ.) DAKOJU SUBBRAYADU v. MUSTI RAMADASU.

1923 Mad. 237 (1).

—O. 22, R. 3—*Decree passed in appeal after death of one of joint plaintiffs—No legal representative on record—Effect.*

Where one of several plaintiffs prefers an appeal in which the others are also interested and a decree is passed in ignorance of the death of one of the joint plaintiffs, the judgment is a nullity. (Rafiq and Piggott, JJ.) AMBIKA PRASAD v. JHINAK SINGH. 45 A. 286; 21 A. L. J. 91; 1 R. 4. A. 92 71 I. C. 321; 1923 A. 211.

—O. 22 R. 3—*Legal representative—Who is.*

The words 'legal representative' cannot be construed to mean all legal representatives. They must include any legal representative to whom the right to sue survives. (Mannair, A. J. C.) NARAYAN v. AMRITA. 1923 Nag. 101 (2).

—O. 22, R. 3—*Minor defendant—Guardian ad litem—Appointment of head clerk—Guardians address and whereabouts known—Procedure illegal—decree—Setting aside—Inherent power of court. See (1922) DIG. COL. 310* JABU AMMAL v. MINOR NATARAJAM PILLAI. 70 I. C. 867.

—O. 22, R. 3—*Pro-forma defendant's death*

Where the proprietors who were joined as defendants were merely formal defendants and were not interested in the result of the suit brought by the plaintiffs and it was found that the plaintiffs were not suing in a representative capacity but they were suing on their own interest. *Held* the death of one of the proprietors who was not a necessary party to the suit is of no consequence and cannot result in the abatement of the suit either in part or in its entirety. (Moti Sagar, J.) LEKHA v. BHANI. 1923 Lah 647.

—O. 22, R. 3—*Pro forma respondents.*

Not bringing on record the representatives of pro forma respondents does not cause abatement of the whole appeal. (Broadway, and Jafar Ali, JJ.) ZAIDA v. RAJA. 1923 Lah. 350.

—O. 22, R. 4—*Abatement of appeal against one of the respondents—Abatement against other respondents.*

Where for failure to bring on record the representatives of one of the respondents who is a necessary party, the appeal abates, it also abates as against all the respondents, 35 Bom. 393 22 Bom. 718; 22 All. 430 Dist. (Maccoll, J.) MA ZAN NYEIN v. MAUNG KYAW ZAN.

1 Rang 189; 74 I. C. 1027. 1923 Rang. 258.

—O. 22, R. 4—*Abatement of appeal—Several respondents—Joint cause of action—*

C. P. CODE (1908), O. 22, R. 4.

*Death of one respondent—Legal representative not brought on record—Effect.*

Where there is a decree for joint possession in favour of the respondents one of whom dies the decree cannot be questioned against the legal representatives of that respondent owing to lapse of time without their being brought on record, then the whole appeal abates for if the appeal succeeds against the respondents who remain alive there might be conflicting decisions of the court, that is to say, there might be the decision of the first Court in favour of the respondent who has died, a decision which cannot be questioned and the decision of an appellate court contrary to the decision of the first Court which cannot be called in question owing to the abatement. (*Greaves and Panton, JJ*) SHEIKH DENDOO v. SHAIKH SACHOO 72 I. C. 2.

—O. 22, R. 4—*Abatement—Death of one of the legal representatives—Legal representative not brought on record*

If on the death of one of the defendants his legal representatives are not brought on record the question whether the suit abates as a whole depends upon whether the suit can proceed in the absence of the legal representatives of the deceased defendant. Where the lands in dispute are separately held by some of the defendants and the deceased defendant had no joint interest in those plots of land, the suit does not abate. (*Chatterjee and Pearson, JJ*) SARAT KAMINI DAS v. CHAITANYA CHANDRA. 1923 Cal. 289

—O. 22, R. 4—*Abatement—Failure to object—Effect.*

Where on a party's death, no application is put in to bring in his legal representatives within the time allowed by law, the appeal abates and no failure by the persons concerned to object to action taken on an application presented after expiry of such time would alter the fact of abatement. (*Campbell, J.*) WAHID BAKSHI v. LALTA PERSHAD. 73 I. C. 387.

—O. 22, Rr. 4, 5 and 9—*Abatement—Substitution of parties.*

No substitution can be made until an abatement has been set aside on application under O. 22, R. 9 (2), C. P. Code.

In order that the abatement may be set aside, it has to be proved that the petitioner was prevented by sufficient cause from continuing the suit. A person prosecuting a suit or an appeal is bound to keep himself informed of the adversary's death. A mere plea of ignorance of the death of an opposite party which took place many months or even years before is not a sufficient ground for setting aside the abatement. (*Das and Macpherson, JJ.*) MAHANTH RAMPERKASH DAS v. KUNJ LALI. 4 Pat. L. T. 567.

—O. 22, R. 4—*Appeal—Abatement—Decree for joint possession—Appeal by deft.—Omission to substitute legal representatives of deceased respondent.*

Where a joint decree for possession in favour of the several plaintiffs was passed by the trial court and pending an appeal therefrom by the defendant, one of the plaintiffs respondent dies and his legal representatives are not brought on

C. P. CODE (1908), O. 22, R. 4.

record within time, the whole appeal abates. 24 C. W. N. 44 foll. (*Walmsley and Sukrawardy, JJ.*) ARJAN MIRDHA v. KALI KUMAR CHAKRABUTTY. 1923 Cal. 294 (1)

—O. 22, R. 4—*Appeal—Death of respondent—Remand by appellate Court—Legality of order.*

A suit for cancellation of a sale held under the Putni Regulation was decreed in the court of first instance, upon appeal by the two Zamindars (defendants) that judgment was reversed and the suit was dismissed. The plaintiff thereupon appealed to the High Court. They joined as respondents three sets of persons, viz., (1) the auction purchaser, (2) the two Zamindars and (3) the persons alleged to be joint tenants in the putni. During the pendency of the second appeal in the High Court the executor to the estate of one of the Zamindar respondents, died on the 10th June 1916. The plaintiffs, it is now asserted, were not aware of this circumstance and the auction purchaser as also the other Zamindar respondents were equally ignorant of the event. The result was that on the 31st January 1917, when the appeal was taken up for final disposal in this Court, the hearing proceeded on the assumption that all the parties were properly represented on the record. The appeal was heard, the decree of the lower appellate Court was set aside and the case was remanded for reconsideration. When the case went before the District Judge, he was informed on the 20th December 1917 that one of the Zamindar defendants had died during the pendency of the appeal in the High Court and that the representative in interest of that Zamindar was not bound by the order of remand made by the High Court. Thereupon the District Judge held that the appeal could not be reheard by him. Held the order of the High Court was not a nullity by reason of the death of one of the respondents, that the High Court had jurisdiction to hear the appeal and that the District Judge should have reported the case for the orders of the High Court. (*Mookerjee and Chotzner, JJ.*) ABDUL AZIZ v. LAKHMI CHANDRA MAJUMDAR. 37 C. L. J. 494 : 74 I. C. 545 : 1923 Cal. 676.

—O. 22, R. 4—*Death of certain respondents—Effect.*

Where during the pendency of an appeal in a suit relating to succession, some of the successful respondents died and their legal representatives were not brought on record, the appeal did not abate *in toto* but only as regards the shares of those respondents. (*Broadway and Abdul Qadir, JJ.*) NANDOO SINGH v. BALJIT SINGH. 5 Lah. L. J. 203 : 69 I. C. 495.

—O. 22, R. 4—*Death of defendant—Legal representative—Right to costs.*

Where a defendant dies pending a suit, it is open to his legal representative to come on record on his application notwithstanding the plaintiffs omission to implead him. In such a case the Court might award costs to the legal representative. (*Schwabe, C. J. and Ramesam J.*) KUPPUSWAMI CHETTY v. SINGARAVELU CHETTY. 45 M. L. J. 233 : (1923) M. W. N. 267 : 18 L. W. 99 : 1923 Mad. 679.



C. P. CODE (1908), O. 22, R. 4.

——— O. 22, Rr. 4 and 9—*Death of party—Legal representative—Application to bring on record—Delay*

A Court has no power to extend the time allowed for bringing on record the legal representative of a deceased defendant beyond the three months prescribed (*Fremantle, S. M.*) *GOSHAIN SAHDEOGIR v. MANNU KOERI* L. R. 4 A 148 (Rev.)

——— O. 22, R. 4 (2)—*Death of one respondent—Member of joint Hindu family—Effect.*

Where the respondents are the members of a joint Hindu family and one of them dies but no legal representative is brought on record, the appeal abates not only against him, but as against all as the interests cannot be separated. (*Fremantle, S. M.*) *NAND PRASAD v. BINDESHRI RASAD.* L. R. 4 Ail 391. (Rev.)

——— O. 22, R. 4—*Joint decree—Death of one of the decreeholders—Legal representative not brought on record—Effect of.*

Where an appellate court is called upon to set aside a decree for possession which enured to the benefit of four persons and one of these persons died and his representative in-interest had not been brought on record. *Held* that the appeal had abated.

Even if the appeal were to succeed, the representative-in-interest of the deceased plaintiff would not be bound by the judgment on appeal and would be at liberty to execute the decree in its entirety as one of several joint decree-holders. The appeal had consequently become infructuous (*Mookerjee and Rankin, JJ.*) *MIDNAPORE ZEMINDARY CO. v. ISHAN CHANDRA CHOWDHURY.*

72 I. C. 479

——— O. 22, Rr. 4 and 11—*Legal representative—Statutory period for bringing on record—Extension of time whether allowed.* See (1922) DIG, COL 298 *WALAYATKHAN v. MT. MALAN*

5 Lah. L. J. 119

——— O. 22, R. 4—*Minor—Mistake as to—Amendment.*

Where an application to be brought on record on behalf of a minor was made within 6 months through a *bona fide* mistake as to the period of limitation to bring on record a representative which had been reduced to 3 months by Act XXVI of 1920, the order rejecting the application was set aside. (*Shah and Crump, JJ.*) *KARIYAPPA FAKIRAPPA v. TANTAPPA.*

70 I. C. 832 : 1923 Bom 40.

——— O. 22, R. 4—*Pro forma defendant—Death of—Decree passed in ignorance—Effect*

The death of a *pro forma* respondent during the pendency of an appeal and the passing of a decree without his legal representative being brought on record do not render the decree a nullity. (*Rafiq and Piggott, JJ.*) *AMBIKA PRASAD v. JHINAK SINGH.* 45 A. 286 : 21 A. L. J. 91.

L. R. 4 A. 92 : 71 I. C. 321 : 1923 A. 211.

——— O. 22 Rr. 4 and 6—*Scope—Appeal abatement—Joint and indivisible.*

When the appellants lived 10 miles from the respondents and no reason had been shown for holding that they were prevented by any suffi-

C. P. CODE (1908), O. 22, R. 9.

cient cause from ascertaining the death of one of them.

*Held*, the appeal automatically abated against him and his representative at the end of six months. Where relief sought against defendants is joint and indivisible, abatement against one is abatement against all. 1 Lah. 225 and 56 I. C. 927 Foll. 60 I. C. 722 Dist. (*Broadway and Harrison, JJ.*) *SARDARA v. ALLAHYAR.*

73 I. C. 604 : 1923 Lah. 132.

——— O. 22, R. 4 (2)—*Legal representative—If can alter pleadings.*

The legal representative of a party to a suit occupies the same legal character as the deceased and hence must stick to the position taken up by him in the pleadings (*Oldfield and Ramesam, JJ.*) *KOZHIKOT PAIHINHARE KOVILAGATH v. SANKARA MENON* 73 I. C. 376.

——— O. 22, R. 4 (3)—*Ignorance of death of Respondent.*

There was an affidavit that the appellants, one of them a minor and the other, his brother and next friend, a mere youth, were absent from Multan for the eminently laudable purpose of prosecuting their studies, and were therefore not aware of the death of the respondent. *Held* sufficient cause was established and to set aside the abatement (*Abdul Raof and Cambell, JJ.*) *TIRATH RAM v. MAHOMED ABDUL RAHIM SHAH.* 73 I. C. 616 : 1923 Lah. 546.

——— O. 22, R. 5 O. 22, R. 4—*Legal representatives—Decree for sale on mortgage.* See (1922) DIG COL 298 *RAM PRASAD CHIMONLAL v. ANUNDJI AND CO.* 69 I. C. 885.

——— O. 22, R. 5—*Legal representative—Impleading some of the parties—Effect of.*

Where pending an appeal, the respondent dies and only one of his legal representatives is brought on record without any objection the decision is binding on the estate. Once the Court decides that a person is the legal representative for the purposes of a suit under O. 22, R. 5 then he represents the estate and the adjudication is binding on it (*Brown, A. J. C.*) *MAUNG PO MYA v. MAUNG GYAN BON.* 1 Bur. L. J. 272 : 72 I. C. 205 : 1923 Rang. 114.

——— O. 22, R. 9—*Abatement—Application for legal representative—Order an—Appeal.*

Where a party to a suit dies and more than 3 months after an application is made to bring on record his legal representative, the application is one under O. 22, R. 9 (2) and the order thereon is appealable under O. 43, R. 1 (k) (*Moti Sagar, J.*) *BADLU v. MT. NARAINI.* 74 I. C. 17.

——— O. 22, R. 9—*Abatement—Setting aside—Legal representatives—Minority of.*

Where the delay in bringing on record the legal representatives was due to the fact that the legal representatives were minors, who would not have obtained execution without obtaining a succession certificate under Act VII of 1889, and this Succession Certificate was obtained after the expiry of time fixed for addition of legal representatives. *Held* there is sufficient reason to excuse the delay within the meaning of section 5 of the Indian Limitation Act, read with O. XXII

C. P. CODE (1908), O. 22, R. 9

R. 9. Code of Civil Procedure. (*Kanhaiya, Lal J. C.*) SYED AKHTAR HUSAIN v. QUDRAT ALI.  
9 O. & A. L. R. 287 : 73 I. C. 215.

—O. 22, R. 9 and 3 ACT XXVI OF 1920—*Abatement setting aside of—Sufficient cause*

Where the appellant had reason to suppose that the enactment of Act XXVI of 1920 would not affect the period of limitation for an application to implead the legal representative of a respondent who had died before the Act came into force, the abatement was set aside. (*Martineau and Campbell, JJ.*) NIAZ AHMAD KHAN v. ABDUL LATIF.  
1923 Lah. 475

—O. 22 R. 9—*Death of defendant—Abatement—Order for restitution—Limitation—Art 177 of Limitation Act.*

Where a suit abates on account of the death of the sole defendant in the suit the abatement must be set aside under O. 22 R. 9 C.P. Code before a substitution of parties could be made. The period of limitation is that prescribed by Art 177 of the Limitation Act. (*Coutts and Das, JJ.*) MT BIBEE KHOZAIMA v. THE OFFICIAL LIQUIDATOR OF THE KAYESTHA TRADING AND BANKING CORPORATION  
2 Pat. 168 : 1923 P. 417.

—O. 22, R. 9—*Trustee paying expenses of appeal—Legal Representative not brought on record—Abatement.*

An appeal was filed by one D, the real defendant appellant through one B. During the pendency of the appeal D died but his representative was not brought on record. One M a trustee of D's estate paid all the necessary expenses of the appeal but was not brought on record as the legal representative of D. On the question of abatement it was contended that no question of abatement arose. Held the defraying the costs of the litigation out of the trust fund, will not necessarily make him or the Estate, a party, and the appeal had abated. (*Broadway and Zafar Ali, JJ.*) DAULAT RAI v. LILA RAM.  
1923 Lah. 470

—O. 22, R. 10—*Applicability of.*

O. 22, R. 10 applies only to cases which do not fall under the preceding rules of the same Order. (*Ayling and Venkatasubba Rao, JJ.*) DAKOJI SUBBARAYADU v. MUSTI RAMADASU.  
1923 Mad. 237 (1).

—O. 22, R. 10 and 47—*Ascertainment of mesne profits—Tenancy created pendente lite—Joinder of tenant—Bad.* See (1922) DIG. COL. 299. MAHARAJAH SIR MANINDRA CHANDRA NANDI v. RAM LAL BHAGAT.  
4 Pat. L. T. 1 : 1 Pat. 581 (P. C.)

—O. 22 R. 10—*Assignment pending suit—Rights of assignee—Interlocutory order—Appeal*

The plaintiff in an administration suit assigned his interest to the applicant but continued the suit in his own name. The trial Court refused to appoint a Receiver of the property and the plaintiff appealed to the High Court. Pending the appeal, the plaintiff died and the assignee applied to the trial Court to continue the suit but did not apply in the High Court to continue the appeal whereupon the appeal abated. Held, that the trial Court had jurisdiction to entertain in the

C. P. CODE (1908), O. 22, R. 12.

application for bringing on record the assignee. Where the High Court sends for the records in an appeal from an interlocutory order the suit is still pending on the file of the trial Court and it has jurisdiction to bring on record the legal representatives of a deceased plaintiff. (*MacLeod, C. J. and Crump, J.*) BHOGILAL KIRPASHANKER v. DARASHA KOOVERJI.  
25 Bom. L. R. 308 : 1923 Bom. 303.

—O. 22, R. 10 and O. 23 R. 1—*Compromise of suit—Compromise filed in Court—Decree not passed—Application by purchaser to be added as a party.*

Where a suit is alleged to have been compromised and a document embodying the compromise has been filed in court, the suit does not cease to be pending until the passing of a decree. Consequently it is open to a person alleging himself to be the purchaser of the property before the compromise is entitled to apply under O. 22 R. 10 C. P. Code to be added as a party to the suit. An applicant who invokes the aid of O. 22, R. 10 is not entitled as a matter of right to an order in his favour regardless of delay or laches. The court undoubtedly has a discretion in the matter which must be judicially exercised. Where the result of dismissing the application would be to start a fresh suit between the transferee and the assignor impeaching the compromise as not bona fide, the enquiry might as well be made in the suit itself after adding the transferee as a party. 32 C. 483 : 13 C. L. J. 487, 43 M. 37, 37 A. 326 ref. (*Mookerjee and Rankin, JJ.*) LAKSHAN CHUNDER DEY v. NIKUNJAMANI DASSI.  
27 C. W. N. 755.

—O. 22, R. 10—*Devolution of interest—Gift by father to son—Suit for pre-emption—Right to continue the suit.* (1922) DIG. COL. 300. MIRZA SADIQ HUSAIN v. MAHOMED KARIM  
70 I. C. 53.

—O. 22, R. 10—*Limitation for impleading assignee.*

In the case of the death of a party after his interest has devolved on another, there is no question of bringing on record the legal representative within the period of 90 days prescribed by law, and even in a case where the devolution took place while the suit was pending in the trial court, an application under O. 22, R. 10 C. P. Code can be made in the appellate court. (*Chatterjee and Pearson, JJ.*) RAJANI KANTA ROY v. RAJA JYOTI PRASAD.  
27 C. W. N. 710 : 75 I. C. 255.

—O. 22, R. 10 and 3—*Public trust—Death of trustee—Subsequent trustees impleaded as parties—Defences open to.* See (1922) DIG. COL. 301. SUNDARESAN CHETTY v. VISVANATHA PANDARASANNADHI AVERGAL.  
72 I. C. 103.

—O. 22, R. 12—*Abatement—Execution proceedings—Appeal*

The provisions of O. 22 relating to the abatement of suits and appeals do not apply to execution proceedings or to appeals from orders made in such proceedings. (*Campbell, J.*) MIR KHAN v. SHARFU.  
5 Lah. L. J. 163 : 74 I. C. 577 : 1923 Lah. 560.

C. P. CODE (1908) O 22, R. 12.

—O. 22, R. 12—*Joint decree—Death of one decree holder—Legal representative not brought on record—Effect.*

Where in an appeal against a joint decree in favour of many persons, one of them dies and his legal representatives are not brought on record, the appeal abates as against all of them. (*Daniels J.*) GAJRAJ TEWARI v. BHAGIRATH PANDE. 74 I. C. 14.

—O. 22, R. 12—*Mortgage decree—Sale on non-payment in time—Death—If heirs to be impleaded.*

Where under a mortgage decree the property is to be sold if money is not paid in a certain time, it is not necessary that the heirs of a deceased party should be impleaded before the right of sale is exercised. (*C. C. Ghose and Panton, JJ.*) HEMENDRA LAL SINGH DEO v. FAKIR CHANDRA DATTA. 50 Cal. 650 : 74 I. C. 929.

—O. 23, R. 1—*Appellate Court—If can allow withdrawal with permission to file fresh suit.*

A court of appeal has power to grant permission to withdraw a suit with liberty to file fresh suit. (*Ryves, J.*) TEWARI GAJRAJ SINGH v. SRI THAKURJI MAHARAJ. 74 I. C. 894.

—O. 23, R. 1—*Application to withdraw suit—Withdrawal of application.*

An application to withdraw a suit can itself be withdrawn for proper reasons and the suit could be proceeded with thereafter. 1912 M. W. N. 997 *Rei (Oldfield, J.)* LAKSHMANA PILLAI v. APPALWAR AIWAR AYYANGAR. 44 M. L. J. 77 : 17 L. W. 632 : 71 I. C. 288 : 1923 Mad. 246

—O. 23, R. 1—*Leave to withdraw suit with liberty—Costs to follow the event—Order negating costs of successful party—Interference on appeal.* See COSTS 25 Bom. L. R. 242.

—O. 23, R. 1—*Leave to withdraw suit with liberty to sue afresh—Grounds for* See (1922) DIG. COL. 302 LAKSHMIBAI v. YESHWANT. 47 Bom. 92 : 75 I. C. 283

—O. 23, R. 1—*Revenue court—If can grant permission to withdraw with liberty to file suit in civil court.*

Quære if a Revenue court can grant permission to withdraw a suit or application with liberty to file a fresh suit or application in a civil court. (*Walmsley and B. B. Ghose, JJ.*) SASI KANTA ACHARJA v. SALIM SHEIKH. 50 Cal. 626 : 74 I. C. 1001 : 27 C. W. N. 987 : 1923 Cal. 624.

—O. 23, R. (1)—*Right to withdraw suit in appellate stage not an absolute right.*

An appellant is not entitled to withdraw his suit in the appeal court under O. 23, R. 1 (1) as a matter of course. In other words a plaintiff appellant has no absolute right to withdraw his suit in appeal. (*Dalal A. J. C.*) SAIED ASHFAQ HUSAIN SAIED BUNYAD HUSAIN. 9 O. & A. L. R. 415 : 1923 Oudh 252

—O. 23, R. 1—*Trial on merits—Dismissal—Withdrawal in appeal—Defect.*

C. P. CODE (1908), O. 23, R. 1.

A suit in ejectment was dismissed on the merits. In appeal a court cannot grant him permission to withdraw on the ground that he failed to implead a brother of the defendant as party to the ejectment proceedings. (*Fremantle ; S. M. and Burn, J. M.*) JAGAT NARAIN KURMI v. JAI NARAIN LAL. L. R. 4 All 410 (Rev.)

—O. 23, R. 1—*Withdrawal—Powers of appellate Court.* See (1922) DIG. COL. 304. UDOY CHAND v. MOLLA SYED REASAT HOSSAIN. 70 I. C. 484.

—O. 23, R. 1—*Withdrawal of suit with liberty to sue—Finality of order—Institution of subsequent suit.*

Where a suit has been allowed to be withdrawn with liberty to sue afresh, the court trying the subsequent suit is not competent to enter into the question whether the court which granted the plff permission to withdraw the first suit with liberty to bring a fresh suit had properly made such order (*Chatterjee and Newbould, JJ.*) SAMADDI SHEIKH v. FULBASH BEWA. 1923 Cal. 269 (1)

—O. 23, R. 1—*Withdrawal of suit in —Plaintiff — Respondent — Right of — Discretion of Court—Appeal by some defendants only—Withdrawal of suit against them in appeal leaving intact decree against non-appealing defendants—Appellant—Defendants aggrieved by decree against non appealing defendants—Effect—Ryotwari tracts—Irrigation disputes—Decree against Government—Ryots when aggrieved by—Appeal from decree against Government —Their right of.*

O. 23, R. 1, C. P. C., which gives a plaintiff the right to withdraw his suit and abandon part of his claim is inapplicable to the case of a plaintiff-respondent. Assuming that the Appellate Court can in the exercise of its discretion, allow a plaintiff-respondent to withdraw his suit as against the defendant-appellant, it will not be a sound exercise of such discretion to allow the withdrawal in a case in which some of the defendants only have appealed, and they will be aggrieved by the decree of the Court below being allowed to stand as against the other defendants who have not appealed.

Ryots in ryotwari tracts whose lands are irrigated by a Government tank are prejudicially affected by a decree against the Government affecting the water-supply to that tank can appeal against the same though the Government does not choose to appeal against it. (*Ayling and Odgers, J. J.*) DHARMA RAJA v. PETHU RAJA. 45 M. L. J. 212 : 18 L. W. 243 : (1923) M. W. N. 677 : 74 I. C. 4 : 46 Mad. 811 : 1924 Mad. 79.

—O. 23, R. 1—*Withdrawal of suit without leave—Bar to fresh suit—Same subject matter.*

A previous suit on the same subject-matter having been withdrawn without leave to bring a fresh suit *Heid* the present suit was barred. (*Fremantle, S. M.*) BACHCHA v. MD. UMAR. L. R. 4 A. 231 (Rev.)

—O. 23, R. 1—*Withdrawal of suit without liberty to bring a fresh suit—Same cause of action—Subsequent suit with added prayer—Bar.*

## C. P. CODE (1908), O. 23, R. 1.

In a prior suit the plaintiffs claimed a declaration of their title to a certain War Bond in the hands of one of the defendants. The suit was withdrawn without liberty to bring a fresh suit. Subsequently the plaintiffs brought a suit for the consequential relief of the recovery of the War Bond or its value. *Held* that the subsequent suit was barred by O. 23, R. 1, C. P. Code. (*Pratt and Macgregor, JJ.*) MAUNG MU v. MAUNG KAW GYI 1 R. 618.

## O. 23, R. 1—Withdrawal of suit—Order of Court granting leave—Form of.

The procedure under O. 23, R. 1, C. P. Code is that the plaintiff withdraws his suit. The suit is not dismissed at all and the act is the act of the plaintiff, not of the Court. Where there was no application and no withdrawal and the suit was dismissed, the Court remarking that the plaintiffs might sue afresh if they chose *Held* that there was no grant of leave to withdraw the suit with liberty to sue afresh. (*Dalal and Simpson, A. J. C.*) FATEH SINGH v. JAGANNATH BAKSH SINGH 10 O. L. J. 132 : 74 I. C. 549 : 1923 Oudh 242.

## O. 23, R. 1 (3)—Subject matter if means property in suit—Suit on different cause of action.

The words "subject matter" used in O. 23, R. 1 (3) are not to be identified with the "property" in the suit. They mean the cause of action for a claim. A suit as a different cause of action though relating to the same property is not barred, if the suit is withdrawn without leave of Court. (*Wazir Hasan, A. J. C.*) PUTTOO KHAN v. AHMAD ZAMAN KHAN. 9 O and A. L. R. 978 : 74 I. C. 56.

## O. 23, R. 1 (3)—Withdrawal of suit with liberty to sue afresh—Leave not granted—Fresh suit barred.

In a suit in ejectment by the Zemindar against a tenant, the Zemindar did not raise the plea of illegal subletting by the tenant. The Zemindar withdrew the suit on the ground that 12 years had not been completed by the tenant but leave to institute a fresh suit was not obtained. *Held*, that a subsequent suit for ejectment on the ground of illegal subletting was barred by O. 23 R. 1 (3) C. P. Code. (*Burn, S. M. and Pearson, J. M.*) MADHO SINGH v. MT. RANIKUAR. L. R. 4 A 13 (Rev.) : 9 O & A. L. R. 407.

## O. 23, R. 3—Adjustment—What is.

An adjustment which is not *bona fide* and as the basis of which the court was not asked to record satisfaction and pass a decree in accordance therewith does not comply with the provisions of O. 23, R. 3, C.P.C. (*Mr. Ameer Ali*) SETH KEVALDOSS TRIBHAVANDAS v. SANKERLAL BULAKHIDAS. 45 M. L. J. 763 : 33 M. L. T. (P.C.) 424 : 1923 P. C. 178 (P. C.).

## O. 23, R. 3—Award in a pending suit—Private arbitration—If enforceable. See (1922) DIG. COL. 304. AMAR CHAND CHAMARIA v. BANWARI LALL RAKSHIT. 69 I. C. 808.

## O. 23, R. 3—Award—Misconduct—Jurisdiction to enquire.

It is impossible to conceive that it was intended when an application was made to the Court under O. 23 R. 3 C. P. Code that all that the

## C. P. CODE (1908), O. 23, R. 3

Court has to do was to satisfy itself that there had been an agreement to refer and an award, and that it is bound to pass a decree in terms of the award, without considering any objection raised by one party or the other that there had been misconduct on the part of the arbitrators, such as in any other case would vitiate an award. (*Macleod, C. J. and Crump, J.*) THAKORF DAS v. LAI LUBHAI. 25 Bom. L. R. 452 : 75 I. C. 102 : 1923 Bom. 401.

## O. 23, R. 3—Compromise in fraud on some of the parties—Not allowed.

The Court will refuse to accept compromise between plaintiff and one defendant if the result of it would be to deprive the other defendants of the fruit of their success. (*Dalal, A. J. C.*) SAIED ASHFAQ HUSAIN v. SAIED BUNYAD HUSAIN. 9 O. & A. L. R. 415 : 1923 Oudh 252.

## O. 23, R. 3—Compromise—Matters outside suit affected—Decree—Form of.

Where a compromise is not within the scope of the suit, no decree could be made to give effect thereto under O. 23, R. 3 Civil Procedure Code. When the compromise has been effected between the parties, the proper course to follow is to recite the compromise in the decree in its entirety, but to pass a decree in accordance therewith only in so far as it relates to the suit. (*Mookerjee and Panton, JJ.*) JIBAN KRISHNA CHAKRAVARTHI v. RAVESH CHANDRA DAS. 38 C. L. J. 72.

## O. 23, R. 3—Compromise—Recording of—Order holding that no compromise is proved.

R. 3 of O. XXIII C. P. Code applies, as its very wording shows, only where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit. The rule does not lay down what the Court is to do if it finds that there has been no adjustment, compromise, or satisfaction. Consequently the order passed by the lower Court in the present case finding that there has been no compromise is not an order under R. 3 of O. XXIII and is not appealable. (*Martineau, J.*) SHANTI SARUP v. THE FIRM OF JAHANGIR MAL BANSI MAL. 73 I. C. 177.

## O. 23, R. 3—Lawful—What is—Compromise affecting puisne mortgagee—Validity.

It is incumbent on a Court to pass a decree in terms of compromise only if the same is lawful i.e. enforceable in law. One test to apply is were the parties competent to enter into the agreement in order to achieve the purpose they had in view.

Where after a mortgage decree to which the puisne mortgagee was a party, the mortgagee and prior mortgagee put in appeal a petition of compromise which increases the amount payable to the latter, a decree cannot be passed in accordance therewith, as it undoubtedly prejudices the rights of the puisne mortgagee and hence cannot be said to be lawful. (*Mookerjee and Chotzner, JJ.*) MALCHAND BOID v. OSMAN ALI MANDAL. 38 C. L. J. 272.

## O. 23, R. 3—Proof of compromise—Duty of court.

## C. P. CODE (1908), O. 23, R. 3.

If is not essential before a court can pass a decree in accordance with a compromise that all the parties to it should assent to it before the court. The court can enquire if an assent had been given elsewhere and if this is proved, it can pass a decree in accordance with the compromise thus assented to. (*Scott-Smith, J.*)  
**MAHANT RAGHBI SINGH v. CHANAN SINGH**  
 69 I. C. 395 : 1923 Lah. 4.

———O. 23, R. 3—Reference to arbitration—  
*Partial award—Decree on—Power of Court to pass.*

Where the parties to a suit referred to arbitration to three individuals the matters in dispute between them in the suit as well as certain other matters not forming the subject of the suit, two of the arbitrators were absent and thereupon the parties agreed to abide by the decision of the third arbitrator. That arbitrator gave his decision so far as the dispute in suit was concerned and deferred an enquiry into other matters. Owing to the obstruction of the defendants the arbitrator could not pass an award in respect of the matters outside the suit. On an application to the Court to have the award on the subject-matter of the suit recorded under O. 23 R. 3 C. P. C. held, that it was open to the Court to record the decision of the arbitrator, and pass a decree thereon even though the award was partial. There is no rule of law that a partial award is invalid and the question has to be decided on the intention of the parties the matter being a subject of contract between them. (*Phillips and Devadoss, JJ.*)  
**ALAGU PILLAI v. VELUCHAMI,**  
 45 M. L. J. 76 :  
 32 M. L. T. (H. C.) 369 : (1923) M. W. N. 331 :  
 18 L. W. 26 : 74 I. C. 609 : 1923 M. W. N. 509 :  
 1923 Mad. 576.

———O. 23, R. 4—Execution proceedings—  
*Compromise—Legality of.*

O. 23, R. 4 of the C. P. Code is explicit in its terms and declares O. 23 to be inapplicable to proceedings in execution of a decree or order. Consequently an arrangement entered into after decree for payment of the sum decreed in instalments is not binding and limitation for execution of the decree runs nevertheless. (*Broadway, J.*)  
**BANARSI DAS v. RAMZAN**  
 72 I. C. 477.

———O. 25, R. 1—Pauper appeal—Security for costs—Grounds.

Very special grounds should be required before a suitor *in forma pauperis* should be required to give security for costs. A mere suggestion that somebody else is financing is not such a ground. (*Lentaigne, J.*)  
**MA SAW v. MAUNG SHWE GON.**  
 2 Bur. L. J. 78 : 75 I. C. 309 (1) : 1923 Rang. 244.

———O. 25, R. 1 (3)—Suit for payment of money—Dissolution of partnership accounts and recovery of stridhanam property.

A suit for dissolution of partnership and account and for the recovery of the stridhanam property belonging to a female plaintiff is not a suit for payment of money within O. 25 R. 1 (1) (3) C. P. Code. (*Greaves and Ghose, JJ.*)  
**AMULYA SUNDARI DASSYA v. SYAMA SUNDAR SAHA.**  
 1923 Cal. 316 (2).

## C. P. CODE (1908), O. 30.

———O. 26, R. 1 and 4—"May" meaning of—  
*Discretion to issue commission.*

In the case of a witness not under the control of the party asking for a commission, who resides beyond the limits fixed under O. 16, R. 19 (b), a commission should issue as a matter of right, unless the court is satisfied the party is merely abusing the court's authority to issue process.

It is not for the court to decide whether the party will be benefited or not, as it is a matter entirely for the party.

The word "may" in O. 26 Rr. 1 and 4 means "is given authority to". (*Wallace, J.*)  
**JAGAN-NATHA SASTRY v. SARATHAMBAL AMMAL.**

46 Mad. 574 : 17 L. W. 251 : (1923) M. W. N. 157 :  
 71 I. C. 530 : 1923 Mad. 321 : 44 M. L. J. 202.

———O. 26, R. 2—Examination of witnesses—  
*Power of Court to issue—Commission suo motu.*

It is competent to a Court acting under O. 26, R. 2, C. P. C. to issue a commission for the examination of witnesses acting *suo motu* (*Burn, S. M.*)  
**NANHU v. ABDUS SAMED KHAN.**

1 R. 4 A. 81 (Rev.)

———O. 26, R. 4—Commission to examine defendant—Residence out of Br. India more than 200 miles away.

Where the defendant is his own sole witness and applied for a commission to hear himself examined as he was living more than 200 miles away in a Native State, the application should be allowed. (*Zafer Ali, J.*)  
**ELVERS v. AMERICAN MOTOR COMPANY.**  
 73 I. C. 923.

———O. 26, R. 17—Examination of witness on commission—Deposition not read over to witness—Effect of—Perjury.

The provisions of O. 26, R. 17 of the C. P. Code with regard to the examination of witnesses in Court does not require that the statements of the witness after they have been recorded should be read over to them and the same procedure should be considered applicable in the case of statement of witness recorded on commission. Consequently where statements recorded on commission were not read over to the witness they are admissible in evidence and it is open to the Court to grant sanction for perjury in respect of such statements. (*Daniels, A. J. C.*)  
**MT. FERROZA JAN v. MIRZA AMIR ALI.** 90 L. J. 593 :  
 9 O. & A. L. R. 103 : 74 I. C. 445 :  
 24 Cr. L. J. 781 : 1923 Oudh 119.

———O. 27, R. 1—Plaint—Facts to be set forth.

It is not necessary for a plaintiff to set forth in his plaint anything more than the facts entitling him to the decree that he asks for. (*Martinezau and Campbell, JJ.*)  
**NAIZ AHMAD KHAN v. ABDUL LATIF.**  
 1923 Lah. 475.

———O. 29—Scope of provisions. See (1922) DIG. COL. 308. **RAM PROSAD CHIMONLAL v. ANUNDI & Co.** 89 I. C. 885.

———O. 30—Suit against firm—Defendant also described as owner of firm.

Where a suit is filed against a firm, but the defendant is also described as the owner of the firm and a question of limitation is passed by the heirs

C. P. CODE (1908), O. 30, R. 1.

of the defendant who are subsequently impleaded the suit must in effect be treated as one against a firm and the subsequent words of description mere surplusage. (*Shah A. C. J. and Crump J.*) *MOTILAL JASRAJ v. CHANDMAL HINDUMAL*.

25 Bom. L. R. 1081.

—O. 30, R. 1—*Firm including a minor partner—Reference to suit to arbitration—Sanction of Court.*

Where a suit is brought against a firm, the mere fact that there is a minor member of the firm, does not bring the suit within the purview of O. 32. Where the matter is referred to arbitration, it is not necessary that the court should give assent under O. 32, R. 7 (*Harrison, J.*) *SUKHA NAND v. BEHARI RAM ISHAR DAS*.

1923 Lah. 103.

—O. 30, R. 1—*Suit, by one firm against another—Reference to arbitration by representatives—Validity of.*

Where a suit is brought by one firm against another through their representatives they can agree to refer the dispute to arbitration and the validity of the award is not affected by the fact that the minor members of the firm did not sign the reference to arbitration. 68 I. C. 750 : 25 I. C. 955 ; 50 I. C. 471 ; 19 I. C. 363 ; 16 A. 23 Rel. (*Broadway, J.*) *FIRM OF BISHAMBAR MAL PALA MAL v. FIRM OF GANGA SAHAI NIHAL CHAND*.

5 Lah. L. J. 5 : 71 I. C. 734 : (1923) Lah. 212.

—O. 30, R. 1—*Title of the suit.*

The plaintiff who was a minor was described in the title of the plaint as "owner of the shop C". It was stated in para 4 of the plaint, "As the plaintiff the owner of the shop is a minor, this suit is not barred by limitation". The suit was dismissed by the trial Court holding that the plaintiff was the shop and not the minor, held the dismissal was wrong. (*Macleod C. J. and Crump J.*) *CHANBASSAPPA MALLAPPA v. MALLAKAPPA LINGAPPA*.

1923 Bom. 368.

—O. 30, Rr. 3 and 5—*Ex parte decree—Setting aside of—Service of summons—Suit against firm—Leave to serve by registered post—High Court Rules Ch VII R. 11. See (1922) DIG. COL. 308, HARBIBANDAS GORDHANDAS v. BHAGWANDAS PURSRAM.*

69 I. C. 236.

—O. 32, Rr. 2, 4 and 12—*Suit by minor plaintiff—Absence of next-friend—Dismissal of suit—Propriety of—Minor attaining majority during pendency of suit—Omission to record reasons under O. 32, R. 4, Cl. 2—Effect of.*

Where the plaintiff who was a minor brought a suit without a next-friend and his minority was not apparent on the face of the record but is proved on the trial of an issue in the suit itself the Court ought not to dismiss the suit at once but should allow a reasonable time for a next friend to come on the record and go on with the suit and it is only if no one comes forward that it should reject the plaint. 13 C. 189 relied on. It is no doubt open to the minor on attaining majority to drop the suit as not properly instituted but he is not bound to do so; he could affirm the previous proceeding and continue the suit. The omission to record reasons under O. 32, R. 4, Cl.

C. P. CODE (1908), O. 32, R. 3.

2 for the appointment of a court guardian is only an irregularity and will not by itself vitiate the decree if the minor is in fact properly represented by a guardian appointed by Court. Where however the appointment of a Court guardian is secured by fraud and by false statements and concealment of material particulars the minor is not bound by the decree passed in the suit or by the sale held in execution of the decree 37 A. 179 followed. (*Krishnan, and Ramesam, JJ.*) *RARICHAN alias RAMANUNNI KURUP v. V. M. RAMAN SOMAYAJI PAD* 44 M. L. J. 515 : 32 M. L. T. 107 (H. C.) : (1923) M. W. N. 301 : 17 L. W. 558 : 74 I. C. 309 : 1923 Mad 553.

—O. 32, R. 2 (1)—*Plaint by minor without next friend—No objection by defendant—Rejection of plaint—If proper.*

Where a minor files a plaint without a next friend and though the defendant makes no application to have it taken off the file, the court rejects the plaint, the procedure is improper, as it ought to grant time to have a proper next friend brought on record (*Scott-Smith and Eforde, JJ.*) *ALI AHMAD v. SAID MIAN*, 4 Lah. 390.

—O. 32, Rr. 3, 4, and 11—*Guardian ad litem—Appointment of—Omission to consult minors' wishes—Effect of.*

Though the mother of a minor defendant is the person who should be appointed his guardian *ad litem* in the absence of the father still a decree passed against the minor represented by some other person as guardian *ad litem* is not a nullity. Though the Court should in every case consult the wishes of a minor before appointing any person as guardian *ad litem* in the suit, there is nothing in the C. P. C. which requires it to do so in a case coming within O. 32, R. 11 C.P.C. O. 32, R. 3 Cl. 4 applies only to cases where an application is made for the appointment of a guardian in the name of or on behalf of the minor or the plaintiff. O. 32, R. 11 empowers the Court to appoint any guardian where the guardian for the suit retires, dies or is removed by the Court pending the suit, and there is nothing which requires the Court to give notice to the minors before making the order under this rule. (*Das and Adami, JJ.*) *SRI THAKUR RADHA KRISHNA GOPAL LALJI v. BABU LAKSHMI NARAYAN*.

1 Pat. L. R. 86 : 2 Pat. 273 : 4 Pat. L. T. 329 : 71 I. C. 341 : (1923) Pat. 159 : 1923 P. 385.

—O. 32, R. 3—*Guardian-ad-litem—Father acting as such—No formal appointment—Effect.*

Where a father acted as the guardian-ad-litem of his minor son, the fact that there was no formal order of court appointing him will not vitiate the proceedings, if the minor was in no way prejudiced thereby (*Kanhaya Lal, J. C.*) *DARSHAN SINGH v. RATAN LAL*, 9 O. & A. L. R. 468 : 74 I. C. 821.

—O. 32, R. 3—*Guardian ad litem—Presumption—Absence of formal order of appointment—Compromise—Sanction of Court.*

Where the court by its action had given its sanction to the appearance of a person as a guardian, the absence of a formal order of appointment is not necessarily fatal to the proceedings.

C. P. CODE (1908), O. 32, R. 3.

Even an omission to serve the minors concerned or their mother personally was treated as mere irregularities covered by section 578 of the old Code of Civil Procedure and not errors fatal to the suit.

The presumption is that the proceedings of the Court had been carried out regularly and in accordance with the law and this presumption is found stronger when it is found that an application and an affidavit such as is filed in connection with the appointment of a person as guardian *ad litem* of a minor was on the record and that the guardian had subsequently appeared and filed a compromise on behalf of the minor to which the Court had accorded its sanction (*Kanhaya Lal, J. C.*) *MATA GHULAM SINGH v. SITAL PRASAD*, 26 O. C. 113 : 74 I. C. 409 : 1923 Oudh 206.

———O. 32, R. 3 (4)—*Absence of notice to minor—Effect.*

In the absence of proof of fraud or collusion, the mere fact that notice of appointment of a guardian *ad litem* was not issued to the minor, does not entitle him to treat the proceedings as a nullity. Case Law reviewed (*Abdul Raouf and Campbell, JJ*) *PHULLI v. DEBI PARSHAD*, 1923 Lah 575 : 75 I. C. 449.

———O. 32, R. (3)—Minor—Appointment of guardian whether necessary—Prejudice of minor whether necessary for setting aside the decree. See (1922) DIG. COL 310. *SHAIKH SAJJAD HUSSAIN v. SAKAL RAI*, 2 Pat. 7 : 4 Pat. L. T. 575 : 72 I. C. 637.

———O. 32, Rr. 3 and 4—Minor—Consent of guardian not obtained—*Ex parte* decree—Suit to set aside.

A minor is not a party to the suit, unless he is represented in the record of the suit by a guardian competent to act as such. Where the record of the suit itself shows that the minor is wholly unrepresented or that he is represented by a guardian disqualified from acting as such guardian under express provision of the Statute the result is that the minor is not a party to the suit and a judgment rendered against the minor is without jurisdiction and is null and void. But where he is properly a party to the suit and he is properly a party if he is represented on the record by a guardian not disqualified from acting, the jurisdiction of the Court to try and determine the case against the minor is complete, and such jurisdiction will not be ousted even if the Court did not follow the appropriate procedure for the appointment of the guardian. It is the court that must decide the question of jurisdiction and where the record, on the face of it, shows that the minor was properly a party to the suit, the judgment rendered in such a suit will not be declared a nullity in a collateral proceeding brought to impeach its validity, though it may be set aside if it be shown that the defect or the irregularity in the proceedings affected the merits of the case between the parties. 30 C. 1021 followed 15 C. L. J. 446 : 25 C. W. N. 781 dissented. 32 C. 296 distinguished. The contravention of the provisions of O. 32, R. 4 Cl. 3 C. P. Code does not deprive the Court of its jurisdiction to decide the case. The Court has no jurisdiction to render judgment against one who

C. P. CODE (1908), O. 32, R. 3.

is not a party to the suit though it has jurisdiction to render judgment against one who is a party to a suit but who has not been brought before it by reason of the failure on the part of the Court to follow the particular procedure laid down in the Code. The one affects the existence of the jurisdiction of the Court, the other affects the exercise of it (*Das and Adamu, JJ*) *PANDE SATDEO NARAIN v. RAMAYAN TEWARI*, 4 Pat. L. T. 147 : 2 Pat. 335 : 71 I. C. 705 : 1923 P. 242 (2).

———O. 32, Rr. 3 and 7—Minor—Reference to arbitration—Sanction of Court—Absence of—Effect of—Minor substantially represented in proceedings by guardian—Award not a nullity.

The mere fact that leave of the Court has not been obtained for a reference to arbitration on behalf of a minor will not vitiate the reference and the award where the interests of the minor have in no way been prejudiced. If a minor is substantially represented by a guardian *ad litem* an appointment by the Court under O. 32, R. 3 can be assumed from the action of the Court in accepting the pleas of the major defendant on behalf of the minors also. In the case of a joint Hindu family, the manager can act on behalf of the minors without specific appointment as guardian in the interests of the whole of the family including the minors and the Court must decide whether or not he was acting in the interests of the minor. 43 C. 290 : 30 C. 1021, 36 A. 69 : 28 A. 25 referred to. (*Pipon, J. C.*) *CHET RAM v. KANSHI RAM*, 71 I. C. 7.

———O. 32, Rr. 3 (4) and 4 (4)—Minor defendants—Representation in suit—Appointment of officer of Court as guardian *ad litem*—Omission to adduce evidence when amounts to negligence.

The father of certain minor defendants in a suit refused to be their guardian *ad litem* and there upon the Head Clerk of the Court was appointed guardian. The plaintiff was a stranger who was not aware of the existence of any other relatives of the minors. There was no affidavit by him that there was no other person fit and willing to act as guardian of the minors. There was also no distinct notice to the father of the minors of the appointment of an officer of the Court as guardian *ad litem* but the father himself did not adduce any evidence and the suit was decreed. Subsequently the minors sued to set aside the decree on the grounds that they were not validly represented in the prior suit and that their guardian *ad litem* was grossly negligent in the conduct of the case. Held that the defects, if any, in the appointment of the guardian did not vitiate the decree. 32 A. 287 : 20 M. L. J. 591 (P.C.), 31 A. 572 : 19 M. L. J. 631 (P. C.) referred to.

Held further, that in the absence of proof that the guardian *ad litem* could have adduced any useful evidence or was aware of such evidence being available, his omission to let in evidence in the prior suit did not constitute negligence or fraud. (*Oldfield and Ramsam, JJ.*) *RAMASWAMI CHETTY v. DORAISWAMI*, 44 M. L. J. 299 : 17 L. W. 638 : 73 I. C. 409 : 1923 Mad. 465.

———O. 32, R. 3—Suit by minor—*Bona fide* mistake—Amendment.

C. P. CODE (1908), O. 32, R. 4.

Where the fact of plaintiff's minority was not apparent on the face of the plaint but was discovered only in the course of an enquiry on objection being raised by the defendant, an opportunity should be given to amend the plaint as the plaintiff had no knowledge of his minority and had no intention of leaving the court. (*Harrison, J*) *MT. DURGA DEVI v. GUR NARAIN*.  
69 I. C. 401.

——— O. 32, R. 4—*Guardian-ad-litem—Appointment—Consent of proposed guardian—absence of—Decree against minor—Legality of.*

No person can be appointed a guardian *ad litem* of an infant without his consent. In the present case the mother of the infants was appointed without her consent. She never entered appearance and never defended the suit on behalf of the minors without a formal order for appointment. Held that in the events which had happened, it was plain that the infants were not represented at all and they were in no sense parties to that litigation. Consequently they were not affected by the decree.

When a guardian has not been validly appointed in respect of a minor, he is not a party to the suit and is not bound by the decree made against him. (*Mookerjee and Chotzner, JJ.*) *UMAPATI SAMANTA v. SHEIKH MOSEETULLAH*  
72 I. C. 475 : 37 C. L. J. 496 : 1923 Cal. 692

——— O. 32, R. 4—*Vakil—Officer of the Court—A vakil is an officer of the Court for purposes of O. 32 R. 4 C. P. C. (Piggott and Walsh, JJ.) MOHAN LAL v. GANGA PRASAD*  
45 A. 395 : L. R. 4 A. 352 :  
71 I. C. 975 : 1923 A. 298 (1).

——— O. 32, R. 4 (3)—*Guardian-ad-litem—certified guardian—Duty to appoint—Appointment of another—Effect.*

A court is bound to appoint the certificated guardian as the guardian-ad-litem, unless it considers otherwise for special reasons to be recorded. Where the guardian however, objects, the court must appoint some other person.

There is nothing however in O. 32, R. 4 Cl. (3) which requires the court to obtain the express consent of the guardian to act before appointing him in that capacity, and where the guardian so appointed is a certificated guardian, whom the court was bound to appoint, consent may be properly presumed when he makes no objection.

Where the interests of a minor have not been prejudiced, any defect in the procedure for the appointment of his guardian is not fatal. (*Miller C. J. Foster, J.*) *THAKUR TEJESHWAR DUTT v. LAKHAN PRASAD SINGH*.  
4 Pat. L. T. 127 :  
1 Pat. L. R. 59 : (1923) Pat. 88 :  
2 Pat. 296 : 1923 P. 231.

——— O. 32, R. 6 — *Co judgment-debtors — Payment of decree amount to next friend—Leave of court not obtained—Effect—Right to claim contribution.*

O. 32, R. 6 prohibits the next friend of a minor decree holder from realising money due under a decree without leave of court. If one of several judgment-debtors pay the whole decree amount to the next friend without leave of court, the decree is nevertheless subsisting and hence he

C. P. CODE (1908), O. 32, R. 8.

cannot claim contribution from the other debtors, (*Philips and Venkatasubba Rao, JJ.*) *ABBOY NAIDU v. RAMACHANDRA NAIDU*.  
(1923) M. W. N. 925.

——— O. 32, R. 7—*Compromise decree—Minor—Leave of court—Omission to have it expressly recorded—Effect of.*

In order to attract the provisions of O. 32, R. 7 C. P. Code it is enough to show that the attention of the Court was directly called to the fact that a minor was a party to the compromise and that the leave of the Court was obtained on petition or in some way not open to doubt. No particular formula is necessary to be used by the Court in order to grant the leave and when it is shown that an application was made by the guardian to the Court asking for leave to enter into the compromise and the Court makes a note of that application and passes a decree in terms of that compromise, it must be held that the leave of the Court was expressly recorded within the meaning of O. 32 R. 7 C. P. Code 28 A. 585 Ref. Even if the leave of the Court is not expressly recorded that would not make the decree a nullity. It would only make the decree voidable at the option of the minor and so long as it is not avoided in a proper proceeding, no objection can be taken in the execution proceedings as regards the validity thereof. (*Mullick and Kulwant Sahay, JJ.*) *ISHAN CHANDRA KUNDU v. NILRATAN ADHIKARI*  
2 Pat. 538 :  
4 Pat. L. T. 311 : 1 Pat. L. R. 217 : (1923) Pat. 184 :  
72 I. C. 1049 : 1923 P. 375.

——— O. 32, R. 7—*Minor—Compromise—Deputy of Court—Wishes of guardian or next friend—Weight due to.*

Although the court can and must approve of a compromise on behalf of infants it cannot and will not force one upon them against the opinion of their next friend or guardian *ad litem* in the action. No doubt if the court found that a guardian or next friend was acting improperly and against the infant's interest in refusing to assent to an arrangement which appeared clearly beneficial to them, steps might be taken to remove him and substitute some other person, (*Ghose and Panton, JJ.*) *HEMANGINI DAS v. BHAGWATI SUNDARI*.  
27 C. W. N. 792 :  
75 I. C. 682 : 1923 Cal. 685.

——— O. 32, R. 8—*Minor—Guardian ad litem—Appeal by another person as next friend—Maintainability.*

Where a guardian-ad-litem to a minor defendant has once been appointed such appointment continues for the whole of the *lis* or until it is revoked by Court, and the guardian so appointed is the only person who can file an appeal on behalf of the minor. 41 A. 619 toll. (*Ryves and Daniels, JJ.*) *BHAGELU v. DHARMA*  
45 A. 623 : 21 A.L.J. 591 : L. R. 4 A. 304 :  
1924 A. 79.

——— O. 32, Rr. 8 and 9—*Pauper suit—Minor plaintiff—Costs to be paid by next friend.*

Where the next friend of a minor sues in form a *pauperis*, the Court can order the next friend to pay the costs of the defendant (*Hallifax, A. J. C.*) *MAROTI v. BHAGI*.  
1926 Nag. 43.



C. P. CODE (1908), O. 32, R. 15.

—O. 32, R. 15—Guardian of a deft. alleged to be of unsound mind by one party and denied by the opposite party—Judicial inquiry if necessary. See (19:2) DIG COL. 1081 RAM SUNDER SAHA v. KALI NARAIN SEN CHOWDHURY.

70 I. C. 307

—O. 33, R. 1—Dismissal of pauper application—Court if can extend time for payment of court fee. See C. P. CODE, S. 149.

18 L. W. 451.

—O. 33, R. 1—Minor—Suit in forma pauperis—Status of next friend immaterial.

A minor who is not possessed of sufficient means within the definition of pauperism for the purpose of O. 33, C. P. Code is entitled to be allowed to sue in forma pauperis by a next friend although the next friend is not a pauper. The law in India in this respect is very different from the law in England 3 M. 3 foll. (Rankin and Ghose, JJ.) NANIBALA DASSYA v. JAMINI SUNDARI

37 G. L. J. 394:

70 I. C. 919 (1) : 1923 Cal. 656.

—O. 33, R. 1—Suit in forma pauperis—Leave to sue—Payment of part of the claim into Court—Determination of question of pauperism.

A Hindu widow applied for leave to sue in forma pauperis for the recovery of maintenance and her stridhanam jewels and cash withheld by defendant. The defendant admitted liability for the jewels and cash and produced them in court. It was found that the jewels and cash were more than sufficient to pay the Court-fee and the Court dispaupered her. Held on revision, that the order of the Court was improper and it could not be said that owing to the defendant's offer the plaintiff was possessed of sufficient means to pay the prescribed Court fee. In a suit where no fee is prescribed by law for the plaintiff, no admission or even payment into Court by the defendant can be taken into consideration. The time when the application is made to institute a suit as a pauper is the point of time which the Court has to consider when the application comes to be dealt with, and the subject matter of the suit is in no case at the disposal of the applicant for payment of fees 10 B. 207 diss. 34 638 1011 (Macleod, C. J. and Crump, J.) BAI BALAGAVRI v. MOTILAL

47 Bom. 523 :

25 Bom. L. R. 199 : 72 I. C. 224 : 1923 Bom. 247.

—O. 33, R. 1—Suit to redeem—Equity of redemption—If to be excluded in calculating means.

In a suit to redeem a mortgage of property of which plaintiff is not in possession, the value of the right to redeem which is the subject matter of the suit for the purposes of O. 33, R. 1, should be excluded in considering whether he is entitled to sue as a pauper. (Baker, O. J. C. and Halifax A. J. C.) ACHALSINGH v. SETH JIVANDAS.

19 N. L. R. 165.

—O. 33, R. 2—Contents of application—Omission to state immovable property—Effect of.

Under O. 33 R 2 of the C. P. Code an application for permission to sue as a pauper must contain a schedule of the moveable as well as

C. P. CODE (1908), O. 32, R. 9.

immovable property. Where therefore an applicant omits to mention his immovable property and also fails to submit a list of such property when required, the application is not in proper form. (Ashworth, J.C.) SHEO NARAIN LAL v. MT. MUNAQQA.

9 O. L. J. 610 :

74 I. C. 344 : 1923 Oudh 118.

—O. 33, Rr. 3 and 5—Separate affidavit sufficient.

Where the petitioner did not verify the contents of the petition at the foot of the petition, but he did so by a separate affidavit in which the statements contained in the several paragraphs of the petition were said to be true and no part of them was false and nothing had been concealed: Held this affidavit being annexed to the petition must be treated as a part of it. 16 I. C. 83 Diss. (Abdul Raoof, J.) PIRJI ASHRAF ALI v. RAMESHWAR NATH.

1923 Lah. 684.

—O. 33, R. 5 (d)—Pauper application—Rejection of—Enquiry into the merits of the case.

Where an application is made for leave to sue in forma pauperis, it is not open to the Court to dismiss the application on the ground that though the plaintiff discloses a cause of action, the plaintiff's case would fail on the merits (Krishnan, J.) POLIMATI MUNIGADU v. NALLA BAPADU.

18 L. W. 53 : 73 I. C. 946 : 1923 M. W. N. 412:

1924 Mad. 80.

—O. 33, R. 6—Evidence as to plaintiff's title

The only matter in regard to which evidence may be taken is the question of the pauperism or otherwise of the applicant. Rule 6 does not empower the Court to try the question of the plaintiff's title after taking evidence on that question and in fact to try the suit on the merits before the application for leave to sue is granted. (46 Cal. 651, Appl., I. 501. C 521. Not Appr., 20 All 299, Dist.) (Banerji and Gokul Prasad JJ.) MT. SHAURAN BIBI v. ABDUS SAMAD.

45 A. 548 :

L. R. 4 A. 252 . 21 A. L. J. 441 : 73 I. C. 538 :

1923 A. 577.

—O. 33, Rr. 9 and 1—Dispaupering plaintiff—Possession of sufficient means to pay Court fee—Test of.

Clause (b) of rule 9 of O. 33, C.P. Code empowers the Court to dispauper a plaintiff and to withdraw the original order allowing her to sue as a pauper when, it appears that her means are such that she ought not to continue to sue as a pauper. The word "means" in this clause is to be interpreted with the help of the definition of pauper referred to above. To apply clause (b) of R. 9 the Court could dispauper her when her means are such as to enable her to pay the Court-fee of Rs. 3,000 upon the plaint in the case.

Where the plaintiff who had sued in forma pauperis was allowed an interim maintenance of Rs. 200 a month and arrears of maintenance from time to time, aggregating to 5,000 rupees but at no time was she paid a sum of Rs. 3,000 in a lump which would be the amount required for paying court-fee on the plaint. Held that the plaintiff should not be dispaupered. The mere fact that the plaintiff was appearing through eminent counsel would not be sufficient to dispauper the plaintiff. (Jwala Prasad and Ross,

C. P. CODE (1908), O. 33, R. 9.

JJ.) SRIMATI SAVITRI THAKURAIN v. THE SECRETARY OF STATE FOR INDIA.

2 Pat. 879 : 4 Pat. L. T. 538 : 1924 P. 27.

——— O. 33, R. 9—Suit in forma pauperis—Dispaupering—Concealment of property—Asset of doubtful value—Insurance policy. See (1922) DIG. COL. 312. SHANKABHAT v. SAKHARAMBHAT 70. I. C. 964

——— O. 33, R. 10 and 11—Pauper plaintiff—Partial success—Costs decreed to defendant exceeding amount decreed to plaintiff—Right of Government to a first charge. See (1921) DIG. COL. 294. See (1922) DIG. COL. 313. T. V. CHAKRAPANI AYYANGAR v. THE GOVERNMENT OF INDIA. 69 I. C. 743

——— O. 33, R. 10—Suit in forma pauperis—Amendment of plaint—Cost of application. See (1922) DIG. COL. 313. AMBAJI BALWANT RAO v. HANMANT RAO BAJIRAO. 47 Bom. 104 69 I. C. 207.

——— O. 33, R. 15—Application in forma pauperis dismissed as not pressed—If bars fresh application.

Where an application for leave to sue in forma pauperis is dismissed as not passed, it bars a fresh application in respect of the same right. 20 Bom. 86 followed. (Abdul Rasool, J.) MT. BEGUM v. JAFAR HASSAN. 73 I. C. 897.

——— O. 33, R. 15—Bar—Dismissal for default. A dismissal of an application to sue in forma pauperis for default is not an order refusing permission to sue as a pauper and hence is no bar to an application. (Po Han, J.) MAUNG AUNG TUN v. MA E KIN. 2 Bur. L. J. 217.

——— O. 34, R. 1—All mortgagors not on record—Procedure. See MORTGAGOR AND MORTGAGEE. 73 I. C. 458 : (1923) M. W. N. 234.

——— O. 34, R. 1—Hindu Joint family—Manager—Suit against—Junior member not necessary party.

The omission to implead a Mitakshara son is not fatal to a mortgage suit and the father sufficiently represents the sons. (Das and Kulwant Sahay, JJ.) BABU LAL BEHARI SINGH v. BABUGUR PRASAD SINGH. 4 Pat. L. T. 108 : 71 I. C. 948 : 1923 P. 290.

——— O. 34, R. 1—Interest in the right of Redemption—Attaching creditor—T. P. Act, S 91 (f).

The conflict on the question whether an attaching creditor who is given a right to redeem by clause (f) of section 91 of T. P. Act has any interest in the mortgage property and is thereby entitled under section 85 of the T. P. Act to be joined as a defendant in a suit on the mortgage appears to have been completely set at rest by the amendment of S. 85 of T. P. Act by the substitution for it of rule 1 of Order 34 of the C. P. Code. whereby the interest of those to be joined in a mortgage suit is no longer restricted to an interest in the property but is stated to be an interest either in the mortgage security or in the right of redemption. These words cannot possibly exclude

C. P. CODE (1908), O. 34, R. 1

any person of any of the classes mentioned in section 91 of the Transfer of Property Act whether the words of section 85 of the T. P. Act did so or not and therefore every attaching creditor under a money decree against mortgagor is entitled to redeem the mortgage. (Halliday, A. J. C.) MEGHRAJ MARWARI v. KESHEO GOPAL BUTI. 6 N. L. J. 181 : 73 I. C. 8 : 1923 Nag. 311

——— O. 34, R. 1—Mortgage Suit—Parties—Omission to implead person entitled to equity of redemption—Subsequent suit on mortgage

Where a mortgagee brings a suit on his mortgage and obtains a decree thereon without implead a person in whom the equity of redemption vested by transfer, it is open to him to sue again on the mortgage impleading the latter as a party and thus giving him an opportunity to redeem. (Gokul Prasad and Stuart, JJ.) RAMPIA v. HAZARI LAL. 1923 A. 232.

——— O. 34, R. 1—Mortgage suit—Parties—Owner of equity of redemption not impleaded—Effect of—Execution sale—Purchase by mortgagee—Rights of purchaser See (1922) DIG. COL. 313. DATTATRAYA MANGESAYYA v. VENKATESH VASUDEO. 69 I. C. 165.

——— O. 34, R. 1—Mortgage suit—Parties—person claiming title under mortgage—Omission to implead—Effect of. See (1922) DIG. COL. 315. SHEORAM v. JAMNABHAI.

19 N. L. R. 18 : 1923 Nag. 273.

——— O. 34, R. 1—Mortgage suit—Parties—Suit by prior mortgagee without impleading puisne mortgagee—Decree—Execution sale—Rights of prior mortgagee purchaser—Right to hold prior mortgage as a shield.

Where a prior mortgagee brings a suit on his mortgage without impleading the puisne mortgagee as a party and obtains a decree and in execution sale thereof purchases the property, he can in a suit by the puisne mortgagee to enforce his mortgage set up his prior mortgage right as a shield and insist on redemption. 31 C. 737 Rel. The puisne mortgagee is not entitled to bring the properties to sale in execution of his mortgage decree without redeeming the prior mortgagee-purchaser (Pratt and Duckworth, JJ.) N. N. V. CHETTY FIRM v. K. A. P. L. CHETTY. FIRM. 74 I. C. 151 : 1923 Rang. 107.

——— O. 34, R. 1—Mortgage suit—Prior mortgagee impleaded—Omission to set up priority on the footing of subrogation—Effect of.

Where a prior mortgagee is impleaded as a defendant in a suit brought by a subsequent mortgagee, who, however, claims priority on the footing of subrogation, the prior mortgagee is bound to defend the suit and get an adjudication as to his priority. The mere filing of a written statement is not sufficient.

Where the decree in the suit by the subsequent mortgagee declared his priority over the prior mortgagee, who was directed to redeem the plaintiff, the suit by the prior mortgagee, in so far as it relates to the properties covered by the adjudication in the previous suit, will be barred by res-judicata. 1 P. L. T. 629 : 47 Cal. 662 : 39 Cal

C. P. CODE (1908), O. 34, R. 1.

527; 24 A. 429 discussed. (*Das and Kulwant Sahay, JJ.*) BABU LAL BIHARI SINGH v BABU GUR PRASAD SINGH.

4 Pat. L. T. 108 : 71 I. C. 948 : 1923 P. 290.

———O. 34, R. 1—*Two mortgages—Suit on later one—If bars suit on prior mortgage.*

Where a person holds two mortgages over the same property, there is nothing in the C. P. Code compelling him to sue on both at the same time—A suit on the later one will not bar a subsequent suit on the other. (*Maung Kim, C. J.*) MA MYIT v. S. C. SARMA. 10 L. B. R. 360. 69 I. C. 897.

———O. 34, R. 1—*Mortgage suit—Transferee of equity of redemption—Failure to implead—Effect of—Rights of purchaser at execution sale.*

Where a mortgagee brings a suit for sale upon his mortgage without impleading as party to the suit a purchaser of a portion of the equity of redemption he cannot by purchasing the property in execution claim possession as against the purchaser of the equity of redemption, 11 C. W. N. 314; 19 A. 541, followed. (*Walmesley, J.*) KRISTOPADA ROY v CHAITANYA CHARAN MANDAL.

49 Cal. 1048 28 C. W. N. 92 : 69 I. C. 530 : 1923 Cal. 274.

———O. 34, R. 1—*Object of—Non joinder of parties—Powers of Court.*

The object of O. 34 R. 1 C. P. Code is to prevent multiplicity of suits and to secure that no injury is done, to the rights of any party through his not being impleaded. The provision is expressly made subject to other provisions of the Code which include O. 1, R. 9 and it has been held that where it is possible for the Court to do justice as between the parties before it, it should do so and should not make O. 34, R. 1 a ground for dismissing the entire suit. (*Daniels, J.*) PARSHADI LAL v. LAIQ SINGH.

21 A. L. J. 701 : 74 I. C. 943

———O. 34, R. 1—*Parties—Persons setting up title paramount—Title if can be gone into*

A plaintiff mortgagee cannot be allowed so to frame his suit as to draw into controversy the title of a third party who is not in any way connected with the mortgage and who has set up a title paramount to that of a mortgagor and mortgagee. 33 Cal. 425 followed. But where such a person is impleaded and allows the trial to go on, including the question of his title he cannot ask for a reversal as the ground of his title was not triable. (*Simpson, J. C. and Dalal, A. J. C.*) GALSTAUN v. MIRZA ABID HUSAIN.

10 O. L. J. 263 : 73 I. C. 428. 9 O. & A. L. R. 282 : 1924 Oudh 19.

———O. 34 R. 1—*Same person holding two mortgages—Suit on subsequent mortgage only—Maintainability.*

Under the present law, particularly under the explanation to O. 34, R. 1, C. P. Code, a puisne mortgagee is not required to implead the prior mortgagee as a party in a suit for foreclosure or sale. The principle will be the same if the subsequent mortgagee and the prior mortgagee happen to be one and the same person. There is

C. P. CODE (1908), O. 34 R. 3.

nothing in law to prevent the prior mortgagee from bringing a suit to enforce his mortgage without impleading the subsequent mortgagee. There is, however, some risk, and probably the curtailment of some of the rights of the mortgagee who chooses to sue separately upon his mortgages, he may not be allowed to sell the properties in the subsequent decree when they were already sold in prior decree (*Jwala Prasad and Ross, JJ.*) NAWABA WAZIRI BEGAM v. BABU SHASHI BHUSHAN ROY. 4 Pat. L. T. 546 : 74 I. C. 820 : 2 Pat. 874.

———O. 34, R. 1—*Suit on prior mortgage—Puisne mortgagee if a necessary or proper party—Addition of puisne mortgagee—Limitation—C. P. Code O. 1, R. 9. See (1922) DIG. COL. 311. SITAL PRASAD RAY v. ASHO SINGH.*

69 I. C. 677 : 4 Pat. L. T. 698 : 2 Pat. 175.

———O. 34, R. 1—*Suit to redeem—Persons claiming as heirs of mortgagor—Title disputed by others claiming as heirs—If to be gone into.*

Where in a suit to redeem by persons claiming as heirs of the mortgagor, the mortgagees put in a statement that the plaintiffs were not entitled to redeem but took no further steps in the case, but other defendants claiming to be heirs of the mortgagor also contested the title of plaintiffs, the court ought to go into the question of right to redeem and decide the same. (*Miller, C. J. and Kulwant Sahay, J.*) BASDEO PRASAD v. DWARIKA PANDEY 2 Pat. 805.

———O. 34, R. 1—*Usufructuary Mortgage—Suit for possession—Parties.*

In a suit for possession of a usufructuary mortgage the person in possession of one, who objects to delivery of possession is a necessary party in the case of a joint family, and the other members can be impleaded. (*Subbanna, J.*) KRISHNAPPA v. RAMALAKSHMAMMA

1 Mys. L. J. 38.

———O. 34, Rr. 2 and 4—*Mortgage decree—Costs—Personal liability.*

In a mortgage suit it is open to a Court of appeal to direct that such costs as it may award against the unsuccessful appellant may be recoverable from him personally, but if there is no such express direction the costs are, as a matter of ordinary practice, sanctioned by O. 34, rules 2, 4 and 10 of the Code of Civil Procedure added to the mortgage money and are in the first instance recoverable from the mortgaged property after the decree is made final (*Walsh and Kanhaya Lal, JJ.*) MAHOMED IFTI-KHAR ULLAH v. BANKE LAL

45 A. 630 : L. R. 4 A. 301 : 21 A. L. J. 617 : 73 I. C. 850

———O. 34, R. 2 Cl. (c)—*Time for redemption—Time fixed by original decree—Dismissal of appeal—No extension of time. See (1922) DIG. COL. 316 BASANT KUMAR ADAK v. SM. RADHA RANI DAS.*

70 I. C. 735.

———O. 34 R. 3.—*Preliminary decree for foreclosure—Right of redemption—Final decree not passed. See (1922) DIG. COL. 316 ISOF ALI v. KASIM ALI.*

70 I. C. 152.

C. P. CODE (1908), O. 34, R. 3.

———O. 34, Rr 3 and 5—Redemption—Person having interest in mortgaged property—Not impleaded in mortgage suit—Right to redeem—Basis of redemption—Interest—Mesne profits See (1922) DIG COL. 316 JNANENDRA NATH SINGH ROY v. SHORASHI CHARAN MITRA. 69 I C. 759.

———O. 34, R. 4—Interest up to realization at court rate means an amount inclusive of interest at contractual rate.

When under a decree the contractual rate of interest ceases to be payable at a given date and the Court rate is substituted for it therefrom up to the date of realization, the Court rate will be chargeable on the whole amount due with interest at the contractual rate up to that given date. (Ashworth, J. C. and Simpson, A. J. C.) NAWAB MIRZA FAZ HUR MIRZA v. KHUSHAL CHAND. 1923 Oudh 241

———O. 34, Rr. 4 and 5—Mortgage—Consent decree—Decree payable in instalments—Final decree—Necessity for—Objection in execution.

A consent decree directing payment by instalments is a perfectly valid mortgage decree but it is not covered by O. 34, R. 5, C. P. Code. Consequently it is not necessary to make a final decree under O. 34, R. 5, C. P. Code. 10 C L J. 91; 2 Pat. L. T. 38 foll. It is open to the parties to a litigation to waive a particular procedure and to agree to a final decree being passed without a preliminary decree in the first instance. An objection to the legality of a final decree on the ground that the objector was not properly represented in compromise on which the final decree was based cannot be allowed to be taken in execution his remedy being to get the decree set aside in proper proceedings. (Mullick and Kulwant Sahay, JJ.) ISHAAN CHANDRA KUNDU v. NILKATAN ADHIKARI. 4 Pat. L. T. 311: 1 Pat. L. R. 217: (1923) Pat. 184: 2 Pat. 533: 72 I C 1049: 1923 P. 375.

———O. 34, Rr 4 and 5—Mortgage—Preliminary decree—Final decree—Compromise—Waiver.

It is open to the mortgagor to waive a final decree before executon can be levied. Where pending an appeal from the preliminary decree in a mortgage suit the parties compromised the suit and a decree for a smaller amount payable in two years was passed with a provision that the property was to be sold in default of payment Held it was the intention of the parties that the mortgagee should realise the amount by sale of the property immediately on the expiry of the two years. (Ghose and Panton, JJ.) RAJA HEMENDRALAL SINGH DEO v. FAKIR CHAND DUTT. 27 C. W. N. 621: 1923 Cal. 626.

———O. 34, Rr. 4 and 5—Mortgage—Preliminary and final decree—Compromise decree—Order for sale on default of payment.

Under the terms of a compromise decree in a mortgage suit the judgment debtor was directed to pay the debt due to the decree holder by certain instalments specified therein, and it was also further provided that, in default of the judgment debtor paying the money as therein mentioned, the property mortgaged by him to the decreeholder should be sold. Held on a construction of the decree, that it was not a preliminary one

C. P. CODE (1908), O. 34, R. 5.

within the meaning of O. 34, R. 4 C. P. Code but a final decree directing the sale of the property of the judgment debtor on default of payment. (Shadi Lal, J.) KORA LAL v. PUNJAB NATIONAL BANK, LTD. 5 Lah. L. J. 67.

———O. 34 Rr 4 and 5—Preliminary decree in a suit for sale on a mortgage—Application for an order absolute in 1915—Dismissal of—Remedy of party aggrieved—Whether application can be received—No second application for final decree lies—Limitation Act. Art. 171 applies to an application for a final decree. See (1922) DIG COL. 318 MUMMADI VENKATIAH v. BOGANATHAM VENKATA SUBBIAH. 69 I C. 366.

———O. 34, R. 4 and 5—Scope of—Mortgage—Arbitration—Decree for money—Realization by sale—Final decree.

A mortgage suit was referred to arbitration and based on the award a decree for money was passed and the same was to be realised by the sale of the hypotheca. In execution, it was objected that the same could not be executed till a final decree was passed. Held, a final decree under O. 34, R. 5 can be asked for only if a preliminary decree under O. 34, R. 4 has been passed and the decree based on the award being of the same nature as a compromise decree was itself executable. (Das and Ross, JJ.) NRIPENDRA NATH CHATTERJEE v. JHUMAK MANDAR. 4 Pat. L. T. 694: 2 Pat. L. R. 9.

———O. 34, R. 5—Application for final decree necessary

An application for execution should not be treated as an application to make the decree final. (Kennedy J. C. and Madgaskar, A. J. C.) SAKER CHAND NARSIDAS v. YACOOB. 73 I. C. 311: 1923 S. 14.

———O. 34, R. 5—Decree under Dekhan Agr. Relief Act S. 15 B—It to be made final See DEKHAAN AGR. RELIEF ACT, S. 15 B.

20 Bom. L. R. 1214.

———O. 34, R. 5—Delivery of title deeds—Decree—Default—Damages See (1922) DIG. COL. 318. MARATH SIVARAMAN NAIR v. SESILU PATTAR. 70 I. C. 529.

———O. 34, R. 5—Final decree—Passing of—Notice to judgment-debtor if necessary.

Notice to the judgment-debtor is not prescribed by law before making a decree final on the application of the decree holder but in practice it is given on the principle that it is just and proper to hear the opposite party. But the principle of *audi alteram partem* does not require a notice of the second application where notice of the first application was duly served and the mortgagor failed to appear to show cause on the day fixed for the hearing. It may reasonably be interdicted in such a case that he had nothing to say and there was nothing for the Court to hear from him. A second notice under such circumstances was not required, and the fact that the second notice was not duly served is not a ground for setting aside the *ex parte* final decree. (Kotwal A. J. C.) BABUJI v. RAMGOPAL. 73 I. C. 32: 19 N. L. R. 124: 1923 Nag. 320.

C. P. CODE (1908), O. 34, R. 5.

—O. 34, R. 5—*Suit for sale—Final decree—Court if can extend time.*

A Court has no power to extend the time after a final decree is passed in a suit for sale. (*Dulal, A. J. C.*) GANGA RATAN v. CHANDIKA PRASAD.

9 O. & A. L. R. 319 : 74 I. C. 573

—O. 34, R. 6—*Money decree—Effect of non-challenging.*

Where a preliminary decree for sale obtained by a mortgagee was declared not valid on the ground that the mortgagor as a member of a joint family could not mortgage the properties in the absence of a legal necessity, and thereupon the mortgagee obtained a decree under O. 34, R. 6 for the money due and this was not objected to or challenged in appeal by the mortgagee, the purchaser of the property in execution gets a good title. (*Walsh and Ryves, JJ.*) TEJA v. TIKA RAM.

21 A. L. J. 754 : L. R. 4 A. 522.

—O. 34, R. 6—*Personal decree against mortgagor—Form of.*

Where there is a personal covenant in a mortgage deed, the proper form of the decree is to direct that if the net proceeds of the sale are insufficient to pay the amount due to the plaintiff, then the plaintiff to be at liberty to apply for a personal decree against the defendant for the amount of the deficit. It is not proper to direct that in default of payment of the decretal amount the plaintiff is to be at liberty to recover the same by applying for sale of the mortgaged property or sufficient portion thereof. (*Machad, C. J. and Shah, J.*) KESHAV MANJA BHAT v. GOVIND NAGA BHAT.

75 I. C. 188 : 1923 Bom. 32.

—O. 34, R. 6—*Personal decree—Transfer and redemption of mortgage—Covenants for payment of debt—Appellate Court—Power to pass decree.* See (1922) DIG. COL. 319, ASKARAN BAID v. GOBORDHAN KOLERA.

70 I. C. 158.

—O. 34, R. 6—*Personal liability—Purchaser of mortgaged property.*

A purchaser of the equity of redemption is under no personal liability to the mortgagee though he agreed to pay off the mortgage. (*Lord Atkinson*) NANKU PRASAD SINGH v. KAMPTA PRASAD SINGH.

1923 P. C. 54 (1) (P.C.).

—O. 34, R. 6—*Scope of.*

The personal liability of a mortgagor arises only after first exhausting all remedies against the person of the mortgagor but this does not mean that in a case where a portion of the mortgaged property is destroyed there can be no personal liability. (*Mookerji and Rankin, JJ.*) CHAND MALL BABU v. BAN BEHARI BOSE.

50 Cal. 718 :

74 I. C. 1021.

—O. 34, R. 7—*Preliminary and final decree—Mortgage suit.*

The provisions of the Civil Procedure Code which regulates the granting of a preliminary decree in a suit for redemption is Order XXXIV, rule 7, which clearly contemplates there being only one preliminary decree, (a) directing an account to be taken if the amount due cannot be at once declared, and (b) giving directions as to payment of the sum certified on that account to

C. P. CODE (1908), O. 34, R. 8.

be due in respect of the mortgage debt etc. The same applies to other mortgage suits under rules 2 and 4. Otherwise there would be two preliminary decrees, a thing which is, clearly not contemplated by the provisions of the Civil Procedure Code. (*Pratt and Fawcett JJ.*) VAMANA CHARYA v. GOVIND.

25 Bom. L. R. 826 : 1924 Bom. 33.

—O. 34, R. 7—*Suit for redemption—Procedure—Preliminary decree—Direction as to taking up accounts—Procedure.*

Under O. 34, R. 7 of the C. P. Code it is open to the Court either to order that an account shall be taken of what will be due to the defendant for the principal and interest due on the mortgage, and for his costs of the suit, if any, or to declare the amount due at the date of such order : but in either cases the Court should proceed to ascertain the amount which would be found due on the date which is to be fixed for payment and specify what the consequence of the payment of that amount or the non payment thereof would be. If it merely directs that an account should be taken of what would be due to the mortgagee for the principal and interest due on the mortgage, as was originally done by the learned Subordinate Judge here, its order would be nothing more than an interlocutory order, to be followed by the making up of such an account, till which the preparation of the preliminary decree should be postponed. (*Kanhayalal, J. C.*) MOHKAN SINGH v. THAKUR CHANDRA PAL SINGH.

10 O. L. J. 374.

—O. 34, R. 7 Cl. (d)—*Applicability of—Co-mortgagor redeeming whole mortgage.*

Order 34, R. 7 Cl. (d) applies to the case of a mortgagor only and has no application to the case of a co-mortgagor who had redeemed the entire mortgage. (*Scott Smith and Brasher JJ.*) ALI AKBAR v. SULTAN-UL-MULK.

69 I. C. 653 : 1923 Lah. 129

—O. 34, R. 8—*Kanom—Redemption—Notice*

O. 34, R. 8 does not specifically require any notice given to a Kanamdar after the decree for redemption is passed and before plaintiff obtains possession. The Kanamdar is not prejudiced as he is not entitled to have delivery stayed pending realisation of improvements. (*Spencer and Devadoss, JJ.*) AMBI v. PUDIA KOVILAGATH SRIDEVI.

(1923) M. W. N. 753 : 18 L. W. 686.  
33 M. L. T. 101 (H.C.) 75 I. C. 566 : 45 M. L. J. 687.

—O. 34, R. 8—*Mortgage decree—Preliminary decree—Redemption—Money not paid in time—Effect of*

Until the mortgagee chooses to take action and bring the property to sale, the mortgagor judgment-debtor under the decree absolute has no right to move in the matter.

The intention of O. 34 R. 8 C. P. Code is that an end should be put to the mortgage once a suit for redemption is brought, and such an intention would be defeated if the mortgagee after obtaining the decree absolute for sale is permitted not to proceed with the sale, and to prevent the mort-

C. P. CODE (1908), O. 34, R. 8.

gagor from satisfying the decree. (*Dalal, A. J. C.*)  
*HAYAT MAHOMED v. NAGESHWARI PRASAD.*

26 O. C. 303 9 O. & A. L. R. 315 :  
 72 I. C. 390 : 1923 Oudh 236.

—O. 34, R. 8—Mortgage—Redemption  
 decree—Application for sale, *See* (1921) Dig.  
 Col. 301. *See* (1922) Dig. Col. 320 SANKARA  
 NARAYANA PILLAI *v.* P. V. THANGAMMA.

70 I. C. 333

—O. 34, R. 8—Order refusing to extend  
 time—Second appeal—If lies

Where a petition for extension of time under  
 O. 34, R. 8 is dismissed, the order is appealable  
 under O. 43 R. 1 (o, but no second appeal lies.  
 (*Shah, A. C. J. and Kemp J.*) DATTATRAYA VITHAL  
 GARWARE *v.* VASUDEO ANANT GARGATE.

47 Bom. 956 : 25 Bom. L. R. 990.

—O. 34, R. 8—Proviso—Extension of time  
 —Contract rate of interest. *See* (1921) Dig. Col.  
 320. MT BASHIRAM *v.* BISHAMBAR NATH.

69 I. C. 667.

—O. 34, R. 14—Applicability of—Compromise  
 decree—Provision for payment of mortgage  
 money in instalments—Default—Provision for  
 sale—Effect of.

In a suit for sale on a mortgage instead of the  
 usual mortgage decree a compromise decree was  
 passed which provided that the judgment debtor  
 should pay the decretal amount in certain instal-  
 ments, and if he should fail in the payment of  
 three consecutive instalments, then execution for  
 the whole amount should issue against the other  
 property of the judgment debtor and in the  
 event of the amount not being realised in that  
 manner, against the mortgaged properties. Held  
 that the decree itself ordered, in the event of  
 default and in the event of the other properties of  
 the judgment debtor proving insufficient, a sale of  
 the mortgaged property and it was not necessary  
 for the decreeholders to bring a suit for the sale  
 of the property merely because the other remedy  
 given under the decree has proved infructuous.  
 The decree in the case was something more than  
 a decree for the payment of the money in satis-  
 faction of a claim arising under a mortgage and O.  
 34, R. 14 did not govern it. (*Miller, C. J. and*  
*Kulwant ahar, J.*) CHAURASI MAHASARICK *v.*  
 BHAGVAN SAHU (1923) Pat 209 :

2 Pat. 787 : 74 I. C. 144 : 1924 P. 20.

—O. 34, R. 14—Contravention of—Effect  
 of—Sale in execution of money decree—Purchase.

O. 34, R. 14, C. P. Code is confined only  
 to claims arising under the mortgage and has no  
 application to a case where the sale takes place  
 in execution of a decree for money upon a claim  
 not arising under the mortgage 5 B. L. R. 420 ;  
 32 C. 296 Rpt. (*Chatterjee and Pearson, JJ.*)  
 RAJA JAGADISH CHANDRA DEO DHABAL DEB *v.*  
 BHUBANESHWAR MITRA.

37 C. L. J. 265 : 1923 Cal 121.

—O. 34, R. 15—Mortgage—Prior and  
 puisne mortgages—Decree obtained by one  
 without impleading the other—Rights

The rule that under the new Code of Civil  
 Procedure the puisne mortgagee can bring the  
 mortgaged property to sale without impleading a

C. P. CODE (1908), O. 33, R. 5.

prior mortgagee would apply in an ordinary case  
 in which the property belongs to the mortgagor,  
 but where the relief claimed by the puisne  
 mortgagee is against the mortgaged property  
 which has been sold in satisfaction of a decree on  
 a prior mortgage to which he was not a party,  
 the rule would not apply. He must first redeem  
 the prior mortgage and then bring the property to  
 sale. (*Gokul Prasad, J.*) BENARSI GOLDSMITH *v.*  
 BHULLA. 73 I. C. 227 : 1923 A. 423.

—O. 34, Rr. 8, 7 and 9—Decree—Mortgage  
 Deposit under S. 83 of T. P. Act, *See* (1922) Dig.  
 Col. 320. SETH ROSHAN LAL *v.* BHURI SINGH.

70 I. C. 899.

—O. 37—Suit under on promissory note—Oral  
 agreement as to payment of interest—Decree *See*  
 (1922) Dig. Col. 321. KADER BUKSH HAZIR  
 BUKSH *v.* SHAIK SERAJUDDIN. 70 I. C. 130.

—O. 37—Summary suit—If can be con-  
 verted into ordinary suit.

Where a summary suit on a promissory note  
 is barred it cannot be allowed to be converted  
 into an ordinary suit either by S. 153 or O. 6,  
 R. 17 of the Code. (*Chandreskhara Iyer, C. J.*)  
 GOPALAKRISHNAYYA *v.* NAVARATNA.

1 Mys L. J. 43.

—O. 37, Rr. 7 & 8—Interest up to redemp-  
 tion.

The parties did not complete redemption of a  
 mortgage if it remained unredeemed on the ex-  
 piry of four years from date as agreed. Held the  
 mortgagee in possession is entitled to damages  
 and the fair measure of damages is *prima facie*  
 the rate of interest determined by the parties in  
 their original contract. (*Le Rossignol and*  
*Harrison, JJ.*) MANGLI *v.* BIDHA LAL

1923 Lah. 404.

—O. 38—Small Cause Court—If can attach  
 immoveable property. *See* PROV. SM C. C. Act  
 S. 17. 28 C. W. N. 16.

—O. 38, R. 1—Pendency of appeal—Effect

The mere fact that an appeal is pending against  
 a decree is no reason for not enforcing execution  
 by arrest when the execution has not been stayed.  
 (*Scott-Smith, J.*) MEHR CHAND *v.* RAM LAL.

73 I. C. 766.

—O. 38, R. 2—Surety—Extent of liability—  
 Production of judgment-debtor.

Where a person stands surety under O. 38, R. 2  
 C. P. Code for another arrested before judgment,  
 the surety is not discharged from liability unless  
 at the time when the judgment debtor is produced,  
 he can be called upon to pay up the decree  
 amount or suffer imprisonment in default. The  
 mere production of the debtor with a production  
 order does not absolve the surety. (*Maug Kinn,*  
*J.*) SUBRAMANIA IYER *v.* ABDUL RAHMAN.

70 I. C. 129 : 1923 Rang. 98 (3).

—O. 38, R. 5—Attachment before judgment  
 —Final decree passed but not personal decree—  
 objects to be decided.

An application for attachment before judgment  
 in a mortgage suit before the personal decree  
 under O. 34, R. 6 is passed but after the final

## C. P. CODE (1908), O. 38, R. 5.

decree for sale is maintainable, as the latter does not put an end to the suit. The objections to such an attachment must be enquired into and decided (*Subbanna and Ramaswamy Iyengar, JJ.*) *MUNINARASIMHAIA v. CHIKKAVEERAPPA.*

1 Mys. L. J. 82.

## —O. 38, R. 5—Attachment before judgment—Immoveable property—Power of Small Cause Court

It is open to a Small Cause Court to attach immoveable property before judgment under O. 38, R. 5 C. P. Code. (*Newbould and Panton, JJ.*) *KEDARNATH PARAMANIK v. HEM NATH KARMAKAR.*

49 Cal. 904 : 70 I. C. 841 (1)  
1923 Cal. 176 (2).

## —O. 38, R. 5 and 6 and O. 43, R. 1 Clause (g) Attachment before judgment—Conditional order on failure to give security—Security furnishing—Appeal from order—Letters Patent Cl. 15.

O. 38, R. 6 of the C. P. C. empowers the Court in the events stated to direct the attachment of the defendant's property. The power given by O. 38, R. 5 to make an alternative order directing the defendant within a specified time to furnish security or to appear and show cause why he should not furnish security carried with it as an incident the power, after hearing the defendant, to confirm the order that security be furnished. Under its general powers the Court may then, if necessary, extend the time for the furnishing of the security. Where the defendant fails to show cause why he should not furnish security, the Court may, under R. 5, direct finally that security be furnished or in the alternative, under R. 6 direct the attachment of the defendant's property. The power of attachment also exists if the required security is not furnished. The provisions of the C. P. C. do not contemplate an appeal from an order directing the defendant to furnish security. An appeal lies from an order of attachment made under R. 6. Where an order for attachment is made on failure of the defendant to furnish security and the defendant in fact furnishes such security, there is no operative order of attachment and the remainder of the order is merely an order for the furnishing of security not appealable either under the C. P. C. or as a judgment under the Letters Patent. (*Sanlerson, C. J. and Richardson, J.*) *Haji Mohamuddin and Co. v. THE EASTERN JAPAN TRADING CO.*

50 Cal. 215 : 1923 Cal. 639

## —O. 38, R. 5—Considerations guiding the applicability of sale.

The power given under the C. P. Code to attach before judgment should be exercised only on clear proof of the existence of the mischief aimed at. The court must be satisfied not only that the defendant is about to dispose of his property or to remove it from the jurisdiction of the court, but also that his object in so doing is to obstruct or delay the execution of any decree that may be passed against him. If the court accepts the view that defendant has no intention of alienating the property, there is no power to order attachment (*Miller, C. J. and Kulwant Sahay, J.*) *CHANDRIKA PRASHAD SINGH v. HIRA LAL.*

73 I. C. 721.

## C. P. CODE (1908), O. 39, R. 1.

## —O. 39, R. 1—Injunction—Defendant residing outside jurisdiction—Acts within jurisdiction Interference with acts of religion.

No Court would grant an injunction against persons residing outside its jurisdiction and not subject to its jurisdiction in cases where they would have no means of enforcing the order.

But where the acts complained of are acts taking place within the court's jurisdiction and a party although a resident outside the court's jurisdiction appears in the suit and submits personally to the jurisdiction of the Court (not under protest or to question the court's jurisdiction) the Court has power to grant an injunction against him. Before granting a temporary injunction the Court must be satisfied in the first instance that the plaintiff applicant has a fair question to raise as to the existence of the right alleged, and further that the defendants have infringed or are threatening an infringement of these rights.

No person is entitled to enforce his religious views upon another or to restrain that other from committing any lawful act or making any lawful use of his property, merely because it would not fit in with the tenets of his particular religion. The right to worship is a right in *aliena solo*, and so long as it is not interfered with, the owner can do what he would like with his own property. (*Miller, C. J. and Ross, J.*) *MAHARAJAH BAHADUR SINGH v. SETH HUKUM CHAND.*

4 Pat. L. T. 48 : 71 I. C. 11 : 1923 P. 209.

—O. 39, R. 1—Power to restrain proceedings in another court—Jurisdiction. See (1922) Dig. Col. 322. *KUMAR GANGA SINGH v. PIRTHI CHAND LAL.*

4 Pat. L. T. 10

## —O. 39 R. 1—Principle—Suit for declaration without the further relief of injunction.

The general principles applicable to cases of interim injunctions is that where a permanent injunction cannot be given, no prayer for a temporary injunction will be allowed. (*Mullick and Kulwant Sahay, JJ.*) *BISHUN PRASHAD PATHAK v. SASHI BHUSAN MITRA*

(1923) Pat. 133 :

2 Pat. L. R. 17 : 73 I. C. 294

## —O. 39, R. 1—Scope of,

An order to defendant to prepare an inventory and to keep accounts is not an order under the inherent powers of the Court but one under O. 39, R. 1, C. P. Code. (*Campbell, J.*) *THE FIRM RAGHIB SINGH JASWANT v. NARAYAN SINGH*

72 I. C. 569 : 1923 Lah. 48.

## —O. 39, R. 1—Temporary Injunction—Prima facie case—Defendant residing outside jurisdiction—Property within jurisdiction.

On an application for a temporary injunction to restrain a sale in execution of a decree, pending a suit, the applicant must show a *prima facie* case. A Court has jurisdiction to issue an injunction upon a person residing outside its territorial limits if he has property within the jurisdiction against which the Court could proceed in the event of any contempt of the Court's authority. (*Mullick and Bucknill, JJ.*) *MAHARAJADHIRAJ SINGH RAMESHWAR SINGH BAHADUR v. KUMAR GANGANAND SINGH.*

1 Pat. L. R. 462 :

75 I. C. 381.

## C. P. CODE (1901) O. 39, R. 1.

—O. 39, R. 1—*Temporary injunction—Principles governing.*

When plaintiff has made out a prima facie case for possession and there is a real danger of damage or waste to the suit property which is in defendant's possession, an order for temporary injunction restraining defendant from using the property is good. (*Shadi Lal, C. J. and Fforde, J.*) SUNDAR SINGH v RAM SARAN DAS

5 Lah. L. J. 262 : 1923 Lah. 227.

—O. 39 R. 2—*Injunction—Candidate for election—Procedure.*

A temporary injunction can only be issued to the defendant and not to any other person. A suit for a declaration that a certain person is not eligible to stand as a candidate, cannot be said to be a suit for restraining him from committing an injury of any kind. Where a person has been declared by competent authority to be eligible for standing as a candidate at the election, and as the election itself could not be stopped, it would not be right to restrain him from taking part in it. To restrain the defendant in such a case would be tantamount to granting the plaintiff the relief sought in his suit and might deprive the defendant of a right to which he is really entitled. This would be a grave injustice to him for which he could not be adequately compensated afterwards. (*Scott-Smith, J.*) THE ELECTION OFFICER, GUJRAT v. ABDUL GHANI, ETC. 1923 Lah. 47.

—O. 39, R. 2—*Interlocutory injunction—Arbitration proceedings—Contract of reference impeached—Effect of* See (1920) DIG. COL. 323 FIRM OF KIRPALDAS KALIANDAS v. FIRM OF GAJANMAL. 70 I. C. 864.

—O. 39 R. 2—*Temporary injunction—Stay of execution proceeding in Munsif's Court by subornate judge—Specific Relief Act, Ss. 56 and 53.*

S. 56 which occurs in the chapter relating to perpetual injunctions has no application to temporary injunctions which are, by the express words of section 53 left to be regulated by the Code of Civil Procedure.

A Sub-Judge could issue a temporary injunction staying the execution of a decree proceeding in a Munsif's Court. The C. P. Code is not exhaustive and the Court has inherent jurisdiction to act *ex debito justitiæ*, in order to do that real and substantial justice for the administration of which alone it exists 23 Cal. 351 and L. P. A. 17 of 1920 toll. (*Shadi Lal, C. J. and Abdul Quadir, J.*) KANSHI RAM v. SHARAF DIN.

73 I. C. 909 : 1923 Lah. 144 (2).

—O. 40, R. 1—*Appointment of receiver—Notice of application—Necessity for—Grounds for appointing a receiver.*

O. 40, R. 1 C. P. Code does not lay down that notice to the opposite party should be issued before appointing a receiver and it is obvious that in many cases the object of the appointment might well be nullified if notice were issued. 22 C. 459; 21 M. L. J. 821; 107 P. R. 1908; 36 P. R. 1910 distinguished. The question that the Courts have to see in dealing with applications for a receiver, is whether, in the circumstances of the case the appointment of the receiver is just and

## C. P. CODE (1908), O. 40, R. 1.

convenient, the main object being to preserve the property. The power is discretionary with the court, but at the same time discretion is not to be exercised arbitrarily but in a regulated manner. Where there are a large number of outstandings due to the estate of the deceased person, some of which are liable to be lost owing to the efflux of time, and the heir of the deceased is a lady and there is a *bona fide* dispute between the parties the court is justified in appointing a receiver to recover the outstandings and to bring the proceeds into Court. (*Broadway, J.*) MT ISHRI v. SHIB RAM

71 I. C. 743 : 1923 Lah. 239 (2).

—O. 40, R. 1—*Appointment of receiver—Vesting of property—When effective.*

Where a receiver is appointed property vests in him only when the orders under O. 40, R. 1 (b) (c) and (d) are made. (*Halliday, A. J. C.*) RAMAKRISHNA v. GANAPATI. 1923 Nag. 6

—O. 40, R. 1—*Appointment—When liable to be set aside.*

A court of appeal will not, except in an extreme case, direct an order as to the appointment of a Receiver by a Court below (*Moti Sagar J.*) DHUMI v. NAWAB MUHAMMAD SAJJAD ALI KHAN

73 I. C. 600 : 1923 Lah. 623.

—O. 40, R. 1—*Declaratory suit—Appointment of Receiver—Agricultural lands.*

Even in a case of a pure declaratory suit, where no possession is asked for, a court has power to appoint a receiver as the object of such an appointment is only to keep the property in *custodia legis* and to preserve the same. A civil court in the Punjab can make such an appointment to collect the rent even in the case of agricultural lands. (*Moti Sagar, J.*) DHUMI v. NAWAB MUHAMMAD SAJJAD ALI KHAN. 73 I. C. 600 : 1923 Lah. 623.

—O. 40, R. 1 and O. 43, R. (8) 1—*Dispossession by receiver of a third party—Appeal.*

When property of a third party is interfered with by an officer of the court like the Receiver the party has ordinarily two remedies. He may apply to the court for a summary order restraining the Receiver from interfering or he may ask the leave of the Court to permit him to sue the Receiver and restrain him from interfering and for any other appropriate relief. Where the party has adopted the summary remedy, the order of the court is an order under O. 40, R. 1 (b) and is appealable. 39 C. 713, 3 Pat. L. J. 573 rel. (*Oldfield and Venkatasubba Rao, JJ.*) RAMASWAMY PILLAI v. JANAKI AMMAL. 32 M. L. T. (H. C.) 96 : 69 I. C. 393 : 1923 Mad. 129.

—O. 40, R. 1—*Execution—Ghatwali estate—Collection of rents.*

The rents and profits other than the surplus earmarked for payment of *chowkidars, sardars* and Government dues in a *ghatwali* estate belong to the *ghatwal* and in execution of a decree against him a receiver can be appointed to collect the same. (*Jwala Prasad and Ross, JJ.*) TIKAIT DAMODAR NARAIN SINGH v. GANGA RAM MARWARI 1923 Pat. 372.



## C. P. CODE (1908) O. 40, R. 1.

— O. 40, R. 1—*Just and convenient—Meaning of—Principles governing appointment—Merits of case—Appeal—Parties.*

The appointment of a Receiver is a matter of judicial discretion and courts should proceed cautiously viewing all the circumstances of the case. The words "just and convenient" mean that the Court should appoint a Receiver for the protection of property or prevention of injury according to legal principles and not because it thinks it convenient to do so. They confer no arbitrary and non-regulated discretion on the court.

The Receiver appointed in an action should as a general rule be a disinterested person, but it is competent to the court upon the consent of parties and in a proper case, without such consent to appoint a person mixed up in the subject matter of the litigation, if it will be beneficial to the estate.

In an appeal against an order refusing to appoint a receiver, the only necessary parties are those who are entitled to present possession.

The order on an application under O. 40, R. 1 should not express an opinion on the merits of the case. (*Mookerjee and Chotzner, JJ*) BHUPENDRA NATH MUKHERJEE v. MANOHAR MUKHERJEE. 23 C. W. N. 86.

— O. 40, R. 1—*Mahant—Disputes regarding title—Convenience.*

Where disputes arose between two persons as to who was entitled to be *mahant* and there was something to be said regarding the claim of each and under the circumstances putting one of them into possession would give him a great advantage over the other, a proper case was made out for appointing a receiver. (*Scott Smith, J.*) MANOHAR DAS v. KALYAN DAS. 69 I. C. 361.

— O. 40, R. 1—*Memorandum of appeal—Contents of.*

A memorandum of appeal should raise every plea and each issue specifically. A mere statement that the findings on all issues are attacked is insufficient. (*Daniel, J. C.*) BANKE LAL v. KANHAIYA LAL. 9 O. L. J. 637 : 1923 Oudh 113.

— O. 40 R. 1—*Partition suit—Appointment—Receiver—Appeal.*

The Court should not appoint a Receiver, merely because of strained relations, except by consent and upon proof by the plaintiff that *prima facie* he has a very excellent chance of succeeding in establishing the case made out in the plaint and that the property in possession of defendants the opposite party, was in danger of being wasted especially where one of the defendants is presumably manager. In any case the facts, that a mere declaration is sought for the land, that the Civil Court cannot divide it, that the plaintiffs appear from the materials on the record to be out of possession and that the Court has no jurisdiction over the apportionment of the produce make the order of the appointment of a Receiver for the agricultural lands still less justifiable than that regarding the other property.

An order of a Court that a Receiver should be appointed in a case, without appointing any body by name as receiver, and adjourning the case to a later date for so appointing one is an order

## C. P. CODE (1908) O. 40, R. 1.

under O. 40, R. 1 and appealable under O. 43 r. 1 (s). (Case-law discussed). 55 I. C. 827, 36 P. R. 1910 foll. (*Campbell, J.*) THE FIRM RAGHBIR SINGH JASWANT v. NARAIAN SINGH.

72 I. C. 569 : 1923 Lah. 48.

— O. 40, R. 1—*Receiver Appointment—Grounds for—Mahomedan widow in possession—Procedure on application—Refusal to appoint receiver at one stage—Subsequent application.*

The mere fact that a Mahomedan widow is entitled to a lien for dower on her husband's estate is no ground for refusing the appointment of a receiver summarily without enquiry into the merits of the application. There is nothing in O. 40, R. 1 C. P. Code to prevent the appointment of a receiver in such a case. The mere fact that a receiver has not been appointed at a prior stage of the suit is no ground for re using the application at a later stage, when fresh grounds are made out. (*Batten, J. C. and Halifav, A. J. C.*) ZAHROS SYED ALI v. AHMAD SYED.

1923 Nag. 21.

— O. 40, R. 1—*Receiver—Appointment of—Impartible zamindari—Large estate—Mines and minerals.*

Where the subject of dispute between the parties to a litigation was a large impartible zamindari with valuable forests and mines and minerals and the zamindari had been long under the management of the Court of Wards Held that the case was a fit one for the appointment of a receiver pending the appeal and for stay of execution of the decree by the successful claimant. (*Mookerjee and Rankin, JJ*) SRI PRATAB CHANDRA DEO DHABAL DEB v. SRI RAJA JAGADISH CHANDRA DEO. 37 C. L. J. 417. 75 I. C. 417.

— O. 40, R. 1—*Receiver—Interference with possession of third parties—Injunction.*

Where a receiver appointed in a suit interferes with the possession of third parties, it is open to the latter to apply to the Court for redress and for an injunction restraining the receiver from such trespass. It is not necessary for them to file a separate suit. (*Kumaraswami Sastri, J.*) THAVASIMUTHU NADAR v. BALAGURUSWAMI NADAR. 17 L. W. 64 : 70 I. C. 673 : 1923 Mad. 304.

— O. 40, R. 1—*Receiver suit against—Acts done in official capacity—Court's leave necessary.*

As a Receiver is an officer of the Court, he cannot be sued for acts done in his official capacity by a third party, except with the leave of the Court. 40 Cal. 1014 and 26 Mad. 492 Foll.

Ordinarily the party feeling aggrieved by the Receiver's conduct should seek redress against him in the very proceeding in which he was appointed as receiver, or any separate proceedings taken against him either in that Court or elsewhere, should be with the leave of the Court under whose authority the Receiver was acting. (*Rutledge, J.*) SECUNDER v. J. A. M. KASAIAR & Co. 1 Rang. 138 : 1923 Rang. 208.

— O. 40, R. 1—*Remuneration of receiver—Insolvency proceedings.*

A receiver is generally remunerated by the method of percentage or commission but there

C. P. CODE (1908), O. 40, R. 1.

is no absolute rule that he should be so remunerated. The Court has a discretion, if it thinks fit to allow him remuneration at a fixed rate. The receiver's remuneration must come out of the estate of the insolvent and the legal representatives of the insolvent cannot be made personally liable for the same. *Sanderson C J. and Richardson, J.* SREPAT SINGH v. RAM SARUP SURYA PRASAD. 1923 Cal. 516

—O. 40, R. (1) (d)—*Power of receivers.*

Where the receiver was given power to collect outstandings and do all things necessary for the realisation and preservation of the assets of a firm, *held* the Receiver had no authority to mortgage the property of the firm. (*Lord Carson*,) M. SUBRAMANIAN v. M. L. R. M. LUTCHMAN. 44 M. L. J. 602; 50 Cal. 338;

2 Eur. L. J. 25. 32 M. L. T. (P. C.) 184; 25 Bom. L.R. 582; 38 C. L. J. 41; 18 L. W. 446 (1923) M. W. N. 762; 28 C. W. N. 1; 1 Rang. 66; 71 I. C. 650; 50 I. A. 77; 1923 P. C. 50; (P. C.).

—O. 40 R. 4—*Receiver—Neglect—Account.*

An appeal from an order on an application to the Court below, to call upon a discharged receiver in a suit to render accounts and refund losses due to his neglect during the time he was in the office of a receiver, is not competent. (*Le Rossignol and Abdul Qadir, JJ.*) GOKAL CHAND v. UDHEKAM. 70 I. C. 224.

—O. 41, R. 1—*Appeal—Copy of decree not presented—Decree not prepared—Effect of.*

Where the plaintiff's suit was dismissed by the trial Court but no decree was drawn up it is not competent for an appellate Court to entertain an appeal from the decision of the trial Court. The proper course for the appellate Court is to adjourn the appeal to enable the plaintiff to file a copy of the decree. 19 P. R. 1919; 66 P. R. 1916 followed. (*Harrison J.*) SHER MAHOMED v. MAHOMED KHAN. 69 I. C. 558

—O. 41, R. 1—*Appeal—Presentation without copy of judgment—Validity of.*

A second appeal filed without a copy of the trial Court's judgment within time is not incompetent, inasmuch as Or. 41, R. 1 C, P. C., requires that only a copy of the lower Appellate Court's judgment is to be filed and does not require the filing of the judgment of the trial Court.

R. 6 of Chap. VII of Patna High Court Rules does not affect the rule of limitation. The rule was based upon the old Code of Civil Procedure and has not been made under S. 122 of the present Code.

In order to have the effect of varying the rules in the first schedule to the Code, the rules under S. 122 must first have been considered and submitted by a Rule Committee appointed under S. 123. (*Jwala Prasad and Ross, JJ.*) RAMDEO SINGH v. MAKHAN SINGH. (1923) Pat. 19; 74 I. C. 330.

—O. 41, R. 1—*Conditional order setting ex-parte decree—Appeal—Order of dismissal.*

An ex-parte decree was set aside on condition the defendant deposited in court a large sum of money; an appeal was preferred against it, but meanwhile for non-compliance with the order, the

C. P. CODE (1908), O. 41, R. 2.

petition, had been dismissed. *Held*, the order of dismissal should also be filed. (*Dalal, J. C.*) INDAR SINGH v. GURDAYAL SINGH. 74 I. C. 86.

—O. 41, R. 1—*Failure to file copy of order appealed from.*

The appellants before the District Judge failed to file a copy of the formal order appealed against but the formal order was a precis copy, so far as its operative words were concerned, of the judgment of the order which they did file, *held* that the failure mattered to nobody and the objection was futile. (*Waish and Ryves, JJ.*) MT. KAUSILLA KUER v. MT. SUKHDEI.

1923 A. 579

—O. 41, R. 1—*Memorandum of appeal written by the petitioner—Validity.*

It is immaterial whether a memorandum of appeal is written by the appellant himself or by some body else as long as it is signed by the appellant or his agent duly authorised in his behalf, and represented to the proper authority. Hence there is no valid objection to the entertainment of the appeal where the memorandum is written by a petition-writer. (*Shadi Lal, C. J. and Zafar Ali, J.*) MUSSAMMAT SHIB DEVI v. KALLA RAM. 1923 Lah. 484.

—O. 41, R. 1—*Memorandum of second appeal—Presentation of, without copy of decree—Power to excuse delay in furnishing copies—Ex-parte order excusing delay—Application to vacate order.*

The provisions of O. 41, R. 1, C. P. Code are imperative and the presentation of a memorandum of second appeal without a copy of the decree appealed against is not a valid presentation.

27 I. C. 447, 16 C. L. J. 135; 16 All. 77 followed. It is open to the Court in the exercise of its discretion under S. 5 of the Limitation Act to excuse the delay in the presentation of the decree appealed against. 17 C. L. J. 86 referred to.

Where an ex-parte order is passed excusing the delay in the presentation of an appeal, it is open to the respondent to apply to have the order set aside. (*Kumarswamy Sasire, J.*) SUNDARAM AIYAR v. RAJA RAJESWARA MUTHURAMALINGA SETHUPATHI. 44 M. L. J. 279;

(1923) M. W. N. 164; 17 L. W. 352; 32 M. L. T. (H. C.) 232; 72 I. C. 308; 1923 Mad. 482.

—O. 41, R. 1—*Several appeals from one judgment—Copies of judgment necessary with memo. See (1922) Dig. Col. 1081.* RIJAN THAKUR v. CHARITAR THAKUR. 4 Pat. L. T. 290; 69 I. C. 686; 1 Pat. 670.

—O. 41, R. 1—*Valid presentation—What is.*

In cases in which a formal order is not drawn up, it is sufficient for the appellant to attach to his memorandum of appeal a copy of the judgment alone, but where a separate order is drawn up both are necessary. (*Kanhaiya Lal, J.*) KEDAR NATH v. NANAK. 74 I. C. 486.

—O. 41, R. 2—*Factum of Adoption not questioned.*

Where the finding of the lower appellate Court against the *factum* of adoption was not questioned in the grounds of second appeal, *held* validity of the adoption could not be allowed to be urged at

C. P. CODE (1908), O. 41, R. 2.

the further proceedings. (*Ayling and Odgers, JJ.*)  
RAJAMBAL AMMAL v. SHANMUGA MUDALIAR.

70 I. C. 653 : 1923 Mad. 11.

—O. 41, R. 2—*Alternative grounds of appeal—Power of Court to go into.*

Where alternative grounds of appeal are raised an appellate Court is not debarred from going into questions which are admitted for the purposes of an alternative argument and finding adversely to the appellant. (*Broadway and Martineau, JJ.*) RAM DAS v. MT. PANNA DEVI.

5 Lah. L. J. 117.

—O. 41, R. 2—*Copy of decree. See (1922, DIG. COL. 326. MUNICIPAL COMMITTEE, CHINOT V. BASHI RAM.*

69 I. C. 395.

—O. 41, R. 4—*Joint plaintiffs—Appeal by one—Parties*

Where one of several plaintiffs prefers an appeal in which the other plaintiffs are also interested, O. 41, R. 4 does not authorise him to proceed with the appeal without making the other plaintiffs parties thereto. (*Rafiq and Pigott, JJ.*) AMBIKA PRASAD v. JHINAK SINGH.

45 A. 286 : 21 A. L. J. 91 : L. R. 4 A. 92 ;

71 I. C. 321 : 1923 A. 211.

—O. 41, R. 4—*Power of appellate court—Deceased defendant—Judgment in favour of.*

Under O. 41, R. 4, C. P. Code an appellate court has power to reverse a judgment in favour of a deceased defendant as regards the whole of the plaintiff's claim and not only as regards that part of it in which the surviving defendants were particularly interested. 40 M. 846, 848, 25 M. L. J. 248 foll. (*Spencer and Ramesam, JJ.*) SUBBARAYA MUDALIAR v. KANDASWAMI MUDALI.

32 M. L. T. (H. C.) 124 : 70 I. C. 168 .

1923 Mad. 58

—O. 41 R. 4 and 22—*Powers of appellate Court—Variation of decree in favour of party not appealing.*

An appellate Court has power to vary the decree of the lower court as to costs in favour of a party who has not appealed against the decree (*Burn, S.M.*) DOLA v. SHAIKH KARIM-UD-DIN.

L. R. 4 A. 70 (Rev.)

—O. 41, R. 5—*Security—Appeal.*

An injunction was granted to stay execution on the condition of filing security. The judgment debtor thereupon offered to hypothecate his immoveable property by way of security. The Judge, however, refused to accept this security as sufficient and allowed two weeks time to the judgment debtor to produce some other person as surety. *Held*, every interlocutory order passed in the course of execution proceedings is not appealable, and an appeal lies only from a decree and a decree must conclusively determine the rights of the parties with regard to all or any of the matters in controversy. (*Moti Sagar, J.*) BAJRANG DAS v. DONGARSEE DAS.

1923 Lah. 446.

—O. 41, R. 5—*Stay of execution—Costs—Practice.*

Where the respondent is an insolvent and an application for stay of a decree for costs is made

C. P. CODE (1908), O. 41, R. 10.

the proper order to make is to direct the appellant to pay the costs to the respondent's solicitor on the latter's undertaking to repay the same in the event of the appellant succeeding on appeal. (*Schwabe, C. J. and Krishnan, J.*) RAMANUJAM CHETTY v. PADMANABHAM PILLAY.

70 I. C. 784 (1) :  
1923 Mad. 229 (2).

—O. 41, R. 5—*Stay of execution—Delivery of possession—Absence of notice—Effect of.*

An appellant applied for stay of execution and delivery of possession under the decree of the Court below. The Registrar of the High Court rejected the application without notice to the appellant's pleader on 20-2-23. The appellant's pleader got knowledge of the order on 1-3-23 and immediately applied for and obtained an interim Stay order from a Bench of the High Court on 6-3-23. In the meantime the order of the Registrar had been communicated to the court below which passed an *ex parte* order for delivery of possession on 28-2-23 and possession was actually delivered on 5-3-23. *Held* that under the circumstances the High Court was entitled to ignore the said delivery of possession and restore the *status quo ante* on the judgment-debtor furnishing security (*Jwala Prasad and Ross, JJ.*) KARSHAN BHABAN CHATALIA v. INDRA NARAIN CHANDRA.

4 Pat. L. T. 508 : 1 Pat. L. R. 393 :

1923 P. 597.

—S. 41, R. 5—*Stay of sale during appeal.*

If the decree holders shall have sufficient security in the property itself which will remain under attachment, execution therefore ought to be stayed. (*Moti Sagar, J.*) RAM GOPAL v. MANFUL SINGH

1923 Lah. 445 (2).

—O. 41, R. 10—*Appeal under the Letters Patent—Power to demand security for costs—Bombay High Court Rules 1921, R. 736.*

The High Court has power on an appeal under Cl. 15 of the Letters Patent to demand security for costs from the appellant in addition to the deposit of Rs. 500 under Rule 736 of the Bombay High Court Rules. But the power to demand security for the costs of an appeal must in any event be exercised according to well known principles. The mere fact that the appellant may lose and may not pay the costs of the appeal is not a sufficient ground for demanding security. There must be some evidence at least of facts which cast doubts on the honesty and *bona fides* of the appellant, such as obstruction to the execution of the decree in the lower Court, or the fact that the appellant is not the real litigant, or if in any way it can be shown that the application is vexatious. (*Macleod C. J. and Crump, J.*) RATANJAND v. DAMJI.

25 Bom. L. R. 468 :

73 I. C. 474 : 1923 Bom. 399.

—O. 41, R. 10—*Security for costs—Appeal dismissed—Effect.*

Where during the pendency of an appeal, security for costs was ordered, and then the appeal was allowed, the sureties ceased to be liable thereafter. The fact that the respondent therein was able to get the appellate order reversed does not make the sureties liable (*Mookenjee and Puthan, JJ.*) KEDAR NATH CHAKRABARTY v. CHANDI CHARAN MITTER.

38 C. L. J. 190.

C. P. CODE (1908), O. 41, R. 10.

—O 41, R. 10-A—Security—Failure to furnish—Rejection of appeal—Extension of time for giving security—Jurisdiction.

When once an appellate Court has rejected an appeal for failure to furnish security, it has no jurisdiction to extend the time for furnishing security. (*Greaves and Ghose, JJ*) *HARI BHABINI DEBI v. NARENDRA NATH ROY*.

1923 Cal 317.

—O 41, R. 10—Security for costs—Discretion of Court—Interference on appeal.

Under O. 41 R. 10, C. P. Code, the appellate Court may in its discretion demand from the appellant security for the costs of the appeal or of the original suit or of both. The poverty of the defendant is no ground for depriving him of his right to appeal. As a general rule a Court is both to prevent an appellant from pursuing the remedy allowed to him by law merely on the ground of poverty. But each case must stand on its own facts, and there may be cases in which a party should be directed to give security, at any rate for the costs of the appeal, before he is allowed to go further. (*Macleod, C. J. and Crump, J.*) *GULAB RAO v. VINAYAK*.

25 Bom L. R. 195 72 I C 285 :  
1923 Bom. 264.

—O. 41, R. 10—Security for costs when ordered—Poverty of appellant.

Poverty of the appellant by itself is not a sufficient ground for an order directing a security to be given. But no case has gone to the length of saying that mere want of means on the part of the appellant is a sufficient ground for dispensing with security. The true rule is that poverty of an appellant, standing by itself and without reference to the general facts of the case under appeal, ought not to be considered sufficient to warrant his being required to furnish security for costs 8 A. 203 and other cases cited (*Venkat-subba Rao, J.*) *KONAMMAL v. ANNADANA JADAYA GOUNDAR*,  
17 L. W. 26 :  
70 I. C. 586 : 1923 Mad. 204.

—O. 41, Rr. 11 and 31—Dismissal of appeal—Contents of judgment.

The dismissal of an appeal under O. 41, R. 11 of the Civil Procedure Code, by Court whose decision may be subject of an appeal does not relieve the Appellate Court from the necessity of writing a judgment which, however, need not be a long one. But the judgment, whatever it is, should show the points raised, the decision upon those points and the reasons for the decision. (*Ghose and Panton, JJ.*) *SURENDRA NATH SHOME v. RAGHUNATH DUTT*.  
27 C. W. N. 501 :  
1923 Cal. 558.

—O. 41, R. 11—Summary dismissal of appeal—Effect on mortgage decree—Time for payment.

Where an appeal from a mortgage decree is summarily dismissed under O. 41, R. 11, the time for payment of the mortgage money is not extended as the decree appealed from cannot be taken to have been confirmed under O. 41 R. 32. (*Shah A. C. J. and Kemp J.*) *DATTARAYA VITHAL GARWARE v. VASUDEO ANANT GARGATE*.

47 Bom. 956 : 25 Bom. L. R. 990.

C. P. CODE (1908), O. 41, R. 17.

—O. 41, R. 17—Appeal—Non-appearance of appellant on date fixed for hearing—Procedure—Dismissal on the merits—Propriety of.

On the day fixed for hearing an appeal, the appellant was not present in court but a vakil holding a vakalat from him was present and applied for an adjournment. This was refused and thereupon the vakil informed the court that, as he had no instructions or papers he could not argue the appeal and took no further part in the proceedings. The appellate court instead of dismissing the appeal for default under O. 41, R. 17 C. P. Code considered the evidence in the light of the grounds raised in the appeal memo. and dismissed the appeal with costs. *Held* (1) that there was no appearance on the part of the appellant within the meaning of O. 41, R. 17, C. P. Code.

(2) that the appellate court has no power to go into the merits of the case and to dismiss the appeal on the merits.

(3) and that the proper order to be made on second appeal was to set aside the order of the lower appellate court dismissing the appeal on its merits as *ultra vires* and to direct him to restore the appeal to file and dispose of it according to law. (*Ayling and Odgers, JJ*) *MUSALIA-RAKATH MAHOMED v. MANAVIKRAMA*.

69 I. C. 513 : 1923 Mad. 13.

—O. 41, R. 17—Default of appearance—Pleader refusing to argue the case.

Where when an appeal was taken up for hearing the pleader for the appellant declined to argue the appeal as he was unready and the court dismissed the appeal for default. *Held*, that it was a case of non-appearance of the appellant. To constitute appearance by a pleader it must be shown that the pleader was ready to place the materials before the Court to enable it to apply its judicial mind. 34 C. 403 foll. (*Mullick and Kulwant Sahay, JJ*) *FIRM OF JAI NARAIN RAMJASH v. SITARAM MARWARI*. (1923) Pat. 175 :  
1923 P. 520.

—O. 41, R. 17—Dismissal of appeal for default—Notice of hearing not fixed—Application to set aside the dismissal—Limitation.

Where no date was fixed for the hearing of an appeal and the Court purported to dismiss the appeal for default, *held*, that the dismissal was without jurisdiction and that an application to set aside the dismissal was not governed by Art. 168 of the Limitation Act. (*Scott Smith, J.*) *ATA MAHOMED v. SHANKAR DAS*.  
69 I. C. 618.

—O. 41, R. 17 and O. 23, R. 3—Dismissal of appeal for default—Compromise thereafter—Power to record.

Where an appeal has been dismissed for default of appearance of both the parties and both the appellant and respondent within a month of the dismissal file a petition of the compromise settling their disputes, with an additional application for restoration of the appeal. *Held* that in the circumstances of the case, the court ought to have restored the appeal and passed a decree in terms of the compromise. (*Suhrawardy and Panton, JJ.*) *ASWINI KUMAR DUTT v. SUKHODA SUNDARI DEBYA*.  
1923 Cal. 319 (2).

C. P. CODE (1908), O. 41, R. 17.

—O. 41, R. 17 and 19—Dismissal of appeal for default—Remedy of appellant—Court it has an inherent power to restore. See LIM. ACT, ART. 165. 45 M. L. J. 813.

—O. 41, R. 18—Dismissal of appeal—Omission to provide identifier—Effect of.

An appeal cannot be dismissed under O. 41, R. 18, C. P. Code, on account of the omission of the appellant to provide a person to identify the respondent as required by O. 5, R. 18, C. P. Code, (*Jwala Prasad and Ross, JJ.*) NAGENDRA NATH GHOSH v. SHAMBHU NATH PANDE. 1923 P. 114

—O. 41, R. 19—Appeal dismissed for failure to pay printing charges—If can be restored.

An appeal dismissed on account of failure to pay printing charges cannot be restored under O. 41 R. 19 (*Chandrasekhara Iyer C. J.*) CHEN-NARAYAPPA v. MUNIAPPA, 1 Mys L. J. 44.

—O. 41, R. 19—Dismissal of appeal for default—Absence of counsel for appellant—Unintentional absence—Restoration.

When an appeal was called on for hearing neither the appellant nor his counsel appeared and the appeal was dismissed for default. Immediately after the appellant's counsel appeared and applied for restoration. Held that the omission to appear was wholly unintentional and that the appeal must be restored to file. (*Broadway, J.*) BALMOKAND v. WAZIR CHAND. 5 Lah. L. J. 89

—O. 41, R. 19—Dismissal for default—Case put down lower in the list without notice to petitioner's vakil—Absence when case called on—Dismissal for default.

There is no rule laying down that where a Judge for any reason orders a case, which is before him, for hearing, to be put down lower in the list he must give notice to the counsel of the parties in other cases. On the other hand the counsel are expected to be present within the compound of the Court if they have got any case in the list. Where at the time of the hearing of a case transferred lower down in the list without notice to the appellant, the appellant's counsel was not present in court and the appeal was consequently dismissed for default held that there was no cause for the restoration of the appeal. (*Abdul Raoof, J.*) NANAK CHAND v. SAJJED HUSSAIN. 71 I. C. 813.

—O. 41, R. 19—Effect of—If sole remedy.

When an appeal is dismissed for default under O. 41 R. 18 C. P. C., O. 41, R. 19 gives an option to the appellant to apply for re-admission, but it does not take away any other remedy that may be available. The omission of a provision for fresh appeal cannot have the effect of taking away such right. (*Das and Kulwant Chay, JJ.*) SURAJDEO NARAIN SINGH v. PARTAP RAI.

2 Pat 739 : 4 Pat. L. T. 405.  
(1923) Pat. 213 : 75 I. C. 284 : 1923 P. 514.

—O. 41, R. 19—Sufficient cause—Counsel engaged in another court.

The fact that the counsel was engaged in another court when the appeal was called on and had sent word to the Reader of the court for a short pass over is not sufficient to set aside the dismissal for default and re-admitting the appeal

C. P. CODE (1908), O. 41, R. 22.

(*Abdul Raoof and Martineau, JJ.*) SAIF ALI v. CHIRAGH ALI SHAH 1923 Lah. 97 (1).

—O. 41, R. 20—Applicability of law of limitation

The law of limitation does not apply to action taken by a court under O. 41, R. 20 but the power to take action is discretionary and should not be exercised in a case of extreme neglect. A third party cannot appeal on behalf of co-sharers who are interested in the appeal against a co sharer and if they are not made respondents in time the appeal abates. (*Broadway, J.*) MUNICIPAL COMMITTEE BHERA v. SHIVRAM.

75 I. C. 90 : 1923 Lah. 503.

—O. 41 R. 20—Scope of 151—Inherent powers when to be exercised.

An appellate court has power to implead only such persons as parties to the appeal as were parties in the trial court and were not made parties to the appeal but not those who were complete strangers to the suit. 18 All. 133 Ref.

Powers of a court to implead parties under S. 151, C. P. Code, are circumscribed by O. 41, R. 20 and it is only in exceptional circumstances that the inherent powers under S 151 could be invoked. 3 Pat. L. J. 409 Dist. (*Mohitsagar, J.*) MUSSAMMAT HALIMAN v. NUR MAHOMMED KHAN.

73 I. C. 136 : 1923 Lah. 490.

—O. 41, R. 22—Cross-objection—Co-respondent.

Under O. 41, R. 22 a respondent can file a memorandum of cross objections against a co-respondent. 38 Mad. 705 foll. (*Martineau, J.*) CHHAJU v. QUTAB DIN.

5 Lah. L. J. 92 :  
69 I. C. 330 : 1923 Lah. 39.

—O. 41, R. 22—Cross objections—Hearing of—Dismissal of appeal—Co respondents.

A cross appeal should ordinarily be directed against the appellants and not against the co-respondents. Where an appeal is dismissed for failure to furnish security under O. 41, R. 10, C. P. Code in the presence of the respondent and without any objection on his part he cannot subsequently proceed with his cross-objections. 5 Pat. L. J. 328; 8 O. L. J. 358 foll. (*Daniels and Lyle, A. J. C.*) QARA MAHOMED SHABAN v. BAZAR ARA BEGUM.

70 I. C. 79 : 1923 Oudh 108

—O. 41, R. 22—Ex parte decree—Appeal from decree—Right to prefer—Conditions.

A defendant who has been placed *ex parte* can impugn the decree in appeal on the ground that he was wrongly made *ex parte* provided he has not moved the trial Court under O. 9, R. 13 C. P. C. The fact that before the decree was passed he took futile proceedings purporting to be under O. 9, R. 13 on the erroneous impression that a decree had been passed, does not take away the right of appeal. What he could have raised in appeal, can also be raised by way of objections under O. 41, R. 22 (*Oldfield and Devadoss, JJ.*) BAVA LEVVAI SAHIB v. AMMEENAMMAL.

45 M. L. J. 805,

—O. 41, R. 22—Memorandum of cross objections—Appeal barred by limitation—Effect of.

Where it is found that the appeal itself was preferred out of time and therefore barred, the

C. P. CODE (1908), O. 41, R. 22.

memorandum of objections could not be heard. (*Shadi Lal, C. J. and Fforde, J.*) JAI GOPAL SINGH v. MUNA LAL. 4 Lah. 140; 5 Lah. L. J. 345; 73 I. C. 655; 1924 Lah. 43.

—O. 41, R. 22—Memorandum of cross objections—Respondent putting in a petition supporting the decree of the lower court—fee. See (1922) DIG. COL. 331. RAM PRASAD KALWAR v. MT. AJANASIA. 9 O. and A. L. R. 59.

—O. 41, R. 22—Memorandum of cross objections—Right to file—Intervenor.

In a suit in ejectment filed against the father of a deceased tenant, his widow intervened and the Court dismissed the suit upholding the claim of the father. It was found that the father and the widow supported each other's claim to the tenancy. On an appeal by the land-holder held that it was competent to the widow to file cross objections. (*Fremantle, S. M.*) RANI DHAN DEI. KOER v. MT. PHULWASI.

L. R. 4 A, 170. (Rev.)

—O. 41, R. 22—Memorandum of cross objection—Second Appeal

A memorandum of cross objections as to costs in the Courts below is not a matter which can be considered on second appeal. (*Shadi Lal, C. J. Le Rossignol, J.*) MADHO PRASAD v. FIRM OF ASHAN LAHI, 5 Lah. L. J. 108.

—O. 41, R. 22 Objection as to jurisdiction to attach not taken in the execution court.

When an objection to jurisdiction of the execution Court was not taken in first Court, held it is doubtful whether the order of the Court attaching the property could be properly attacked by means of cross objections in connection with an appeal from an entirely different order.

It is not open to the judgment debtor to raise his objection by way of cross objections in the appeal of the decree holder from the order of the executing Court refusing to set aside a prohibitory order. (*Scott Smith, J.*) FITZ HOLMS v. WARYAM SINGH. 75 I. C. 419; 1923 Lah. 514.

—O. 41, R. 23—Decision on all issue by trial court—Appellate court differing in its conclusion—Legality of remand.

When a suit is tried by the first court and is dismissed on the merits and the appellate court comes to a different conclusion on the main issue in the case but nevertheless remands the case on the ground that evidence was not properly directed, the order of the appellate court recording its finding on the issue and then directing a remand is materially irregular and should be set aside in revision by the High Court. (*Devadoss, J.*) PERICHERLA SURYANARAYANA RAJU v. GANAPATHY RAJU. 70 I. C. 655; 1923 Mad. 113.

—O. 41, R. 23 and O. 43, R. 1 (cl). 4—Decision on preliminary point—Meaning of—Order of remand—Appealability. See (1922) DIG. COL. 331 MALAYATH VEETHIL RAMAN v. KRISHNAN NAMBUDRIPAD 69 I. C. 828.

—O. 41, R. 23—Determination as to the date of cause of action.

C. P. CODE (1908), O. 41, R. 23

A remand in order to enable the plaintiff (appellant) to ascertain whether or not a demand was made within three years of the institution of the suit which would save limitation, was refused in this case (*Harrison and Zafar Ali, JJ.*) RAM v. GAMAN RAM. 1923 Lah. 645.

—O. 41, R. 23—Disposal by first court on all issues—Order of remand—Legality.

Where the first Court has framed a number of issues and has decided every one of them, it is not open to an appellate court to remand the case on additional issues. The proper course is to call for findings on the additional issues. (*Spencer and Venkatasubba Rao, JJ.*) MALAYANDI GOUNDAN v. BOMMAN POOSARI. 17 L. W. 159; 71 I. C. 204; 1923 Mad. 331 (1).

—O. 41, R. 23—Disposal of suit on preliminary point—Remand.

Order 41 R. 23, C. P. C., does not make it compulsory for a Court to remand a case for decision by the lower Court where it has been decided on a preliminary issue (*Burn, J M.*) KUAR MD. ABDUL JALIL KHAN v. PURAN. L. R. 4 A. 218 (Rev.).

—O. 41, R. 23—Issue settled and tried—Remand.

The C. P. Code does not make any provision for an order of remand where all the issues have been settled and tried. (*Sanderson, C. J. and Richardson, J.*) INJAD ALI v. MOHINI CHANDRA. 27 C. W. N. 1025.

—O. 41, Rr. 23 and 25—Order of remand—Decision on a point of law—Appeal from final decree after remand—Legality of order of remand not to be questioned.

Where the High Court in Second Appeal differs from the lower Court on an issue of law and remands the case to the Court below the order of the High Court is binding upon that Court and cannot be questioned in an appeal from the final decree passed after remand. (*Miller, C. J. and Ross, J.*) RAI BRIJ RAJ KRISHNA v. CHATHU SINGH. 4 Pat. L. T. 35; 1923 P. 226.

—O. 41, Rr. 23 and 25—Order of remand—Propriety of Decision by trial court on all issues—Appellate court differing on one issue and remanding the case.

Where the trial Court decided a suit on all the issues and dismissed the suit and the appellate court being of a contrary opinion on one of the issues, remanded the suit for fresh disposal but without disturbing the findings of the first court on the other issues, held, that the order of remand was improper. The appellate court should have dealt with the other issues and disposed of the case or if in its opinion the evidence on record and the findings of trial court were insufficient to dispose of the case the appellate court should have called for findings under O. 21, R. 25 C. P. Code. (*Spencer and Venkatasubba Rao, JJ.*) MUNISAMI NAICKEN v. MUNISWAMI NAICKEN. 1923 M. W. N. 11; 1923 Mad. 227

—O. 41, Rr. 23, 25—Order of remand—Reconsideration of by appellate Court. See (1922) DIG. COL. 332 NAGESHAR SAHAI v. KUAR MATA PRASAD. 69 I. C. 7

C. P. CODE (1908), O. 41, R. 23.

—O. 41, R. 23—*Powers of Appeal Court under—Suit decided not only on preliminary point.*

The power of the appellate court to direct a remand is wider than that indicated in O. 41, R. 23. The Appellate Court has inherent power to direct a remand where such remand is needed in the ends of justice. An Order of remand may be valid even though it is not covered by O. 41, R. 23. Assuming for a moment that an order made in the exercise of the inherent powers of High Court has been improperly made; that is made under circumstances which do not justify it. Such an order is not without jurisdiction. It is an order made with jurisdiction though the jurisdiction may have been erroneously exercised. A remand Order made on second appeal is, unless a review of it be obtained within the prescribed time a conclusive determination of the points of law involved in it; and the correctness of the Law laid down upon a remand cannot be questioned on a subsequent second appeal; nor is the fact of the court's adopting a different view of the law after an order has been made in general a good ground for allowing a review of such order after the time for a review has elapsed. The policy of the legislature as indicated in the C. P. Code of 1908 is in favour of finality of orders of remand. (*Mookerjee and Rankin, JJ.*) BISAI NATH v. TARA NATH DEB. 72 I. C. 588 : 1923 Cal. 385.

—O. 41, R. 23—*Powers of remand—If confined to rule. 23.*

A Court of appeal has powers of remand even in cases not covered by O. 41, R. 23, if the ends of justice require the same. (*Moti Sagar J.*) BHUP SINGH v. PREM SINGH. 5 Lah. L. J. 384.

—O. 41, R. 23 S. 151—*Remand—Amendment of plaint—Appeal.*

Where a suit is remanded for rehearing after amending the plaint, the order is one made under S. 151 and not under O. 41, R. 23 and hence there is no right of appeal. The remand is not on a preliminary point and as O. 41, R. 23 will not apply, the court has power under S. 151 to remand. (*Martineau, J.*) MAHOMED SHAH v. TALAB HUSSAIN SHAH. 73 I. C. 915.

—O. 41, R. 23—*Remand by appellate Court—Jurisdiction to try suit on remand. See C. P. CODE S. 21 & O. 41 R. 23.* 44 M. L. J. 238.

—O. 41 R. 23—*Remand—Consideration of inadmissible evidence.*

Where the lower court has based its findings on certain inadmissible evidence but there is ample evidence otherwise on the record to sustain the findings the High Court need not remand the case to the court below for a decision on the admissible evidence in the case. (*Suhrawardy, J.*) FAIJADDIN v. AGNI KUMAR SARMA. 71 I. C. 300.

—O. 41, R. 23—*Remand—Decision not on pleadings but evidence.*

There should be a remand, if the lower Court fails in its duty to discuss the evidence bearing on this point and to come to a conclusion not on the pleadings of the parties, but on the evidence

C. P. CODE (1908), O. 41, R. 23

adduced before the court. (*Das, JJ.*) MAHARAJA BAHADUR KESHO PRASAD SINGH v. BHAGWAT SARAN PANDE. 1923 Pat. 174.

—O. 41, R. 23—*Remand—Opportunity to plaintiff to supplement his case.*

Where the plaintiff has not come into Court with a definite statement of facts necessary for him to succeed and with all his evidence he cannot in second appeal ask for a remand so as to give him an opportunity to supplement his case in the Court below. (*Sanderson, C. J. and Ghose, J.*) JATINDRA MOHAN CHAKRAVARTI v. BIJOY CHAND MAHATAB. 71 I. C. 284.

—O. 41, R. 23—*Remand—Order for—Decision when conclusive.*

In the case of a remand under O. 41, R. 23 points decided by the order of remand are final subject to appeal and cannot be reopened at any subsequent stage of the litigation 48 C 499, 43 A. 379 Ref. (*Daniels and Dalal, A. J. C.*) JANKI SHAH v. MAHOMED ABBAS

70 I. C. 983 : 1923 Oudh 50 (2).

—O. 41, R. 23—*Remand order—Execution proceedings.*

In an appeal against an order in execution proceedings, where the case had not been disposed of upon a preliminary point, an order of remand was made by the lower appellate Court. An order for refund of the Court fee stamp paid on appeal was also made under S. 13 of the Court Fees Act.

Held the order of remand was admittedly illegal as an order for refund of Court fees can only be passed when demand is made under O. 41, R. 23 (*Campbell, J.*) MIRAN BAKHSH v. CHANAN DIN.

70 I. C. 1008 : 1923 Lah. 171

—O. 41, R. 23—*Remand order made under inherent power—Appeal—C. P. C. O. 43 Sub-R. 1 (u).*

In a suit for partition the defendants resisted the claim of the plaintiffs in the Primary Court on the allegation that the land had been previously partitioned by metes and bounds and that they and their predecessors had long been in separation. The trial Court held in favour of the defendants and dismissed the suit. Upon appeal the plaintiffs asked for permission to adduce in evidence any entry in the record of rights which had been finally published after the date of the decree of the Trial Court. The lower Appellate Court acceded to the request of the plaintiff and set aside the decree of the Court of first instance and directed a re-trial of the suit with reference to the entry in the record of rights and such other evidence as might be adduced by both the litigants. Against this order for re-trial the defendants preferred an appeal to the High Court. Held (1) that the order of remand was made not under the provisions of O. 41, R. 23, C. P. C. but under the inherent powers of the Court, (2) that an appeal lay against the order of the lower Appellate Court in as much as it amounted to a decree irrespective of the provisions O. 43, R. 1 (u) C. P. C., (3) that the admission of the record of rights was justified under the circumstances of the case. (*Mookerjee and Chotzner, JJ.*) BHAIROB CHANDRA DUTTA v.

C. P. CODE (1908) O. 41, R. 23.

KALI KUMAR DUTTA. 37 C. L. J. 491 :  
71 I. C. 453 : 74 I. C. 1038 : 1923 Cal. 603.——— O. 41, Rr. 23, 24 and 25—*Remand—Power of appellate Court—Full trial in Court of first instance.*

Where the trial Court has decided the suit on the evidence on all the issues it is not open to the appellate court to remand the case under O. 41, R. 23, C. P. Code as though the suit had been decided on a preliminary point. The appellate Court should have taken the course indicated by O 41, R. 24 or R. 25, C. P. Code (*Richardson and Ghose, JJ.*) NURUL GUNI v. KAZAMAINI.

1923 Cal. 323.

——— O. 41, Rr. 23—*Remand Powers of an appellate Court—Inherent power.*

The power of remand under S 107 Civil Procedure Code is limited to the case described in O. 41, R. 23, but nothing in that section restricts in any manner the application of the principle of inherent power of remand recognised by S. 151 of the Code. (*Abdul Raof and Moti Sagar, JJ.*) MT. UMRI v. SHAH MAHOMED.

5 Lah. L. J. 269 : 74 I. C. 497 : 1924 Lah. 36.

——— O. 41, R. 23—*Remand—Power of High Court—Decision on issue given by the courts below.* See (1922) DIG. COL. 335. GANPAT RAO BANKA PURI v. RAJ KUMAR SINGH. 1 Pat. 639.

——— O. 41, R. 23—*Remand—Preliminary point—Inherent power of remand—Appeal—Revision.*

An appellate Court has power to remand a case under O. 41 R. 23 C. P. Code only when the lower court has disposed of it on a preliminary point. No order of remand can be regarded as made under O. 41 R. 23, C. P. Code unless the case has been disposed of without entering into the full merits by reason of a decision on law or fact which has prevented the case being tried to the end 19 A. L. J. 971 ; 20 A. L. J. 321 Ref. An appellate Court has powers of remand apart from the power conferred by O. 41 R. 23. Such powers are conferred by S. 107 and are also implied by the provisions of S. 100 Sub S. (2) and S. 105 (1) of the C. P. Code. 30 M. 54 Ref. Where an order of remand is made under its inherent powers by an appellate court, there is appeal from the order but the High Court can interfere in revision with the order. (*Ashworth, J. C.*) FARZAND ALI v. EKADASHI.

26 O. C. 10. 10 O. L. J. 36 : 9 O. & A. L. R. 332 :  
73 I. C. 591 : 1923 Oudh 177.——— O. 41, Rr. 23, 25—*Remand—Propriety of.*

In a suit for possession and damages where the appellate court differs from the trial court on the question of title and possession, but as there was no finding of the trial court as to damages remanded the whole suit, held the procedure is improper. The proper course would be to remit an issue under O. 41 R. 25 (*Piggott and Walsh, JJ.*) ABDULLAH KHAN v. MAHAMMAD MAQBUL HUSAIN.

45 A. 565 : L. R. 4 A. 260 : 21 A. L. J. 538 :

74 I. C. 822 : 1923 A. 603 (2).

——— O. 41 R. 23—*Remand—Revision.*

No revision lies against an order of remand. (*Rafique, J.*) BISHNATH SINGH v. MT. RAM SRI. 1923 All. 464 (2).

C. P. CODE (1908), O. 41, R. 25.

——— O. 41, R. 23 and S. 151—*Reversal and remand for denovo trial—Propriety of* See (1922) DIG. COL. 335. RADHA KRISHNA SAHA v. KAMAL KAMINI DEBYA. 70 I. C. 547.

——— O. 41, R. 23—*Second appeal—Custom—Punjab Courts Act, S. 4.*

There can be no appeal from an order of remand under O. 41, R. 23 of the Code of Civil Procedure where the question involved is one of custom. As the appellant would have a right of second appeal from the decree of the Appellate Court only if he were to obtain a certificate under sub S. 3 of S. 40 of the Punjab Courts Act, it could not be said definitely that an appeal would lie from the decree of the appellate Court. The question of custom can be agitated in second appeal from the final decree if the certificate is obtained. (*Scott Smith and Fforde, JJ.*) MT. CHANDO v. MIRAN BAKSH.

5 Lah. L. J. 392 : 73 I. C. 650 : 1923 Lah. 535.

——— O. 41, R. 24—*Appellate Court—Power to dispose of appeal on issue not framed.*

An appellate court has power to dispose of a case on an issue not framed by the original court and the power to send the case back is merely discretionary. (*Burn, S. M.*) BHAWANI v. ZAHRIA. L. R. 4 A. 34 (Rev.).

——— O. 41, Rr. 25 and 26—*Appellate Court—Issues sent to Lower Court—Findings—No objections—Acceptance by Appellate Court.*

The lower Appellate Court referred certain issues for trial to the court of first instance. After the findings which were against the defendant had been received the defendant failed to prefer objections to the findings within the ten days time allowed. The lower Appellate Court thereupon without considering the finding on the merits decided the appeal, considering those findings to be final and dismissed the appeal. The defendant preferred a second appeal urging that the action of the District Judge was not warranted by law, and that he ought to have himself considered whether the findings were good or bad findings and should have decided the case. Held that the Lower Appellate Court ought to have itself considered the correctness or otherwise of the findings returned by the trial Court before deciding the appeal. 6 A. 391 referred to. (*Gokul Prasad, J.*) MUKHTARA v. SARDARA. 71 I. C. 444 : 1923 A. 417 (1).

——— O. 41, R. 25—*Case remitted for trial to lower appellate court—Power of lower appellate Court to send the case to the first Court.*

Where the High Court has remitted certain issues for trial to the lower appellate Court, that court has no power to delegate its duties to the Munsif and the Munsif has no authority to record additional evidence in the case or express any opinion upon it. 105 P. R. 1903 : 14 A. 23 referred to. (*Abdul Raof, J.*) UTTAMCHAND v. MUHAMMAD BAKSH. 71 I. C. 896.

——— O. 41, R. 25—*Finality of order determining issues.*

Where a Court at the first hearing does not decide the case but merely remits certain specific issues it is open to the Court before which the



C. P. CODE, (1908), O. 41 R. 25.

case ultimately comes to disregard the findings on those issues and equally to form its own opinion on the whole case irrespective of anything that is said in the remand order. An order remanding issues under O. 41 R. 25 is not a final order. No appeal lies against it. The responsibility for the decree ultimately passed is entirely that of the Court before which the case comes after remand. It is quite otherwise with an order of remand passed under O. 41 R. 23 for this is an order which does finally determine subject to any right of appeal the issues which it decides (*Daniels J.*) *GOPAL NATH SHUKUL v. SAT NARAIN SHUKUL*.

74 I. C. 1014 : 1923 A 384

—O. 41, R. 25—Order under—Nature of. See (1922) DIG, COL 336 *NAGESHAR SAHAI v. KUAR MATA PRASAD*. 69 I. C. 730.

—O. 41, R. 25—Partial remand—Appeal. A partial remand order under O. 41, R. 25 is not appealable. (*Po Han, J.*) *MAUNG SHWE ON v. N. K. R. P. MUDALIAR*. 2 Bur. L. J. 216

—O. 41, R. 25—Remand to lower Appellate Court—Dismissal for default—Propriety of

Where an Appellate Court remands a Second Appeal to the lower Appellate Court for taking further evidence in the case and the lower Appellate Court finding the parties absent on the date fixed for hearing and dismissed the appeal for default under O. 41, R. 17, held that the dismissal was improper. (*Burn, J. M.*) *UMA DATT v. SHEO DARSHAN RAM*. L. R. 4 A 62 (Rev.).

—O. 41, R. 25—Revision—Remand of case to the lower court for findings—Power of the High Court.

The High Court has power on second appeal to remand a case for findings even on the points not taken in the grounds of appeal. The finding of the lower appellate court on a question of fact which has not been put in issue can be contested in second appeal. (*Shadi Lal and Martineau, JJ.*) *CHANDU LAL v. FIRM OF LAKHMI CHAND JOWALA DAT*. 5 Lah. L. J. 49.

—O. 41, Rr. 25 and 26—Scope of—Remand—Calling for findings—Distinction.

It cannot as a matter of principle be affirmed broadly that when an order has been made under O. 41, R. 25 the court called upon to determine the appeal finally under O. 41, R. 26 is competent to treat the order as erroneously made. When an order has been made under O. 41, R. 25, the appeal remains pending and undisposed of on the file of the court. The order, however, whether rightly or wrongly made, is an order made with jurisdiction its validity may be attacked on review but till it has been set aside in an appropriate proceeding, it must be treated as an interlocutory one which is operative in law. If the order had been made under O. 41, R. 23 its propriety would not have been challenged in an appeal against the final decree made after remand. The same principle is applicable to order under O. 41, R. 25 subject to the reservation that as the appeal remains pending, the ultimate decision must be based upon a consideration of all the findings before and after the order under O. 41, R. 25. This, indeed, is plain from the language used by

C. P. CODE (1908), O. 41, R. 27.

the legislature in O. 41, R. 26. The evidence and findings become part of the record in the suit, and when the Court proceeds to determine the appeal such determination must be based upon all the materials on the record, these include whatever was part of the record as it stood before the order under O. 41, R. 25 was made, as also what has been added in the Court of appeal, namely, the order together with the evidence taken pursuant thereto and the reasoned findings thereon. No portion of the record can be disregarded and neither the order nor the materials placed on the record on the basis thereof can be rejected as if brought in without lawful authority. (*Mookerjee and Rankin, JJ.*) *KAMINI KUMAR DEB v. DURGA CHARAN NAG* 37 C. L. J. 122 : 74 I. C. 392 : 1923 Cal 521.

—O. 41, R. 27—Additional evidence—Admission of, on appeal—Considerations governing.

A party cannot claim admission of additional evidence oral or documentary, as a matter of right. O. 41, R. 27, C. P. Code gives a discretion of the court of appeal to allow the production of such evidence and lays down definite limits within which additional evidence may be produced in an appellate court. The words "any other substantial cause" mean a *causa ejusdem generis* to the grounds already mentioned in O. 41, R. 27 C. P. Code or in other words as meaning a case at least analogous to those specified previously. Further the appellate court has a discretion in the matter and when it has exercised its discretion in one way it is not open to a court of second appeal to interfere with that discretion. 42 M. 737 Rel. (*Wazir Hasan, A. J. C.*) *BADRI PRASAD v. MUKANDI* 26 O. C. 66 : 75 I. C. 331 : 1923 Oudh 109.

—O. 41, R. 27—Additional evidence—Admission on appeal.

It is largely discretionary with an appellate court to admit additional evidence on appeal and a party cannot claim it as a matter of right. (*Greaves, J.*) *NAYAJAN ALI v. MIDNAPORE ZAMINDARY COMPANY* 1923 Cal. 285.

—O. 41, R. 27 and O. 47, R. 1—Additional evidence—Admission of—Discovery of evidence on appeal—Review.

Even where a party satisfies the Court that since the filing of the appeal he has discovered further evidence that was not known or available to him and could not have been discovered with due diligence during the pendency of the appeal even up to the date of the judgment, that is no sufficient cause for an appellate Court to admit that evidence under O. 41, R. 27 C. P. C. It is a ground for review under O. 47, R. 1 C. P. Code. (*Macleod, C. J. and Crump, J.*) *THE BOMBAY SIZING & STORES SUPPLYING CO. v. KUSUMGAR & CO.* 47 Bom 674 : 25 Bom. L. R. 310.

—O. 41, R. 27—Additional evidence—Admission of—Powers of Appellate Court.

An appellate court has no power to admit additional evidence unless upon examining the evidence as it stands some inherent lacuna or defect becomes apparent. 31 B. 381 P. C. followed. (*Das and Bucknill, JJ.*) *JAI KRISHNA v.*

C. P. CODE (1908), O. 41, R. 27.

BIBI SOGHRA. 71 I. C. 881. 4 Pat. L. T. 418  
1923 P. 446.

—O. 41, R. 27—*Additional Evidence—Power of appellate Court to admit—Point not pressed in Court below allowed to be raised on appeal.*

Where an appellate Court allows the appellant to raise a point which was not pressed in the Court below, the other side must be given opportunity of meeting the point by adducing additional evidence on appeal. (*Das and Kulwant Sahay, JJ.*) MAN SINGH v. NAWLAKHBATI.

72 I. C. 239.

—O. 41, R. 27—*Additional evidence—Power of appellate court to admit.*

The appellate court should exercise its power allowing additional evidence very cautiously and sparingly and only in the interests of justice. (*Mookerjee and Chotzner, JJ.*) RAJA SREENATH ROY v. SECRETARY OF STATE FOR INDIA.

50 Cal 276. 70 I. C. 510: 1923 Cal. 238.

—O. 41, R. 27—*Additional evidence—Admission by appellate Court—Grounds for.*

The mere fact that a litigant was not aware of the existence of documentary evidence in the case is no ground for admission of such evidence for the first time on appeal. 31 B. 381, 42 C. 675 Rel. (*Newbould, J.*) SRIMATI MANMOHINI DEBI v. RAMKISHORE. 1923 Cal. 273

—O. 41, R. 27—*Admission of additional evidence—Powers of appellate Court—Opposite side to be given opportunity by rebut.*

An appellate court can admit additional evidence only under the provisions of O. 41, R. 27 C. P. C. and if it admits additional evidence the other side must have an opportunity of rebutting it. 31 B. 381; 24 C. L. J. 457 Ref. (*Ghose, J.*) HRIDAY KRISHNA PAL v. RAJANKANTAPAL.

1923 Cal. 300.

—O. 41, R. 27—*Admission of document on appeal—Documents received after close of the arguments.*

Arguments in the Lower Appellate Court were finished and the judgment was reserved on the 24th March. On the next day, 25th March, the defendants filed a copy of the deposition of a person in a claim case and that was accepted by the appellate Judge. There was nothing to show that the plaintiff had any notice of the document having been filed, or having been used in evidence, Held that the appellate Judge ought not to have admitted this document in evidence after arguments had been finished on both sides and judgment was reserved. An opportunity should have been given to the plaintiff to raise any objection which he might have to the admissibility of the document in evidence. (*Chatterjee and Cuming JJ.*) MANJURI DASSI v. KHETRAMANI DASSI. 73 I. C. 96.

—O. 41, R. 27—*Appeal—Additional evidence admitted without recording reasons—Effect.*

Where the First Appellate Court issued a commission for the measurement of the plot in dis-

C. P. CODE (1908) O. 41 R. 27.

pute and considered the report of the Commissioner along with other evidence on record without stating reasons for admitting the additional evidence and give a finding. Held that the finding cannot be accepted as binding as it is partly based on inadmissible evidence. (*Gokul Prasad J.*) KABUL v. KABOOL SINGH. 1923 A. 413.

—O. 41, R. 27—*Appellate Court—Admission of additional evidence.*

Under O. 41, R. 27, (1) (b) the appellate Court was justified in sending for the original record and examining it. (*Burn, J. M.*) MALAI KHAN v. SHEODHAN SINGH. L. R. 4 A. 217 (Rev.).

—O. 42, R. 27—*Appellate Court—Admission of evidence—Grounds, to be stated.*

Where an appellate Court admits additional evidence on appeal without stating sufficient reasons therefor its findings are vitiated thereby and the case will have to be remanded for retrial. 19 A. L. J. 407 followed. (*Gokul Prasad J.*) ALI AHMAD v. KISHAN PRASAD. 71 I. C. 289.

—O. 41, R. 27—*Appointment of commissioner—Additional evidence.*

An appellate court can appoint a commissioner and direct him to file his accounts into court after examining the same. (*Scott Smith and Abdul Raoof, JJ.*) MT. RAM PIARI v. SULTAN BAKSH. 1923 Lah 115

—O. 41, R. 27—*Carelessness in regarding evidence—If ground to let in additional evidence.*

The carelessness of the Court in recording evidence is sufficient ground to let in additional evidence to correct the error which has crept in through carelessness. (*Burn, J. M.*) CHURAMAN v. SHIAM LAL. L. R. 4. A. 380 (Rev.).

—O. 41, R. 27—*Discretion to be sparingly exercised.*

The words "substantial cause" used in the rule confer a wide discretion which should be sparingly exercised, otherwise it may open a wide door to the admission of evidence in the Appellate Court. (*Raymond and Madgawkar A. J. C.*) NARAINIDAS v. TEK CHAND. 1923 S. 42.

—O. 41, R. 27—*Point not raised—Admission of additional evidence relating to it.*

Where a point is not raised in the trial court, the appellate court should not admit additional evidence relating to it. (*Fremanile S. M.*) MAULVI ASAD ULLAH v. BALDEO PATAKWAR. L. R. 4 All. 406 (Rev.).

—O. 41, R. 27—*Reasons for—Knowledge—Effect.*

When an appellate Court failed to record the reasons for admitting additional evidence, but it was known to the parties that it was because there was no legal proof of a document on the record, the defect is only technical. (*Fremanile, S. M.*) SURJAN MISRA v. ACHHAIBAR RAI. L. R. 4 A. 187 (Rev.).

—O. 41, R. 27—*Scope of—"Any other substantial cause".*

C. P. CODE (1908) O. 41, R. 27.

The word cause " in O. 41, R. 27 C. P. Code, is not *ejusdem generis* with the causes stated in the earlier part of the rule, and the expression any other substantial cause " confers a wide discretion on the appellate court to admit additional evidence when the ends of justice require it. (*Moti Sagar, J.*) PRABHU LAL v. GULZARI MAL. 1923 Lah. 584.

—O. 41, R. 27—*Second Appeal—Powers of High Court.*

Where a lower appellate Court refuses to admit a certain material document as additional evidence in the appeal under O. 41, R. 27 C. P. C., the High Court cannot interfere in second appeal. 42 Mad. 737 (F. B.) 9 I. C. 265 Foll. (*Broadway, J.*) SANTA SINGH v. BHAN SINGH. 70 I. C. 830 1923 Lah. 30.

—O. 41, R. 31—*Adoption of judgment of lower Court.*

The Judge of an appellate Court should state his own reasons and should not confine himself to approving reasons of the Court of the first instance. A general and wholesale adoption of the judgment of the Court of first instance cannot be considered as a sufficient compliance with the law. (*Moti Sagar, J.*) MT. AISHA BIBI v. MT. SUGHRA JAN. 1923 Lah. 658.

—O. 41, R. 31—*Appellate judgment—Contents of Judgment affirming decision of court below.*

Whether or not a judgment is according to law must depend on the facts and circumstances of each case. There is firstly the difference which exists between cases of affirmance of judgments and cases of reversal of judgments of the first court. Where the judgments of the first court has fully discussed all the matters which were placed before it and the appellate court has appreciated the main facts in the case but has dismissed the appeal in a short judgment the appellate judgment is not vitiated by any irregularity. (*Woodroffe and Ghose, JJ.*) MAHOMED HUSSAIN CHOUDHURY v. RABIA KHATUN. 1923 Cal. 163.

—O. 41, R. 31—*Appellate Judgment—Reasons for decision to be stated.*

The provisions of O. 41, R. 31, C. P. Code are mandatory. A Judge is bound to give the points for decision and the reason for the decision thereon in order to enable the Court of second appeal to see that the judge whose findings on facts are binding as the High Court has put property before him the points at issue and has decided them. 9 A. 26 Rel. (*Gokul Prasad, J.*) GUPTA NAND v. BEHARI LAL. 21 A. L. J. 567 : L. R. 5 A. 21 : 74 I. C. 827.

—O. 41, R. 33—*Appellate Court—Powers of.*

Where an appellate court is seized of the whole case on appeal, it can make such orders as are necessary to terminate the controversies and to do justice between the parties by making the necessary alterations in the decree of the lower court. (*Piggott and Walsh, JJ.*) GOVIND DASS v. RAM CHARAN LONIA. 1923 A. 235.

C. P. CODE (1908), O. 43, R. 1.

—O. 41 R. 33—*Appellate Court—Powers of interference with decree of the lower Court—Portion of decree not appealed against.*

O. 41 R. 33 of the C. P. C. empowers an appellate Court to interfere with a portion of the decree of the Trial Court which has not been appealed against in a case where the appellate Court adopts the ground of decision of the trial court and tries to give complete effect to it, 34 All. 32 dist 43 A. 85 relied on. (*Foster, J.*) GOBIND SINGH v. JAI GOPAL SINGH. 72 I. C. 96.

—O. 41, R. 33 and O. 7, R. 7—*Discretion.*

The discretion allowed to the Judge by Order VII, R. 7 and order XLI, R. 33 is wide and covers the granting of a declaratory decree in a suit for possession where alternative relief is claimed. (*Campbell, J.*) ARJUN v. JUG LAL. 1923 Lah. 422.

—O. 41, R. 33—*Mortgage decree—Reversal in favour of non-appealing mortgagor—Power of.*

An appellate court acting under O. 41, R. 33 C. P. C. can reverse a decree in favour of even a non-appealing party. (*Miller C, J and Mullick J*) AJTI CHAUDHURI v. JANAK LAL CHAUDHURI. (1923) Pat. 332.

—O. 41 R. 33—*Partition suit. See (1922) DIG. COL. 839. PROBhat CHANDRA BISWAS v. GOPAL CHANDRA MUKERJEE. 69 I. C. 981 (1).*

—O. 41, R. 33—*Powers of Court under—Consistency in decree. See C. P. CODE, O. 47 R. 1. 17 L. W. 254.*

—O. 41, R. 33—*Respondent—Transposition as appellant—Procedure.*

An appellate court acts without jurisdiction in ordering by its judgment that a respondent who has not been formally transposed as appellant, should be shown as appellant. Such an order deprives the respondent of his costs and ought to have been made during the pendency of the appeal and not as part of the judgment. (*Piggott and Walsh, JJ*) HARDEO PRASAD v. DAMODAR PRASAD. L R 4 A. 53 : 71 I. C. 424 (2) : 1923 A. 119.

—O. 43, R. 1—*Dismissal of application under O. 9 R. 9—Previous dismissal and O. 17, R. 3—Appeal.*

When the plaintiff's application under O. 9, R. 9, C. P. C. is rejected on the ground that the previous order of dismissal was under O. 17, R. 3 and not under O. 17, R. 2, the plaintiff is entitled to appeal against it under O. 43, R. 1. (*Mullick and Kulwant Sahay, JJ.*) SYED BAKAR HUSSAIN v. MIRZA HUSSAIN MIRZA. 4 Pat. L. T. 46 : 73 I. C. 373 : 1923 P. 223.

—O. 43, R. 1 (c)—*Application to set aside dismissal for default—Dismissal of that application for default—Appeal. See (1922) DIG. COL. 340. HARA KUMAR MITTER v. MURARI MOHAN BOSE. 69 I. C. 1003.*

—O. 43 R. 1 (c)—*Dismissal for default—Application for restoration—Dismissal for non-appearance—Appeal. See C. P. CODE S. 141. 19 N. L. R. 119*

C. P. CODE (1908) O. 43 R. 1

—O. 43 R. 1 (c)—*Execution application Dismissal for non-prosecution—Appeal from order refusing to restore—Maintainability of*

Where the Court dismissed an application for execution for want of prosecution and subsequently refused to restore the application there is no appeal from the order refusing to restore the application (*Piggott and Walsh, JJ*) BHARAT INDU v. ASGHAR ALI KHAN. 45 A. 148 :

21 A. L. J. 135 : 73 I. C. 453 : 1923 A. 460 (1).

—O. 43, R. 1 (K) Abatement—Application to bring on record legal representative—Order on, if appealable. See C. P. CODE O. 22, R. 9.

74 I. C. 17.

—O. 43, R. 1 (k) and O. 22 R. 3—*Dismissal of application under O. 22 R. 3—Appeal.*

An order under O. 22, R. 3 is not open to appeal. O. 43 R. 1 (k) Civil Procedure Code, allows an appeal from an order under R. 9, O. 22 but no appeal is allowed against an order under R. 3. (*Daniels, A. J. C*) TIRLOCHAN PRASAD SINGH v. BHAGWATI.

9 O. & A. L. R. 70 : 73 I. C. 230.

—O. 43, R. 1 (m)—*Order holding no compromise—Appeal.*

The words used in O. 43, R. 1 (m) C. P. C. "an order under R. 3, of O. 23 recording or refusing to record an agreement, compromise or satisfaction" pre-suppose the existence of an agreement, compromise or satisfaction. An order holding that no compromise has been proved is not appealable. (*Marineau, J.*) SHANTI SARUP v. THE FIRM OF JAHANGIR MAL BANSI MAL.

73 I. C. 177

—O. 43, R. 1 (n)—*Appeal—Injunction subject to a condition. See (1922) DIG COL 340.* DIWAN CHAND v. JHARIA COAL CO.

5 Lah. L. J. 142.

—O. 43, R. 1 Cl (s)—*Appeal against order under O. 40, R. 4 directing attachment of Receiver's property for failure to pay amount fixed as due from him—Scope of—Correctness of amount—Right to question—Receiver's indebtedness—Procedure for fixing—Fixing of approximate amount—Legality.*

In an appeal from an order under O. 40, R. 4, C. P. C. directing attachment of the property of a receiver on the ground that he failed to pay the amount directed to be paid by him, it is open to the receiver to question the amount fixed as due from him by the lower court.

*Held*, that the Court below erred in law in not fixing the exact amount of the receiver's indebtedness and in directing him to pay an approximate amount.

Observations on the proper procedure to be followed in fixing the amount to be paid by a receiver and in directing attachment of his property in default of payment. (*Krishnan and Venkatasubba Rao, JJ*) R. M. P. PALANIAPPA CHETTI v. M. S. A. PT. PALANIAPPA CHETTI.

69 I. C. 203 : 1923 Mad. 85 (2).

—O. 43, R. 1 (s)—*Appeal—Order declaring that Receiver should be appointed—Nature of.*

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C. P. CODE (1908) O. 45 R. 7.

See (1922) DIG COL 341 GOBIND RAM v. GANESH RAM.

1 Pat. 625 4 Pat. L. T. 210 : 1 Pat. L. R. 161 : 69 I. C. 929.

—O. 43, R. 1 (4) — *Order of remand by Special Judge under the Bengal Tenancy Act—Appeal—Maintainability.*

There is no appeal against an order of remand passed by a Special Judge under the provisions of the Bengal Tenancy Act (*Ghose and Choudhuri, JJ.*) DEBI PRASAD BHAKAT v. OFFICIAL TRUSTEE OF BENGAL.

37 C. L. J. 314 :

72 I. C. 1013 : 1923 Cal. 333.

—O. 45—*Application for leave to appeal—Review petition successful—Reversal in appeal—Effect on original application.*

Against the judgment of the High Court, an application for leave to appeal to the Privy Council and a review petition were put in. The latter proving successful no order was necessary on the former. The Privy Council in an appeal against the order granting the review reversed the same. *Held* the original application for leave to appeal was still alive and leave could be granted thereon. (*Harrison and Zafar Ali, JJ*) NEKI v. CHHAJJU RAM.

4 Lah. 445.

—O. 45, R. 4—*Appeals to the Privy Council—Consolidation—Requisites of—Different suits involving substantially same questions—Separate judgments in the first court—Same judgment on appeals—Later judgment on review in one of the appeals adopting to a large extent original judgment in appeal—Consolidation in latter case.* See C. P. CODE SS. 109 (c) AND 110.

44 M. L. J. 424

—O. 45, R. 4—*Consolidation—When permissible.*

O. 45, R. 4 C.P.C., allows consolidation but only to make good a defect of pecuniary valuation and not a defect of any other kind. The rule speaks only of the consolidation of different suits decided by the same judgment but the principle applies where the interests of the two parties are so entirely separate that they are practically defendants in two different suits decided by one judgment. (*Batten J. C. and Halifax, A. J. C*) SETH NARAYANADAS v. MT. KAMLABAL.

69 I. C. 525 : 1923 Nag. 198.

—O. 45, R. 4—*Consolidation when allowed.*

Under O. 45, R. 4, the case is only consolidated for the purpose of pecuniary value. It does not matter what the reason is why the appeals are consolidated. Once they are consolidated for whatever reason they form in fact one appeal and the parties in that appeal must be treated just as the parties in one suit. (*Dawson Miller, C. J. and Mullick, J.*) THE MIDNAPUR ZAMINDARY CO. v. MADAN. MARWARI.

(1923) Pat. 17 : 70 I. C. 732 : 1923 P. 215.

—S. 45 R. 7—*Decree amended on review—Leave to appeal to Privy Council—Limitation.*

On an application for leave to appeal from a decree of the High Court which reversed the decree of the Court of first instance, the decree of the High Court was first passed on the 29th November 1921 but on an application for review it was modified on the 9th May 1922. *Held* that

C. P. CODE (1908), O. 45 R. 7.

the period of limitation for the application for leave to appeal to the Privy Council is to be re-counted from the latter date, on which a new decree was passed in substitution for first one. (*Abdul Raoof and Maitineau, JJ.*) NAWAZ ALI v. ALLU. 4 Lah. 185 : 75 I. C. 520.

—O. 45, R. 7—Deposit out of time—Effect—Act XXVI of 1920.

A deposit made out of time is not one made to the satisfaction of Court within O. 45, R. 8.

The periods both for security and deposit are identical: 20 A. L. J. 13, *Foll* (*Mears, C. J.* and *Piggott, JJ.*) JAGMOHAN SARAN v. SAHU DEOKI NANDAN. 1928 A. 572.

—O. 45, R. 7—Security for the costs of respondent—Time for furnishing—Extension of—Limitation Act (26 of 1920) S. 3 (1).

The High Court has no power to extend time or excuse delay in the matter of furnishing security for the costs of the respondent in an appeal to His Majesty in Council, beyond the period given by S. 3 (1) of Act XXVI of 1920. (*Oldfield and Venkatasubba Rao, JJ.*) KACHI REDDI NAGIREDDI v. SAKI REDDI. 18 L. W. 29 : (1923) M. W. N. 510 : 74 I. C. 703 (1) : 1924 Mad. 44.

—O. 45, R. 7—Time for furnishing security—Extension of

The High Court has no power to extend the period of 6 weeks prescribed for the granting of security. (*Lyle and Ashworth, A. J. C.*) ASHIG ALI v. ARJUNAN-UN-NISSA. 70 I. C. 937 (1) : 1923 Oudh 50 (1).

—O. 45, R. 15—Order of Privy Council—Transmission—Execution—Limitation—Right of person not a party to Privy Council Appeal to apply for restitution.

Though O. 45 R. 15 C. P. Code makes it part of the procedure for the enforcement of orders of His Majesty in Council that the person desiring to obtain execution of such an order shall obtain its transmission, it is inconvenient, if not impossible, to require that each person interested in the execution of a particular order shall obtain a separate transmission when that order has already been transmitted at the instance of another successful party. The fact that a person applying for restitution was not a party to an appeal to the Privy Council does not disentitle him to such relief. 17 M. 82; 25 M. 426 referred to. (*Oldfield and Devadoss, JJ.*) BALUSAMI IYER v. VENKATASWAMI NAICKEN. 75 I. C. 219 : 32 M. L. T. 249 (H.C.).

—O. 47, R. 1—Any other sufficient reason Omission to refer to documentary evidence.

The mere fact that a Judge has not in terms referred to certain of the evidence in favour of one party or the other is not "sufficient reason" to ask for review. (*Miller, C. J.* and *Kulwant Sahay, J.*) RAGHU SINGH v. MAHANT KRISHNA DAYAL GIR. 2 Pat. 765.

—O. 47, R. 1—Compromise decree—Setting aside—Grounds for—Separate suit—New and important matter—Discovery of. See (1922) DIG. CQL. 343, ALAMELU AMMAL v. RAMA IYER. 70 I. C. 425.

C. P. CODE (1908), O. 45 R. 7.

—O. 47 R. 1—Dismissal of appeal for default—Application for review—Maintainability

Where an appeal against a decree has been dismissed for default and that order of dismissal has become final, the appellant cannot thereafter apply for review of the judgment. (*Piggott and Walsh, JJ.*) MANPHUL SINGH v. HAKIM HAMID ALI KHAN. 21 A. L. J. 416 : L. R. 4 A. 276 : 74 I. C. 528 : 1923 A. 576.

—O. 47, R. 1 and O. 41, R. 11—Dismissal of second appeal—Review—New and important evidence—Discovery of. See (1922) DIG. COL. 344, SAILABALA DEBI v. GADAHAR HAZRA. 70 I. C. 408.

—O. 47 R. 1 and O. 41, R. 27—Effect of filing appeal—Duty and power of appellate Court.

Under O. 47, R. 1, which reproduces S. 623 of the Civil P. C. 1882, a party has a right to apply for a review of judgment to the court that has decided the case before an appeal has been preferred. The grounds on which such an application may be made are specifically set forth in R. 1. Where an appeal has been preferred, a review is out of the question and the party's proper course is to apply to the appellate Court, which is in possession of the cases to admit the additional evidence either under the general principles of law or under the specific provisions of R. 27, which lays down that the appellate Court may for any other substantial cause (viz., other than those particularly specified) allow such evidence or documents to be produced or witnesses to be examined. Rules of procedure are not made for the purpose of hindering justice. 11 Moo. I. A. 28 ; 34 I. A. 115, Distinguished. (*Mr. Amter Ali.*) RAJA INDRAJIT PRATAP BAHADUR SAHI v. AMAR SINGH. 2 Pat. 676 : 45 M. L. J. 578 : 33 M. L. T. (P. C.) 233 : 18 L. W. 728 : 25 Bom. L. R. 1259 : 28 C. W. N. 277 : 1 Pat. L. R. 345 : 74 I. C. 747 : 50 I. A. 183 : 21 A. L. J. 554 : 4 Pat. L. T. 447 : L. R. 4 P. C. 123 : 1923 P. C. 128 (P.C.).

—O. 47, R. 1—Error in judgment—Amendment of decree—If proper—Excusing delay in applying for review.

Where a court passes a personal decree where it ought not to have done so, and the same is found out by the party aggrieved only when it is sought to be executed his remedy is not by way of amendment but by way of review. If he first applies for amendment and fails and then puts in a petition for review the second may be looked on as a continuation of the first one for purposes of limitation. (*Hughes J.*) LAKSHMANA AIYANGAR v. NARAYANA IYENGAR. 18 L. W. 876 : 33 M. L. T. (H. C.) 221.

—O. 47, R. 1—Grounds for review—Error apparent on the face—Ruling of superior court ignored.

Where in ignorance of a decision of the High Court the court below decided a question and subsequently on the decision being brought to its notice reviewed its prior judgment. Held the error of law was one apparent on the face of the record and O. 47, R. 1 applied to the case. Error need not necessarily be limited to errors of fact.

C. P. CODE (1908), O. 47, R. 1.

(*Phillips and Venkatasubba Rao, JJ.*) MUDLAPUR MURARI RAO v. BALAVANTH DIKSHIT.

46 M. 955 : 45 M. L. J. 309  
18 L. W. 363 : (1923) M. W. N. 761.

—O. 47, R. 1—*Judgment on a wrong view of the law—Full Bench decision not noticed—If ground for review.*

It is not a sufficient ground to order a review that the decision of the Court was based on a view of the law which had been overruled by a Full bench decision, but which had not been taken to the notice of the court by the pleader appearing in the case. (*Miller, C.J., and Mullick J.*) SM. GARABINI KUMARI v. SURJA NARAIN SINGH.

1923 Pat. 361 : 75 I. C. 177

—O. 47 R. 1—*New and important matter—Discovery of—Review.*

The Court ordered the ejectment of a tenant on the ground that in a certain year the field was shown as in the possession of another person. It was subsequently discovered that the entry was due to mistake of the Patwari which was corrected in the following year. *Held* that this was a new and important matter within the meaning of O. 47, R. 1 of the Civil Procedure Code justifying a review by a different officer. (*Burn J., M.*) LALA MANNI LAL v. GHULAM LAL.

L. R. 4 A. 272 (Rev.)

—O. 47, R. 1—*Power of review—Commissioner for taking accounts.*

A Commissioner for taking accounts may in his discretion and on proper grounds reopen the enquiry into any one or more of the items before his report is made. Until then he decides nothing that is final and conclusive. But where every opportunity is given to a party to prove his objection to a particular item, and then the Commissioner has after hearing the parties recorded his finding, it is highly undesirable that he should reopen the enquiry merely because he is invited to do so by the party. There must be a finality to the enquiry and if he does re-open the enquiry, it must be on grounds similar to those mentioned in O. 47, R. 1, not because the provisions of O. 47, R. 1 apply to proceedings before him but because that rule affords the best guide in a matter of this kind. If he reopens the enquiry on grounds which are not proper, the party aggrieved can object only by way of exception to this report. (*Mulla, J.*) FERNANDEZ v. RODRIGUES.

47 Bom. 593 : 25 Bom. L. R. 280.

—O. 47, R. 1—*Review—Grounds for—Different view of law taken since original judgment.*

The ground for a review must be something which exists at the time of the decree. There is no authority that review can be granted because of the happening of some subsequent event. It may be that the decree of a court would have been different had the new law been in force. But if it was not in force at the passing of the decree and the decree was perfectly correct and there is no ground for review. (*Prideaux, A. J. C.*) SARFARAJ KHAN v. RAMCHANDRA.

73 I. C. 4.

—O. 47, R. 1—*Review—Grounds for—Reversal of High Court's decision by Privy Council—Effect of.* See (1922) DIG. COL. 344.

C. P. CODE (1908), O. 47, R. 4.

GANNABATHULA VENKAMMA v. GANNABATHULA RANGA RAO.

70 I. C. 741.

—O. 47, R. 1—*Review—Grounds for—Second appeal—Discovery of fresh evidence.*

The High Court cannot, in a second appeal entertain an application for review of judgment based on the ground that since the disposal of the appeal documentary evidence has been discovered, which, if sufficiently proved, would have led the court below to come to a different finding, although had such evidence been discovered before the disposal of the appeal the court might have allowed the appellant to withdraw the appeal with a view to apply to the lower appellate court for a review of judgment on the discovery of fresh evidence. 32 A. 71 foll. (*Lindsay and Rafiq, JJ.*) MARIAM-UN-NISSA BIBI v. BABU RAM.

21 A. L. J. 377 : L. R. 4 A. 416 :

73 I. C. 1016 : 1923 A. 541.

—O. 47 Rr. 1 and 7—*Review—Inherent power—Exercise of—Appeal from.*

Where a suit was dismissed for default though one of the plaintiffs was personally present at the time of the hearing and on an application for review the trial Court purported to set aside the order of dismissal for default, acting under the inherent powers of the Court, *held* that though there was no sufficient cause for entertaining a review, there was no appeal from the order of the Court below. (*Ghose, J.*) BASANTA KUMARI GUPTA v. ABHOY SHANKAR SEN.

37 C. L. J. 99 :

73 I. C. 306 : 1923 Cal. 450.

—O. 47 R. 1—*"Sufficient reason"—Consistency—Decree not signed.*

Where to be consistent in the decree finally passed, the court has to pass orders under O. 41 R. 33, the same relief can be given in a petition put in by way of review. Much more so will it be the case when the decree itself has not been signed. (*Spencer and Devadoss, JJ.*) GOPALA IYENGAR v. MUMMACHI REDDIAR.

17 L. W. 254 : 74 I. C. 416 : 1923 Mad. 392.

—O. 47, R. 1—*"Sufficient reason" meaning of—Error of law, if a ground* See (1922) DIG. COL. 345. CHHAJU RAM v. NEKI. 72 I. C. 566 (P.C.)

—O. 47, R. 4—*Absence of notice—Effect*

Where the defendant was given every opportunity to raise any objection that he could raise, and he is in no way, therefore, prejudiced by reason of the fact that no notice was issued to him. *Held* the order granting review should not be set aside by the appellate court. 237 P. L. R. 1913 Appr. (*Abdul Raoof J.*) THE FIRM GOPAL MAL GANDA MAL v. HARA CHAND.

75 I. C. 656 : 1923 Lah. 303.

—O. 47, Rr. 4, 7—*Appeal—Order granting review.*

An order granting a review on the ground that the view of the law taken was contrary to a Full Bench decision which had not been taken to its notice, is appealable. (*Miller, C. J., and Mullick J.*) SM. GARABINI KUMARI v. SURJA NARAIN SINGH.

1923 Pat. 361 : 75 I. C. 177.

C. P. CODE (1908), O. 47, R. 4.

—O. 47, R. 4 and 8—Order granting application for review—Effect of—Procedure.

The granting of an application for review merely amounts to a decision to re-hear the case in which the decree or order (in respect of which a review is claimed) was passed. The judge nearing the review is not entitled to do anything in the first stage beyond passing an order granting the review and giving his reasons for so doing. If the review is granted the judge who has allowed the review becomes vested with jurisdiction to pass any order which the original judge could have passed. It may be sufficient for him merely to alter the order of the original judge or it may be necessary for him to take some intermediate step such as an order in remand or referring an issue. (*Ashworth and Simpson, A. J. C.*)

BHAGWATI PRASAD v. ACHHAIBAR SINGH.

26 O. C. 24 : 74 I. C. 214 : 1923 Oudh 98.

—O. 47 R. 5—Judge not party to decree. If can grant review—Effect of. See (1922) DIG. COL. 346, CHHAJU RAM v. NEKI.

72 I. C. 566 (P. C.)

—O. 47, R. 7—Appeal—Order granting review.

No appeal lies under O. 47, R. 7 of the Civil Procedure Code against an order granting an application for review on the ground that the application did not fall under O. 47, R. 1 of the Code. (*Burn, J. M.*) LAIA MANNI LAL v. GHULAM LAL.

L R. 4 A. 272 (Rev.)

—O. 47 R. 7—Execution application—Dismissal for default—Order granting review—Notice if necessary. See C. P. CODE S. 151.

69 I. C. 506

—O. 47, R. 8 and 11—Review—Grant of—Appeal—Effect on original decree.

A review commences ordinarily with an *ex parte* application. The court then may either reject the application at once or may grant a rule calling on the other side to show cause why the review should not be granted. In the second stage, the rule may either be admitted or rejected and it is obvious that the nearing of this rule may involve to some extent an investigation into the merits. If the rule is discharged, then the case ends. If on the other hand, the rule is made absolute, then the third stage is reached, the case is reheard on the merits and may result in a repetition of the former decree or in some variation of it. Though, in one respect, the result is the same whether the rule be discharged or on the re-hearing the original decree be repeated, in law there is a material difference, for in the latter case, the whole matter having been re-opened, there is a fresh decree; in the former case, the parties are relegated to and still rest on the old decree. Consequently the order appropriate to a discharge of the rule is the rejection of the application, an order so made terminates the second stage of the proceedings, and there is no third stage for the rehearing of the case. When the application for a review is granted, the decree previously made is vacated, with the consequence that an appeal preferred against that decree can no longer be prosecuted. But the parties can appeal from the final decree passed on review. Cases reviewed

C. P. CODE (1908), Sch. II, Para. 1.

(*Moorkerjee and Ramn, JJ.*) GOURKRISHNA SARKAR v. NILMADHAB SHA

73 I. C. 34 (2) : 1923 Cal. 113.

—Sch. II, Para. 1—Applicability of—Arbitration without reference to court—Consent of some of the parties only obtained to reference—Effect of.

Though some of the parties have not joined in submitting the dispute to arbitration, the award does not become invalid or ineffectual as between the persons making the reference. The award is binding on them especially when it has been acted upon. The provisions of Sch. II para 1, C. P. Code are not applicable to a reference made outside court. Where the arbitrators decide a matter not strictly covered by the reference but the parties take part in the proceedings without protest and acquiesce in the award and act upon it, they are bound by the award and cannot subsequently repudiate it (*Dhobley, A. J. C.*) DHARNIDHAR v. SAKHARAM.

71 I. C. 860

—Sch. II, Para. 1—Arbitration pending suit—Parties to reference—Exonerated defendants—Validity of award.

To constitute a valid reference to arbitration it is enough if all the parties to suit interested in the subject-matter agree to the reference. From the mere fact that certain defendants did not appear and the suit proceeded *ex parte* so far as they were concerned, it could not be assumed they were not interested parties.

42 M. 632; 47 Cal. 555 Ref.

The High Court will not interfere in revision with an award on the ground that certain exonerated defendants were not parties to the reference when no such objection had been taken to the award in the Court below. (*Spencer, J.*)

BHAGAVANULU v. SEETHARAMASWAMI

44 M. L. J. 399 : 17 L. W. 424.

(1923) M. W. N. 296 : 31 M. L. T. (H. C.) 298:

73 I. C. 202 : 1923 Mad. 502

—Sch. II, para. 1—Arbitration—Reference—Parties to—Parties interested in subject-matter to be joined.

It is not necessary that all the parties to a suit should concur in an application for an order of reference in order to make the submission valid. It is only necessary that all the parties who are interested in the subject-matter of the reference should have joined in the submission, (*Miller, C. J. and Kulkarni Sanay, J.*) RAGHUNATH SIKUL v. RAMRUP RAUT.

2 Pat. 777 : (1923) Pat. 225 : 1924 P. 33.

—Sch. II, Para 1—Reference—All persons interested in suit to be parties.

Where all the persons interested in the subject-matter of the suit do not join in the application for reference to arbitration the Court has no jurisdiction to make the reference. 21 C. W. N. 387 relied on. (*Walmesley and Suhrwardy, JJ.*) HARA PRASANNA BANDOPADHYA v. ARAB ALI

71 I. C. 326.

—Sch. II, Para. 1—Who all must join—Parties interested.

A person who absents himself from a suit may be as much interested in the result of a suit as

## C. P. CODE (1908), Sch. II, Para. 1.

one who is present. So also a party may be interested even after he admits liability. If it is a reference in the absence of such persons is not valid. (*Dalak, J. C.*) *BRIJ RAJ KUER v. RAM NATH*, 90, & A. L. R. 773.

—Sch. II, Para 1, (1) and (2)—*Scope—Agreement to abide by the statement of one.*

From the way in which an agreement was entered in the rokkar of the Court and the application of the defendant, it appeared that the parties had agreed to abide by the statement of one H and not that they had agreed to refer the matter in dispute for decision by H. Where no application in writing showing the agreement to refer the matter in dispute was ever filed in Court nor did the defendant ever apply to the Court to refer the matter to H. *Held* the provisions of S. 1 Sub-clauses (1) and (2) of Schedule II, C. P. C. were therefore not complied with, and accordingly the Court was not deprived of its jurisdiction to hear the appeal. (*Sulaiman, J.*) *MT. MASITA BIBI v. KHUDA BAKSH*, 1923 A. 63.

—Sch. II, Para 3—*Reference to arbitration—Time for submission of award—Extension by arbitrators themselves—Propriety of—Misconduct of arbitrator.*

Matters in dispute between the parties in a pending suit were by their consent, referred by Court to two arbitrators and the order of reference provided that the arbitrators should make their award within 6 months from the date on which an office copy of the said order should be served on them or within such further time as they might allow themselves by endorsement on the said office copy. The arbitrators enlarged the time for making their award under the order from time to time and after a large number of sittings extending over a period of 2 years they adjourned the hearing *sine die*. On an application by the plaintiff to the Court for superseding the reference and for proceeding with the trial of the suit held that the order of the Court giving unlimited authority to the arbitrators to extend the time was bad and of no effect and that under the mandatory provisions of Sch. II Cl. 3, C. P. Code it was the Court that had to fix the time and enlarge it. Consequently it was open to the plaintiff to apply to the Court to supersede the reference and proceed with the trial of suit. 30 A. 169; 36 A. 354 followed, 19 C. W. N. 165 dissented. The appropriate time for entertaining charges of misconduct against an arbitrator is when the award has been filed. (*Rankin, J.*) *ROBINDRA DEB MANNA v. JOGENDRA DEB MANNA*, 27 C. W. N. 420 · 1923 Cal. 410.

—Sch. II, Para. 8—*Filing of award—Date fixed for—Non-appearance of parties—Effect of—Dismissal of suit.*

Where a judge dismissed a suit for failure of of the parties to attend on the date fixed for filing of the award even though the award was not filed on that date, the order of dismissal is improper and would be set aside.

Since the filing of an award is an act of the arbitrator, the parties need not be present in court. A court has no power to supersede an arbitration in anticipation that the award will not

## C. P. CODE (1908), Sch. II, Para. 15.

be filed before the due date. (*Das, J.*) *MAHARAJ BHAGAT v. HARIHAR BHAGAT*, 1923 P. 115.

—Sch. II, Paras. 14, 20 and 21—*Award—Partly in excess of reference—Filing of a portion of the award*

Where a portion of the award is in excess of the reference, it is open to the Court to pass a decree and enforce the award so far as it relates to the dispute between the parties. (*Brown, A. J. C.*) *MAUNG TIN v. MAUNG POYA*, 1 Bur. L. J. 265 · 72 I. C. 193 : 1923 Rang. 130.

—Sch. II, para 14 (a)—*Mixing of matters.*

The arbitrators, who were three in number were to report their decision *qua* the Tohana house in question to the Court, and the parties were to be bound by the award *qua* the other property. The award filed was remitted as it was considered that the arbitrators should omit that part which related to the Kabai property. *Held* when an award deals with a matter extraneous to the reference, which matter can be separated therefrom the Court may modify the award or may remit it to the arbitrators for correction. (*Broadway, J.*) *MANSU RAM v. KARLA RAM*, 1923 Lah. 411.

—Sch. II, para 15—*Arbitrator—Misconduct—Private enquiries—Legality of.*

It is in no case open to an arbitrator to make private enquiries. It may be that in some cases the parties contemplate that the arbitrator should do so. Even if the parties, did not contemplate it where the Court below has found as a fact that the decision of the arbitrator was based exclusively on the evidence which he recorded in the presence of both parties there is no ground for interference. (*Daniels, A. J. C.*) *SHEO PALTAN v. SUKHEO SINGH*, 26 O. C. 107 : 74 I. C. 401 : 1923 Oudh 235.

—Sch. II, Para. 15—*Arbitration—Award—Misconduct of arbitrators—Duty to hear parties.*

The ordinary rule is that the enquiry before the arbitrator is assimilated as near as may be to proceedings on a trial in the courts. Irregularities in procedure can be proved which would amount to no proper hearing of the matters in dispute there would be misconduct sufficient to vitiate the award without any imputation on the honesty or impartiality of the arbitrator. Therefore if the parties are not given notice of any meeting, in the ordinary case that would clearly amount to misconduct on the part of the arbitrators. (*Fawcett, J.*) *TYEBBHAI ESSUBHAI v. ABDUL HUSEIN*, 25 Bom L. R. 392,

—Sch. II, Para. 15—*Arbitration—Irregularity—Waiver.*

Where a party to an arbitration proceeding has condoned an irregularity on the part of the arbitrators by taking part in the subsequent proceedings before them he must be deemed to have waived all objections on that account and he cannot object to the award on the ground of such irregularity. (*Heald and May Oung, Jj.*) *U GUNUWA v. PYINNYADIPA*, 1 R. 15 : 2 Bur. L. J. 30 : 74 I. C. 6 : 1923 Rang. 187.



C. P. CODE (1908), Sch. II, Para. 15.

—Sch II Para 15—Arbitration—Reference—Dispute as regards management—Scheme—Arbitrators appointing themselves as managers—Propriety of—Misconduct—Delegation of functions See (1922) DIG. COL. 348, PANDIT SANKATA PRASAD v. JAGANNATH, 26 O. C. 1 : 69 I. C. 714.

—Sch. II, Para. 15 and 16—*Suit for partition—One of the defendants not a party to arbitration—Objections to award by plaintiff—Devise on award—Appeal.*

In a suit for partition all the parties excepting one of the plaintiffs and one of the defendants agreed to refer the litigation to arbitration. An award was given and the plaintiff who was a party to the arbitration preferred objections to the award. The Court however passed a decree in terms of the award. Held that there was no appeal from the decree on the award. 39 A. 69 followed (Rafique and Lindsay, JJ.) HARI SHANKER v. RAM PYARI, 45 A. 441.

21 A. L. J. 326 : L. R. 4 A. 543 : 74 I. C. 834 : 1923 A. 502.

—Sch. II, para. 16—Arbitration—Award—objection to, to be investigated—Jurisdiction—Revision.

A dispute was referred to arbitration in connection with a pending suit, an award was made, and a decree was passed in accordance with the award under para 16 of the second schedule of the Code of Civil Procedure.

Where the Court has considered the objections to the award on the merits and come to what the applicant contends is a wrong decision as to whether there had been an irregularity on the part of the arbitrator, it is clear that the case will not come within the provisions of S. 115 and that no revision will lie.

It was the clear intention of the legislature that objections to the award on the ground of invalidity from any cause whatever should be decided by the Court which had made the order of reference and by no other Court (Daniels, A. J. C.) SHEO PALTAN v. SUKHDEO SINGH, 26 O. C. 107.

74 I. C. 401 : 1923 Oudh 235

—Sch. II, para 16—Award—Oral award—Effect of—Bar to fresh suit.

In law, an oral award is good and binding on the parties to the reference. Where the actual award is an oral award the drawing up of a formal award is purely a ministerial act to give effect to the previously completed judicial act. If the parties desire to have the award made a decree of the Court it may be necessary for them to get the award reduced to writing to be filed in Court; but so far as the effect of the award on a subsequent suit dealing with the subject matter of the award is concerned, the award will bar the suit whether it be oral or whether it be in writing. (Robinson C. J. and May Oung, J.) MA MYA v. KO PO SA, 2 Bur. L. J. 163.

—Sch. II, Paras. 18 and 20—Award—Institution of suit pending arbitration—Effect of—Power of arbitrators.

If the Court has refused to stay the action or if the defendant has abstained from asking it to do so, the Court has seisin of the dispute and it

C. P. CODE (1908), Sch. II, Para. 21.

is by its decision and by its decision alone that the rights of the parties are settled. As soon as the suit is instituted the arbitrators lose their authority. If the defendant still desires that the controversy should be decided by arbitration, he must endeavour to obtain a stay of the suit by an appropriate application under para. 18. If the application is refused by the Court in the exercise of its discretion, the remedy by arbitration ceases to be available. If the suit is stayed, two possible contingencies may require consideration. If the arbitrators have not yet made an award they are free to bring their proceedings to a termination and make an award in accordance with law. If on the other hand the arbitrators have made an award after the institution of the suit, the award cannot be pleaded as an effective bar to the suit. The award so made should be brought up before the Court under para 20 : the Court will refuse to enforce it under para. 21 read with para. 14 (c), and as the award will thus stand cancelled because made without jurisdiction the arbitrators will be left free thereafter to resume their proceedings on the basis of the original reference. If this view were not adopted, the result would follow that a party to a submission who had appeared throughout and had taken his chance before the arbitrators might at the very last moment, when the award, possibly an adverse award, was about to be made and when there would be no time left for his opponent to obtain a stay order, institute a suit and thereby render infructuous the entire proceedings. Where the defendant did not take recourse to the proper procedure namely, to apply for stay of the suit, cancellation of the award as made without jurisdiction and thereafter remission of the matter to the arbitrators, even if his failure was possibly attributable to ignorance of the law. Held, the agreement to refer to arbitration not having provided for reconstitution of the committee of arbitrators, if one of them should die, the award must be rejected as made without jurisdiction, and the suit should be tried on the merits by the Court. (Mookerjee and Chatterjee, JJ.) SARAT CHANDRA SEN v. RAJKUMAR MOOKERJEE, 69 I. C. 863 : 1923 Cal. 135 (2).

—Sch. II, p. 20—Sch. II—Para 21—Award Judgment and decree—Subsequent suit to set aside the award. See (1922) DIG. COL. 353. GURU CHARAN SIKKAR v. UMA CHARAN SIKKAR

70 I. C. 985

—Sch. II, Para 20 (2)—Application to file an award—Limitation Act, S. 6.

An application to file an award does not become a suit by the provisions of para. 20 (2) Sch. II C. P. C. and hence the applicant cannot claim the benefit of S. 6 of the Limitation Act (Pratt and Carr, JJ.) MA THEIRU TIN v. MAUNG BA THAN, 1 Rang 256 : 1923 Rang. 226.

—Sch. II, Para. 21—Private Reference—Arbitration—Award—Death of parties pending hearing—Minor representatives not impleaded—Effect of—No prejudice. See (1922) DIG. COL. 354: BINAYAKADAS ACHARYA CHOWDHURY v. SASI BHUSAN CHOWDHURY.

70 I. C. 459.

## COMPANY.

**COMPANY—Articles of Association—Agreement by promoters before incorporation affixed—Effect.**

Affixing a copy of an agreement between the promoters of a company and third parties, to the Articles of Association cannot in law amount to the formation of a contract between the company and such third party (*Chevis, J.*) SURENDRO & COY. v. PUNJAB TANNERY COY.

1923 Lah. 100.

———**Contract by promoters before incorporation—If binding—Ratification.**

A Company cannot ratify or adopt a contract entered into by a person on its behalf before incorporation though it may enter into a new contract embodying the terms of the old one or adopting the old one. (*Chevis, J.*) SURENDRA & CO. v. PUNJAB TANNERY CO

1923 Lah. 100.

———**Liquidation—Secured creditor—Rights—Right to interest—Winding up order.** See (1922) DIG. COL. 356. RAM CHAND v. BANK OF UPPER INDIA.

74 I. C. 187.

———**Shares—Transfer of—Formalities necessity for—Inchoate transfer—Rights of transferee—C. P. Code, O. 21, Rr. 46, 76, 79 and 80—Discretion of directors in recognising transfer.**

A deed of transfer of shares in a company not complying with the formalities prescribed by the Indian Companies Act and the Articles of Association of the Company, is invalid as against a person, who has purchased the shares in a sale in execution held under the provisions of the C. P. Code. When the law prescribes a mode of transfer for shares in a limited company, compliance with that mode is necessary before property can pass 'so as to confer title on the transferee as against third persons. A transfer of shares in a company otherwise than as is provided by the Indian Companies Act and the Articles of Association, may confer a right in equity on the transferee to compel the vendor to execute a proper conveyance and the transaction evidenced by transfer can be regarded as an agreement to convey capable of being perfected into an absolute conveyance by compliance with the prescribed formalities. Until then, the transfer is inchoate and the transferee cannot claim priority over a court auction purchaser of the shares. (1902) 2 K. B. 427 and 40 Mad. 1134 foll, 31 Bom. 76 not foll.

**Obiter:**—It is open to the Directors of a Company in the *bona fide* discretion vested in them under the Indian Companies Act and the Articles of Association to refuse to recognise the purchaser of the shares of the company in a court auction, as a shareholder in the company. (*Kumara-swami Sastri and Devadoss, JJ.*) TADEPALLI NAGABHUSHANAM v. SRI RAM RAMACHANDRA RAO.

70 I. C. 659 : 1923 Mad. 241.

———**Shareholders—Rights of—Courts when can interfere—Adjournment—Chairman's rights.**

Irregularity in the proceedings of a limited Company are not a matter for the Court but for a majority of the shareholders to deal with. The Courts will interfere only if the rights of the

## COMPANIES ACT (VII OF 1913), S. 10.

share holders are infringed or if a case of fraud or *ultra vires* is made out.

Where the Articles of Association empower the Chairman to adjourn meetings with its consent, he is not bound to do it even if the meeting desires an adjournment.

A shareholder is not entitled to operate as much as he pleases, but for a reasonable time. (*Praff, J.*) PARSHURAM DATTARAM v. TATA INDUSTRIAL BANK LTD.

47 Bom. 915 :

25 Bom. L. R. 1083.

———**Ultra vires acts—Ratification—Impossibility.** See LIMITATION—TRUST

32 M. L. T. 196 (P. G.)

———**Winding up—Fraud—Waiver.** See (1921) DIG. COL. 357. ORIENTAL NAVIGATION CO. v. BANARAM AGARWALLA,

69 I. C. 241.

———**Winding up—Petition by creditor—Opposition other creditors—Agreement to sell property—Loss to share-holders.**

A petition to wind up a Company by a creditor was opposed by the majority of creditors on the ground that an agreement had been entered into to sell the property, and if winding up was entered, it would cause loss to the creditors and shareholders. Held it was a fit case to adjourn the petition to see if the agreement would be carried through. (*Beasley, J.*) IRRAWADDY FLOTILLA CO. LTD. v. MERGUI TIN DREDGING CO.

2 Bur. L. J. 296.

**COMPANIES' ACT, (VI of 1882) S. 28—Transfer of shares—Registration—Necessity for.**

Every share-holder in a company has an absolute right to transfer his share to another and the transfer is complete on the day the deed is signed by both parties. The provision in the Articles of Association that no transfer would be valid and recognised unless registered in the books and that the company could refuse to register a transferee without assigning reasons is one for the protection of the company and does not prevent the passing of title (*Broadway and Abdul Qadir, JJ.*) FIRM OF SAWAN MAL GOPI CHAND v. SHIV CHARAN DAL.

71 I. C. 814.

———**S. 169—Appeal—Time for—Delay when excused—Sufficient cause**

The carelessness or ignorance of a Pleader is not a sufficient reason to extend the time fixed by S. 169 of the Companies Act. Appeals under the Indian Companies Act, 1882, ought to be filed with such promptitude as to render service of notice upon the respondent possible within three weeks prescribed by S. 169 of the Act, and the Appellate Court will not extend the time for appealing unless the delay is caused either by the conduct of the respondent or by mistake of the officials of the Appellate Court. (*Broadway, J.*) NARINDRA NATH SAHU v. KISHEN LAL.

73 I. C. 211 (2).

———**(VII of 1913)—Ss 10, 12 and 14—Memorandum of association of a company—Alteration—Revocation of appointment of managing agent—Confirmation by Court.**

The only power that the court has to confirm resolutions of a company, in regard to an alteration of the memorandum of association is in

## COMPANIES ACT (VII OF 1913), S. 10.

respect of matters covered by S. 12. The memorandum of association of a company formed for the purpose of carrying on a banking business had a clause appointing a particular person as agent, principal and secretary to the bank and he was given powers to enter into any agreement contract or transaction with other banks or traders. Subsequently by a special resolution, the company purported to alter the clause by removing the agent and applied for confirmation of the special resolution under S. 12 of the Companies Act. *Held* that the court should not confirm the resolution. Firstly, the clause was not one relating to the objects of the Company alterable under S. 12 (1) (a) of the Companies Act as one relating to a detail of management, but was a condition under S. 10 of the Act. Secondly even if the clause related to the object of the Company, the Court had a discretion in confirming it and the court did not think it beneficial to the interests of the shareholders to confirm the resolution (*Schwabe, C. I. and Ramesam, J.*) *VENKATARAMA AIYAR v. THE COIMBATORE MERCANTILE BANK LTD* 18 L W 304. (1923) M. W. N. 568 : 74 I. C. 966

———S. 72—Promissory note—Signed by Secretary, Treasurer and agent—Liability of company.

A Company purchased certain machinery and in lieu thereof one of its secretaries and treasurers executed a promote signing it in his own name. The promote was on a sheet of paper printed with the name of the company and bearing a Stamp impression of the company. *Held* the promote was signed on behalf of the company and it was therefore liable on the note (*Macleod, C. J. and Coyajee, J.*) *POONA CHITRAHALA STEAM PRESS v. GAJANAN INDUSTRIAL AND TRADING CO.* 1923 Bom. 29.

———Ss 76 and 131—Omission of Directors to hold general meeting—Effect of—Holding of extraordinary meeting—Offence

On 27—2—1920 the Standard Aluminium and Brass Works Company Ltd., was registered in Bombay. On 30-3-1921 the statutory meeting of the Company as required by S. 77 of the Companies Act was held. A general meeting was also held on that day. Subsequent to this there was no general meeting held nor was any balance sheet, audited by the auditors of the Company, prepared and read before the Company in a general meeting. On the requisition of certain shareholders an extraordinary meeting was held on 20—6—1922. On a complaint being preferred against the directors of the Company for not complying with the requirements of S. 76 of the Companies Act, *held* that the directors were guilty of an offence under the section and that the holding of an extraordinary meeting on the requisition of the shareholder was not a sufficient compliance with S. 76 (*Macleod, C. J. and Crump, J.*) *EMPEROR v. NASURBHAI ABDULLAHAI* 25 Bom. L. R. 224 : 72 I. C. 349 : 1923 Bom. 194 (2).

———S. 162 — Compulsory winding up solution for voluntary winding up—See 1922

## COMPANIES ACT (VII OF 1913), S. 195.

DIG. COL. 358 ORIENTAL NAVIGATION CO. v. BHANARAM AGARWALLA.

69 I. C. 241

———S. 169—Limitation—Application to set aside *ex parte* order.

S. 169 of the Companies Act is no bar to an application to set aside an *ex parte* order. 16 A. 53 followed. (*Piggot and Walsh, JJ.*) *SHAH MUHAMMAD EHSANULLAH v. THE PEOPLES INDUSTRIAL BANK LTD, ALLAHABD.*

72 I. C. 106 : 9 O. & A. L. R. 477 : 1923 A. 429.

———S. 186—List of contributories—Finality.

Where on liquidation of a company, a shareholder is settled on the list of contributories, he cannot, in proceedings under S. 186, plead that he was improperly so settled. (*Broadway, J.*) *GOBIND SINGH v. UNION BANK OF INDIA.*

71 I. C. 724 : 1923 Lah. 85.

[See ON APPEAL.

4 Lah. 239].

———S. 186—Summary procedure—Scope of.

In order to make a contributory liable, under S. 186 for payment of debts other than calls, the said debts must be due by the said contributory in his own personal capacity and not as a member of a firm, which is not a contributory. (*Broadway, J.*) *GOBIND SINGH v. UNION BANK OF INDIA LTD* 71 I. C. 724 : 1923 Lah. 85.

[See ON APPEAL.

4 Lah. 239].

———S. 186—Summary process—Recovering money from firm of which contributory a partner—Contract Act, S. 43—Applicability.

The summary procedure under S. 186 Companies Act can be resorted to recover money from firm, by selecting from among the partners one who is a contributory and calling upon him to liquidate the whole debt. The principle of S. 43 Contract Act will apply to such a case. (*Shadi Lal, C. J. and Le Rossignol, J.*) *LIQUIDATOR, UNION BANK OF INDIA v. GOBIND SINGH.* 4 Lah. 239.

———S. 186 (1)—Time-Barred debt—Enforcement against contributory.

S. 186 of the companies Act does not override the provisions of the Limitation Act and does not enable the court to enforce by a summary order the payment of a debt which it could not have enforced in an action at law. The section does not create new liabilities or confer new rights. It merely provides a summary procedure for enforcing existing legal liabilities. The words "at any time" can only mean at any time in the course of liquidation proceedings commencing from the date of the winding up order. The Section creates a new machinery for bringing in debts due by a contributory to the company and nothing more (*Shadi Lal C. J. and Ffode, J.*) *SRI NARAIN v. LIQUIDATOR UNION BANK OF INDIA.* 4 Lah. 109.

74 I. C. 600 : 1924 Lah. 53.

———S. 195—Examination—Right of petitioning creditor to attend.

The examination under S. 195 Companies Act is a private one and petitioning creditor should not be allowed to attend the same, particularly when the creditor who seeks to attend is engaged

**COMPANIES ACT, S. 234.**

in litigation with the company in liquidation. (*Beasley, J.*) MOOLLA DAWOOD COTTON MANUFACTURING COMPANY, LTD. *In re.*

1 Rang. 384 : 1924 Rang 24

**—S. 234—Compromise—Validity**

If a bank has gone into voluntary liquidation S. 234 provides that a liquidator could compromise all calls, liabilities to calls, debts, liabilities etc. with the sanction of an extraordinary resolution of the Company but if no such extraordinary resolution was passed sanctioning the compromise by the liquidator and if the compromise was actually entered into, the Bank should be held bound thereby so far as the debtor is concerned any loss occurring thereupon being recoverable from the liquidator, who had ignored or exceeded his powers. (*Broadway, J.*) GOBIND SINGH *v* UNION BANK OF INDIA LTD.

71 I. C. 724

1923 Lah. 85.

[See *infra* ON APPEAL.

4 Lah. 239.]

**—S. 234—Compromise between liquidator and Contributor—When binding**

A Compromise between a liquidator of a Company and a Contributor though it might, if found, be binding on the former person, will not be binding on the Company until sanctioned by an extraordinary resolution as provided in S. 234 Companies Act (*Shadi Lal and Le Rossignol JJ*) LIQUIDATOR, UNION BANK OF INDIA *v* GOBIND SINGH.

4 Lah. 239.

**—S. 235—Misfeasance—Claim for compensation—Limitation—Commencement—Limitation Act. Art. 36—Applicability.**

A claim for compensation for misfeasance under S. 235 of the Companies Act is governed by Art. 36 of the Limitation Act, the provisions of which are made applicable by S. 235 (3).

S. 235 does not create any new right or liability and time begins to run from the date of the misfeasance for which compensation is sought. (*Martineau, J.*) HUKAM CHAND *v* BANK OF MULTAN.

69 I. C. 255.

**—S. 235—Scope of.**

Applications under S. 235 of the Companies Act are in the same position as suits, for the purposes of the law of limitation, S. 225 is not intended to revive any rights that have already become barred by time and it is only reasonable that the powers of a liquidator under S. 235 should extend to those actions only regarding which it can be shown that there is a subsisting right or liability. S. 235 gives no new rights, but simply provides a summary mode of enforcing rights, which must otherwise have been enforced by suit. 19 Mad. 149 Dist. (*Shadi Lal, C. J. and Abdul Qadir, J.*) THE BANK OF MULTAN, LTD. IN LIQUIDATION *v* HUKAM CHAND.

71 I. C. 899 : 1923 Lah. 58 (2).

[ON APPEAL FROM.

69 I. C. 255].

**—S. 284—Procedure—Winding up commenced before new Act came into force—Appeal—Notice.**

When proceedings in winding up were commenced Act VII of 1913 came into force, S. 284

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lays down that for all purposes connected with the winding up, the old Act should be regarded as in force. An appeal against the order of the District Judge must be filed and notice served in such a case within 8 weeks of the order as laid down in S. 169 of the old Act. (*Chevis, J.*) HEM RAJ *v* PUNJAB TANNERY COMPANY.

1923 Lah. 98.

**COMPROMISE DECREE—Construction—Decree for delivery of lands with rents and profits—Collection of rent before such delivery—Liability to account.**

Where under a compromise decree the respondent undertook to deliver possession of certain lands as they then existed together with the rents and profits which had accrued till then, the respondent must be held to hold the property thereafter in a fiduciary capacity and for the purpose of handing over the property to the appellant. Where therefore the respondent cut down certain trees on the land and appropriated them to his own use then he was acting in breach of the obligation he was under by reason of the decree and was in fact committing a breach of trust. Further the respondent was liable to account to the appellant for all the rents that he had collected from the tenant since the date of the decree. (*Miller, C. J. and Jwala Prasad, J.*) MAHADEO PRASAD SAHU *v* GAJADHAR PRASAD SAHU.

1 Pat. L. R. 145 : 73 I. C. 359.

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The parties who were partners in a flourishing business fell out and their differences were settled by a compromise decree.

The clause which determined the respective liabilities of the parties to contribute towards the sum to be paid by party No. 1, appellants, on account of taxes ran as follows—

“As to the amount of Income Tax, Excess Profits Tax and super-tax for 1919-20 to be paid by Bakhsh Elahi and Co. and Karam Elahi Muhammad Shafi, after the tax has been deposited in Government Treasury, the liability will be shared by party No. 1 and party No. 2 among themselves in proportion to their shares for 3/4th of a year or 9 months.” Party No. 1 paid in November 1920 a sum of Rs. 1,22,500 as Excess Profits Tax for the year 1918-19; and claimed that party No. 2 respondent should pay their share of this amount for 9 months.

Held the liability of the respondents was circumscribed by the terms of agreement and that paragraph as it stands does not make them liable for payment of any portion of the Excess Profits Tax for 1918-19. The onus was on the appellants to prove that respondents were liable. (*Shadi Lal, C. J. and Abdul Qadir, J.*) HAJI MAHOMMED TAQI *v* HAJI ABDUL RAHMAN.

1923 Lah. 151

**—Extension of time to pay money—Power of Court.**

Where a compromise decree provides for payment of money on a prescribed date and on default forfeiture is to result, courts should consider in each case whether time was of the essence of the transaction and if relief against forfeiture should be given or not. If time is not

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of the essence courts have power on equitable grounds to extend the time, (*Mullick and Bucknill, JJ.*) *MT. NAND RANIKUER v DURGA DAS NARAIN* 2 Pat. 906.

**Effect.**

When parties are competent to put an end to litigation and do put an end to litigation in one by which other litigations are also put an end to, no Court with judicial notice of the compromise can proceed with the hearing in other suits. Where the filing of further and special vakalatnamas appears to have been intended in the minutes of compromise, but the parties knew what the terms were on which the suit was to be compromised and had assented to those terms and did not consider that it was necessary to file any further and special vakalatnamas, and treated the compromise as binding upon them and acted upon it. *Held*, that the compromise bound the parties. (*Sir John Edge*) *SOURINDRA NATH MITRA v. HERAMBA NATH.*

45 M. L. J. 453 : (1923) M. W. N. 734 :

33 M. L. T. (H.C.) 294 :

L. R. 4 P. C. 138 : (1923) P. C. 98.

Effect of — Disputed title — Mistake of law. See (1922) DIG. COL. 359, *NAGESHAR SAHAI v. KUAR MATA PRASAD*, 69 I. C. 730.

Filing of amended deed — Notice to defendants

Where a petition of compromise is filed by some defendants who had compromised, the court is not competent to partition properties not included in the petition of compromise without notice to the defendants who had compromised. (*Das and Kulwant Sahay, JJ.*) *SHAHDEO SHUKUL v. JAGESHAR PRASAD SHUKUL.* 1923 P. 293.

Legality of — Public trust — Succession to office. See (1921) DIG. COL. 343 See (1922) DIG. COL. 360. *VENKATACHALAM CHETTIAR v RAMANATHAN CHETTIAR.* 70 I. C. 410

Mortgage Suit — Waiver of final decree — Execution. See C. P. CODE, O. 34, RR. 4 AND 5 27 C. W. N. 621.

Variation of terms — Time of the essence of the contract — Equitable relief.

Under the terms of a compromise decree each of the parties thereto were to do certain specific acts within two months from the date of the decree. For one year after the decree nothing was done and afterwards the defendant applied for the execution of the decree. *Held* that under the terms of the compromise decree time was of the essence of the contract between the parties and that the defendant who had defaulted to perform his part of the contract could not execute the decree. Even if time was not of the essence of the contract the defendant who was guilty of an explained delay of more than a year could not claim specific performance of the terms of the compromise. (*Marten and Fawcett, JJ.*) *SHANKAR SAKHARAM v. RANTANJI PREMJI* 47 Bom. 607 : 25 Bom. L. R. 328 : 1923 Bom. 441.

CONTEMPT — Contempt of Court — Newspaper criticism — Immediate apology — Effect of.

**CANTONMENT ACTS, S. 6.**

It is not always a defence to a rule for contempt of Court that a newspaper guilty of contempt immediately afterwards published an apology to the court. (*Macleod C. J. and Crump, J.*) *MARMADUKE PICKTHALL In re.* 25 Bom. L. R. 107 : 72 I. C. 73 : 24 Cr. L. J. 289 1923 Bom. 242.

Contempt of Court — Bombay High Court — Criticism in newspaper.

Where the articles as a whole would leave on the mind of an ordinary reader the clear impression that injustice had been deliberately done on political grounds to some of the accused who were apparently, innocent, in other words, it attributes judicial dishonesty to the Judges. *Held*, such an article constitutes a contempt of Court. The court has to consider the natural and probable effect of the article and not only the intention of the editor. Any unfair criticism of Courts or Judges constitutes such an interference with the administration of justice as should be punished. The tendency of such criticism is to undermine the dignity of the Court and in the end to embarrass the administration of justice.

The High Court will not act so much to protect the dignity of its Judges, as in the interest of the administration of justice. (1899) A. C. 549 : (1900) 2 Q. B. 33 : 33 Bom. 240 Foll. (*Shah, A. C. J. and Crump, J.*) *EMPEROR v. MARMADUKE PICKTHALL.* 25 Bom. L. R. 15 1923 Bom. 8

Disobedience of order of Court — Communication — Absence of formal order — Effect.

The High Court stayed proceedings in a criminal trial. A telegram was sent by the vakil and this was supported by an affidavit, but still the Magistrate proceeded with the trial. *Held*, even in the absence of a formal communication of the stay order, the magistrate was bound to obey the order of the High Court. He would be guilty of contempt if he wilfully disobeyed the same.

Where from the conduct of the Magistrate, two inferences are possible, the Court in such cases accepts that which is in favour of the view that no contempt of Court was meant or intended. (*Venkatasubba Rao, J.*) *PONNUSWAMI AIYAR v. GANAPATHY AIYAR.* 45 M. L. J. 742 :

33 M. L. T. (H. C.) 180 : (1923) M. W. N. 919 : 18 L. W. 809

Contempt of Court — High Court — Commitment for contempt — Jurisdiction. See (1922) DIG. COL. 361. *SATYABODHA RAMCHANDRA ADABADDI. In re.* 47 Bom. 76

CANTONMENT (HOUSE ACCOMMODATION) ACT SS. 6 AND 11 — Lands in cantonment — Conditions as to alienation — Validity.

Cantonment land was granted by Government to plaintiff, on condition that the grantee should not alienate without the permission of military authorities. Plaintiff wanted to sell the land to defendant and on applying for sanction the military authorities proposed to give it on condition the defendant would let out the bungalow to a military officer when required and not claim to live in it as owner. *Held* the condition was perfectly justifiable and defendant was bound to complete the sale. (*Mulla J.*) *ARDESHIR FRAMJI v. TRICAMDASS GORDHANDAS.* 25 Bom. L. R. 938.

## CONTRACT

**CONTRACT.**—*Agreement to give passage to England on completion of service.—If money claimable.*

A contract of service contained a clause that on the termination of the service, the servant would be provided passage back to England—*Held*, he was entitled to the passage money, whether he actually took a passage or not. (*Carr, J.*) *OPPENHEIMER & CO v. LONG.*

2 Bur. L. J. 291.

—*Breach—Failure to certify satisfaction of decree—Damages.*

Where after a decree debt was paid out of court, the decree holder without entering satisfaction as agreed upon, puts in an application for execution, there is a breach of contract and the judgment debtor is entitled to sue him for damages immediately. (*Subbanna and Ramaswamy Iyengar, JJ.*) *YAKUB SAB v. GHULAM MAHOMED KHAN SAB,* 1 Mys. L. J. 108.

—*Breach of—Sale of goods—Mutual obligations—What plaintiff has to prove.*

In a contract for the sale of indigo, under which plaintiff agreed to pay a certain sum of money and the defendant a certain quantity of indigo as per sample given, if the plaintiff sues for damages for breach of contract, he must first show that on the due date, he was ready and willing to perform his part of the bargain. It may not be necessary to prove that he made an actual tender of the money, but it was incumbent on him to show he had made arrangements for the purchase money and was in a position to hand it over as soon as he was satisfied that the bulk of the goods agreed with the sample. (*Rafique and Lindsay, JJ.*) *MAHOMED ISMAIL KHAN v. HASAN ALI KHAN.* 1923 A. 220.

—*C. I. F.—Bills of lading to be delivered on payment of price—Property when passes.*

When a seller deals with, or claims to retain, the bill of lading in order to secure the price, as when he sends forward the bill of lading with a bill of exchange attached, with directions that the former is not to be delivered to the buyer till acceptance or payment of the bill of exchange the appropriation is not absolute, but until acceptance of the draft, or payment or tender of the price is conditional only and until then the property in the goods does not pass to the buyer. (*Martineau and Moti Sagar, JJ.*) *GULAB RAJ SAGAR MAL v. MIRBHE RAM—NAGAR MAL.* 4 Lah. 423

—*C.I.F.S.W., — Delivery of goods—Payment—Conditions precedent—Survey of goods—Right to.*

The consignors of goods under a C I F S W contract are bound to tender to the consignee the bill of lading and insurance policy before demanding the price and a delivery telegram sent by the shipping company is not equivalent to the bill of lading.

In the absence of the usual documents of title the consignee is entitled to inspect the goods and satisfy himself as to the same. (*Mulia J.*) *STEEL BROTHERS AND CO. LTD v. DAYAL KHATAV & CO.* 47 Bom. 924 : 25 Bom. L. R. 1063.

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—*Consideration—Promise to pay decree debt—If can be enforced after decree is based.*

Where in consideration of the decree holder not executing his decree, the judgment debtor promised to pay the decree amount with interest by a certain time, the same is enforceable as a valid contract, even though at the time of suit the original decree is barred. (*Newbould and Rankin, JJ.*) *IBRAHIM MULLICK v. LALIT MOHAN ROY.* 50 Cal. 974.

—*Construction.*

Where the contract provided that goods are to be delivered as and when same may be delivered from the mills, *Held* this should not be construed to mean 'if and when the same may be received from the mills.' To construe in this way is to convert words, which fix the quantities and times for deliveries by instalments into a condition precedent to the obligation to deliver at all, and virtually make a new contract. The words certainly regulate the manner of performance, but they do not reduce the fixed quantity sold to a mere maximum, or limit the sale to such goods, not exceeding the agreed bales as the Mills might deliver to the defendants during the agreed period. (*Lord Sumner*) *HARNANDRAI FATCHAND v. PRAGRAJ.* 44 M. L. J. 498 : 47 Bom 344 :

L. R. 4 P. C. 61 : 32 M. L. T. (P. C.) 171 : 25 Bom L. R. 537. 27 C. W. N. 879 : (1923) M. W. N. 547 : 18 L. W. 441. 38 C. L. J. 248 : 72 I. C. 485. 50 I. A. 9 : (1923) P. C. 54 (2) (P. C.).

—*Construction—Agreement to abide by oath.*

If the parties have made a binding agreement, it does not matter to a Court how foolish it is, and after all the parties probably know their business better than the Court and it may not be so foolish in the eyes of the parties as in the eyes of the Court. Consequently where the parties contracted to abide by the statement of the defendant on oath, there is nothing illegal in such contract and the parties are bound to abide thereby. (*Walsh, J.*) *KESHO RAM v. PEARE LAL.*

21 A. L. J. 209 : 71 I. C. 761 : L. R. 4 A. 368 : 1923 A. 443 (2).

—*Construction—Clause for arbitration—Breach of Contract.*

A contract of sale between the vendors and purchasers of certain goods contained the following arbitration clause : "should any dispute arise as to the interpretation of this contract or any matter in connection therewith or with the carrying out thereof the same shall be submitted to arbitration. *Held* on a construction of the contract that a claim for damages for breach fell within the clause requiring a submission to arbitration. (*Schwabe, C. J. and Ramesam, J.*) *SUBBIAH & CO. v. TETLY AND WHITLEY*

45 M. L. J. 39 : 32 M. L. T. 380 (H. C.) : 18 L. W. 77 : (1923) M. W. N. 445 : 75 I. C. 673 : 1923 Mad. 693.

—*Construction — Commercial contracts—Mode of delivery—Stipulation as to.*

In construing mercantile contracts courts will assume that any clause inserted therein was inserted by the parties to some good purpose and with some definite meaning as merchants are not

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in the habit of inserting in their contracts stipulations to which they do not attach some value and importance. A party to the contract is entitled to delivery of goods in the manner stipulated and he cannot be compelled to take something else in substitution if it however effective a substitute it might be. (*Schwabe, C. J. and Krishnan, J.*) ADAM HAJI PEERA MAHOMED ISHAIK *v* HUSSAIN AKBARI. 70 I. C. 736 : 1923 Mad 108.

## Construction—Condition.

The term 'conditions of sale' in connection with the preparation of bargain paper means 'terms of sale' and not conditions to which the bargain is subject.

Whether an agreement is a completed bargain or merely a provisional arrangement depends on the intention of the parties as deducible from the language used by the parties on the occasion when the negotiations take a concrete shape. As observed by the Lord Chancellor (Lord Cranworth) in *Ridgway v. Waiton* 6 H. L. Cas. 289 the fact of a subsequent agreement being prepared may be evidence that the previous negotiation did not amount to an agreement, but the mere fact that persons wish to have a formal agreement drawn up does not establish the proposition that they cannot be bound by a previous agreement. (*Mr. Amcer Ali.*) HARICHAND MANCHARAM *v*. GOVIND LUXMAN GOKHALE. 44 M. L. J. 608 : 47 Bom. 335 : 28 C. W. N. 73 : 17 L. W. 572 : 31 M. L. T. (P. C.) 175 : L.R. 4 P.C. 84 : 37 C.L.J. 440. 25 Bom. L.R. 531 : 71 I. C. 763 : 50 I. A. 25 : (1923) P. C. 47. (P. C.)

Construction—Contract for conveyance—Duty to make out marketable title—Execution of conveyance—Delay. See (1922) Dig. COL 363 BANKU BEHARI DHUR *v*. GALSTAUN.

21 A. L. J. 9 : 69 I. C. 163 : 9 O. & A. L. R. 237. (P. C.)

Construction—Contract for sale of goods—Delivery by instalments—Total period fixed.

Where a person agreed for the sale and delivery of 2,000 tons of manganese ore at Rs. 6-8-0 a ton "within two years from date in about equal monthly quantities" Held that the words as to the time of delivery imported that the essential condition was that delivery of the whole 2,000 tons was to be made within two years, and words as to the monthly deliveries were nothing more than a statement of the time of delivery within those two years, which, if possible, would be most convenient to both parties. Consequently there was no breach until the expiry of the 2 years prescribed by the contract. (*Hallifax, A. J. C.*) MOHAN LAL *v*. BISHESHWARDAS DAGA.

70 I. C. 344 : 1923 Nag. 121 (2).

Construction—Sale of goods—Contract to purchase from plaintiff's goods which plaintiff had previously thereto purchased from another

Tender by plff. of similar goods relating to other contracts—Repudiation See (1922) Dig. COL 363. S. A. SIVARAMA Aiyar *v*. K. M. SUB BIAH AND SONS. 70 I. C. 346.

Forfeiture of deposit stipulated for—Penalty if can be relieved against See CONTRACT ACT, S. 74. 1923 Rang. 47.

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Implied term—Agreement between two temples regulating processions—Construction.

*Per Chief Justice* :—The law on the subject of the implication of terms in a contract has frequently been misunderstood and misapplied. The Court ought not to imply terms in a contract unless there arises from the language of the contract itself and the circumstances under which it is entered into, such an inference that the parties must have intended the stipulation in question, that the Court is necessarily driven to the conclusion that it must be implied.

Held, on a construction of an agreement between two temples regulating the processions of idols on particular days that there was no implied term that one of them would limit its procession, to those particular days (*Schwabe, C. J. and Wallace, J.*) GOVINDA CHARIAR *v* NATTU KESAVA MUDALIAR. 17 L. W. 79 : (1923) M. W. N. 186 : 72 I. C. 243 : 1923 Mad. 344.

Marriage—Securing a girl for marriage.—Money paid to be given to girl's guardian—Girl not secured—Money recoverable.

Defendant asked for Rs. 200—for the purpose of settling the plaintiff's marriage. The plaintiff however sent only Rs. 175—by money order. Defendant did not spend that sum in connection with the plaintiff's marriage in accordance with the agreement come to and therefore plaintiff sued to get the money back. Plaintiff's pleader stated that girls were scarce and plaintiff wanted the defendant to secure a girl for him and the money was given him to be paid to the guardian of the girl selected, should money be demanded.

Held that plaintiff can recover. 41 M. 197 and 33 B. 411 Foll. (*Prigdeaux A. J. C.*) GANGADHAR DAI *v* GOVIND NARAIN.

74 I. C. 107 : 1923 Nag 296.

Mercantile custom—C. I. F. terms—Payment.

When goods have been sold upon C. I. F. terms the contract of the seller is performed by tendering to the buyer the documents which would enable the latter to obtain on the ship's arrival the delivery of the goods contracted for. These documents must of course be tendered within a reasonable time from the date agreed upon for shipment of the goods which they represent. If the contract of sale provides that payment is to be drawn on the buyer, the latter is bound to accept the draft upon tender of the proper documents. Thus he must do even though the goods be lost or destroyed at the time the draft is presented. The delivery he is entitled to as against payment of the contract price is not the goods contracted for but their symbol represented usually by the bill of lading, charter-party, invoice and policy of insurance. Upon payment he can upon arrival of the ship, demand the goods themselves and should these not be forthcoming, or, when forthcoming, not be of the nature contracted for all his remedies at law are then open to him. (*Shadi Lal, C. J. and Fjorde, J.*) BUBLEY HURRY AND CO. *v*. HERTZ AND CO. 4 Lah 215 : 73 I. C. 421 : 1923 Lah. 541.

Sale of goods—German steamers carrying goods seized during war—Arrival in a

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different ship long after—Doctrine of "frustration." See (1922) DIG. COL. 365. GOURI SHANKAR AGARWALLA v. H. P. MOITRA 70 I. C. 379.

———Stranger to—Right to enforce—Assignment of all the property of the transferor—Credit of transferor—Suit for recovery of debt from transferee—Maintainability, (1922) DIG. COL. 366. RAMASWAMI AIYAR v. DEIVASIGAMANI PILLAI 69 I. C. 957 (2)

———Time of essence—Agreement for re-purchase.

In an agreement for re-purchase, time is of the essence of the contract. (*May Oung and Duckworth, JJ*) MAUNG WALA v. MG. SHWE GUN. 1 R. 472 : 2 Bur. L. J. 188.

———Transfer of future expectancy—Validity of. See. T. P. ACT S. 6 1923 P. C. 189.

CONTRACT ACT (IX of 1872), S. 2—Stranger to—Right to take benefit.

There is no universal rule that a stranger to a contract can in no circumstances claim a benefit thereunder 32 A, 410 ; 41 C. 737, 46 Cal 160 Rel It is competent to a tenant to invoke the benefit of a contract between the Govt. and the settlement holder even though he may not be a party thereto. 11 C. L. J. 68 ; 37 C 449, 3 Pat. L. J. 394 : 17 C. L. J. 70 Ref. (*Mookerjee, and Cuming, JJ.*) RANI HEMANTA KUMARI DEBI v THE MIDNAPORE ZEMINDARI CO. 1923 Cal. 25.

———S. 2—Consideration—Renewal of prior promissory note—Payee under prior promissory note not entitled to sue—Effect of

Defendant executed a promissory note in favour of S. K. and after her death the defendant executed another pronote in renewal of the previous one in favour of a person who was not entitled to sue on the basis of the previous pronote but at the request of a person who was so entitled. Held that under the circumstances it must be held that there was consideration for the subsequent pronote and that the defendant was liable thereunder. (*Daniels, A. J. C.*) SYED MAHAMED JAFAR v RAM CHARAN 10 O. L. J. 43. 9 O. & A. L. R. 155 : 74 I. C. 316 : 1923 Oudh 176.

———S. 2—Offer and acceptance—Auction—Bids—Nature of—withdrawal of bid before property is knocked down—Effect of. See (1922) DIG. COL. 366. JORAVARMULL CHAMPALAL v. JEY GOPALDAS GHANSHAMDAS, 70 I. C. 977.

———S. 2—Sale of lands by Government—Auction—Bids—Acceptance by Tahsildar—Confirmation by Collector—Absence of—Effect of

The Tahsildar of Madura acting on behalf of Government held an auction of certain lands in July 1915. The 1st defendant purchased the property at the auction and deposited 15 per cent of the purchase money on the day of sale. There was a stipulation in the conditions of sale that the sale was to be subject to confirmation by the Collector. In spite of several applications by the 1st defendant the sale was not confirmed and the Government cancelled the sale in 1917. Held, that the effect of the 1st defendant's bid at the auction was a mere offer by him which was to be

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accepted by confirmation of the Collector and that in the absence of such confirmation, there was not a completed contract of sale in favour of the 1st defendant. (*Phillips and Devadoss, JJ.*) MUTHU PILLAI v. SECY OF STATE FOR INDIA.

45 M. L. J. 67 :  
17 L. W. 531. (1923) M. W. N. 317.  
31 M. L. T. (H. C) 309 : 72 I. C. 436 :  
1923 Mad. 582.

———S. 2 (d) Consideration—Promissory note—Forbearance to sue as prior pro note to a near relation—If valid. See PROMISSORY NOTE. 26 O. C. 204.

———Ss. 3, and 7—Acceptance, place of.

When the proposal and acceptance are made by means of letters the contract must be deemed to have been made at the place where the letter of acceptance is posted. Where the customers could have no control over the goods until they had paid the price at Amritsar and had thus obtained the railway receipt, and endorsement in their favour and though the railway would be deemed to take delivery at Calcutta on behalf of the customers of goods despatched from there and consigned to the customers, it is not easy to see how the railway could take delivery on behalf of the customers of goods which were not consigned to the latter and not in any way under their control. But where it must have been understood between the parties that the goods should be delivered and paid for at Amritsar, the cause of action arose at Amritsar. (*Mol: Sagar, J.*) FIRM OF HIRA NAND MURLIDHAR v. FIRM OF GURMUKH RAI, 73 I. C. 205. 1923 Lah 427.

———S. 4—Proposal—Completed contract—Difference between—Letter of request for a loan.

Where a person writes a letter requesting a loan from another and promising repayment with interest the letter is not a contract but a mere proposal. Consequently it cannot be sued on as a promissory note. (*Pipon, J. C.*) SAYAD SIKANDAR SHAH v. BHAI RAMCHAND. 71 I. C. 968.

———S. 10—Minor—Suit on pronote

A minor in whose favour a promissory note has been executed can enforce the same by filing a suit on it (*Po Han, J.*) SHARFATH ALI v NOOR MAHOMED. 2 Bur. L. J. 227.

———S. 11—Minor—Contract—Misrepresentation as to age—Avoidance of contract—Duty to refund benefit.

Where a minor enters into a contract on an erroneous representation as to his age, the contract is none the less void and he is not under any obligation legal or equitable to pay any money before avoiding the contract. If he seeks to recover property transferred by him as a minor, he cannot be compelled to refund to the transferee any money which has been paid to the minor as consideration for the transfer, 1 L. L. J. 122, 30 C 539 followed. 38 P. R. (1919) referred to. (*Broadway, J.*) BISHEN SINGH v. BISHNA.

69 I. C. 543.

———Ss. 11 and 65—Minor—Execution of bond—Consideration paid—No misrepresentation—Suit for cancellation of bond—Duty to restore



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benefit. See (1922) DIG. COL. 367 MUHAMMAD ANWAR KHAN v. JHANDA SINGH

69 I. C. 888.

—S 11—Minor—Sale—Setting aside—Decree for repayment of money.

Though it is open to a Court to set aside a sale deed executed by a minor subject to his refunding the money which he has obtained as consideration, the court will not exercise this power in favour of a vendee who has been unscrupulous in his dealings with the minor. (*Mears, C. J. and Piggott, J.*) MAHOMED SAID v. BISHAMBAR NATH.

45 A. 641:

21 A L J. 596.

—S 12—Soundness of mind—Contractual Capacity—Presumption in favour of sanity—Mere weakness of mind is not sufficient. Party must prove total incapacity to understand business and forming rational judgment—Effect on contract. (*Jwala Prasad and Adami JJ*) MAHOMED YAKUB v. ABDUL QUDDAS. 4 Pat. L. T. 17: 1923 P. 187.

—S. 16—Borrower in needy circumstances—Relief against terms.

The fact that the borrower needs money very badly does not necessarily place the lender in a position to dominate the will of the borrower and unless the case falls within S. 16 I. C. A. there is, no ground for relief. (*Wazir Hasan, A. J. C.*) BALBHADRA PRASAD v. DHAMPAT DAYAL.

9 O. and A. L. R. 707

—Ss. 16 and 74—High rate of interest—Power of court to reduce—Undue influence—Costs.

In cases where there is no proof of undue influence a court has no power to reduce the contract rate of interest merely on the ground it is very high. 28 A. 570 P. C.; 20 O. C. 318: 8 O. L. J. 418; 24 O. C. 313 foll. But the court disallowed costs on the ground that the interest decreed was high. (*Daniels, A. J. C.*) SHEIKH FAZAL AZIM v. LALA GIRDHARI LAL.

69 I. C. 657: 1923 Oudh 8 (1).

—Ss. 16 and 74—High rate of interest—Undue influence—Presumption—Mortgage.

It is not a universal proposition of law that wherever there is a security for the debt a rate of interest over ten per cent per annum is penal. Where a certain rate of interest is excessive or not is a question which must depend upon the particular circumstances of each case and a rate of interest at 15 p. c. per annum compoundable every year is not sufficient to raise the presumption that undue influence was exerted by the mortgagee on the mortgagor in obtaining the mortgage. 42 C 690; 18 A. L. J. 344 referred to, (*Simpson and Wazir Hasan, A. J. C.*) BASANT RAI v. LALA KESHO RAM. 9 O L. J. 612: 74 I. C. 346: 1923 Oudh 139.

—Ss 16 and 74—Mortgage—High rate of interest—Power of court to reduce.

Though the rate of 25 per cent compound interest on a mortgage is high, it is not within the power of the court to reduce the interest in the absence of proof of undue influence on the part of the mortgagee. 101 P. R. 1918; 124 P. R. 1918 foll. (*Martineau and Campbell, JJ*) KHOTA RAM v. NAWAZ.

5 Lah. L. J. 238.

72 I. C. 765: 4 Lah. 76: 1924 Lah. 21.

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—Ss. 16 and 74—Mortgage—Interest—High rate—Penalty—Relief against.

The rate of interest, however exorbitant, cannot be abrogated unless the agreement was tainted by undue influence, fraud or misrepresentation such as are mentioned in the Contract Act. A solemn agreement duly and freely entered cannot be allowed to avoid the terms thereof which they agree to with their eyes open and with no restraint upon their freedom of will. Upon this principle, contracts for payments of exorbitant rates of interest, such as, 75 per cent, in some cases were upheld and were not allowed to be disturbed; but in those cases the contracts were upheld against the party to the contract being allowed to trip up the terms of the contract when he agreed to them voluntarily and with his eyes open. (*Jwala Prasad and Ross, JJ*) MAHADEO PRASAD v. BISSESSAR PRASAD.

2 Pat 488:

4 Pat. L. T. 707: 74 I. C. 695.

—S. 16—Undue influence—Gift—Son taking under—Validity of gift.—Father old but capable of exercising independent and intelligent judgment—No presumption of undue influence. (*Jwala Prasad and Adami JJ.*) MAHOMED YAKUB v. ABDUL QUDDUS. 4 Pat. L. T. 17: 1923 P. 187.

—S. 16—Undue influence—Evidence of—Urgent need of money on the part of the borrower. See (1922) DIG. COL. 368. MT. BASHIRAN v. BISHAMBAR NATH

69 I. C. 667.

—S. 16—Undue influence—Mortgage—High rate of interest.

Neither prior indebtedness nor a high rate of interest would be sufficient to prove undue influence by the mortgagee on the mortgagor. There would be a case of undue influence if the debt is of a large amount and the money lender puts pressure on the debtor for its payment. (*Dalal, A. J. C.*) RAZA HUSAIN KHAN v. GANESH PRASAD.

10 O. L. J. 390.

—S. 16—Undue influence—Old man—Gift of an agent.

Undoubtedly, if a person of competent capacity signs a deed, it is to be presumed that he understood the instrument to which he has fixed his name.

The principles of law applicable to a *pardana-shin* woman will not be extended to a man on the ground that he happened to be old and not in robust health.

But even in a case where an agent was the object of the bounty of his principal there is nothing to prevent this and if an agent can clearly show that a gift was made in his favour by a donor who was in a position to exercise a free and unfettered judgment with full knowledge of what he was doing the gift will be upheld. (*Daniels and Dalal, A. J. C.*) MIRZA YAQUB BEG v. MIRZA RASUL BEG.

10 O. L. J. 86: 74 I. C. 517:

1923 Oudh 254.

—S. 16—Undue influence—Proof of—Distressed state of mind of vendor.

It is not enough to prove undue influence that a vendor of property was in a distressed state of mind and anxious to dispose of his property at the

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time of sale. (*Broadway and Harrison, J.J.*)  
*INDER SINGH v. DYAL SINGH.*

72 I. C. 1032.

—S 16—*Undue influence—What is—Who can plead—Position of obligor's donee—Compound interest—High rate of interest.*

It would not be open to a plaintiff to plead that a mortgage contract is bad for undue influence where he is only a donee from the mortgagor's widow. He is not entitled to the equities which existed in favour of the mortgagor. 20 I. C. 812, *Ref.*, Urgent need of money on the part of the borrower does not of itself place the lender in a position to dominate his will. 34 Cal. 120, P. C., *Foll.* There is nothing inherently wrong or oppressive in an agreement to pay compound interest. The rate of 1½ per cent is not exorbitant and the mere fact of its being high, would not be sufficient to raise a presumption of undue influence 124 F. R. 1918, 96 P. R. 1901, *Ref.* (*Martineau and Zafar Ali, J.*) *CHIRANJI LAL v. DOST MAHOMED.* 1923 Lah. 634.

—S 17—*Contract—Misreading of—Effect.*  
*Per Kincaid J. C.* Where a party to a contract misreads the document of acceptance and believes it to be something different from what it is, the contract is not vitiated. (*Kincaid, J. C. and Modgavkar, A. J. C.*) *SODAWATERWALA v. VOLKART BROTHERS.*

1923 Sind 25

—S 17—*Fraud—Plea of—Allegation and proof—Particulars*

To prove a case of fraud it must be proved that representations were made which were false to the knowledge of the party making them or were such that the party making them could have no reasonable belief that they were true that they were made for the purpose of being acted upon and believes, that they were believed and acted upon and caused the actual damage for which relief is claimed. (*Mears C. J. and Piggoit, J.*) *GAURI SHANKER v. MANKI KUNWAR* 45 A. 624 : 21 A. L. J. 571 : L. R. 4 A 464 : 74 I. C. 466 : 1924 A. 17.

—Ss. 18 and 17—*Failure to make enquiry—Presumption.*

Failure to make such inquiries as an ordinary prudent man would make may under certain circumstances be evidence that the person to whom misrepresentation was made was not actually deceived. (*Kennedy, J. C. Raymond and Kemp. A. J. C.*) *MT. HURI v. ROSHAN KHUDABUX.*

16 S. L. R. 112 :

71 I. C. 161 : 1923 Sind 5 (F. B.)

—S. 20—*Mutual mistake—Effect*

Where both the vendor and vendee of land did not know that the land had already become the subject of proceedings under the Calcutta Improvement Act, and as such might any day come under the Act there is a mistake as to a matter of fact essential to the agreement and the agreement is void. (*Sanderson, C.J. and Richardson, J.*) *NURSING DASS KOTHARI v. CHUTTOO LALL MISSEK.* 50. Cal. 615 : 74 I. C. 996 : 1923 Cal. 641.

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—S. 23—*Agreement to supply funds.*

A fair agreement to supply funds to carry on a suit in consideration of having a share of the property it recovered, ought not to be regarded as being *per se* opposed to public policy. No doubt agreements of this character are to be carefully scrutinized and they are not to be tolerated if their motive is improper or if the immediate object is merely to promote gambling in litigation. (*Kennedy, J. C. and Raymond, A. J. C.*) *BEGRAJ v. ALISHER.* 1923 Sind 50.

—S. 23—*Agreement opposed to excise rules—Validity.*

An agreement entered into in violation of the rules and conditions which are prescribed for regulating, liquor traffic is void as being opposed to public policy. (*Chandrasekhara Aiyar, C. J. and Ramaswamy Iyengar, J.*) *MAHOMED GHOUSE SAB v. THIMMA SETTI.* 1 Mys. L. J. 90.

—S. 23 and 30—*Betting—Partnership of bookmakers—Suit to recover money on a hundi drawn to cover betting losses.*

Defendant was an owner of racehorses and bet on horse races in considerable amounts. On 20—10—20 he owed a sum of Rs. 8500 which he had lost to the plaintiff's firm. As he did not pay the plaintiffs reported him to the Turf Club whose Secretary intimated that he would publish the defendant's name as a defaulter. On 20—12—1920 defendant executed a hundi for Rs. 8,500 in consideration of his name being withdrawn from the defaulters list and his being permitted to run his horses and make his bets. In a suit by the plaintiffs (who were a firm) to recover the money due under the Hundi. Held that the consideration for the Hundi was legal and that it could be enforced. Contracts by way of wagering and gaming are void but not illegal. There is nothing illegal in the agreements made by a partnership firm of bookmakers not are such agreements prohibited by law. Consequently a suit by such a firm is maintainable. (1908) 2 K. B. 696 ; (1920) 3 K. B. 451 *Ref.* (*Buckland, J.*) *LEICESTER AND CO. v. MULLICK.* 27 C. W. N. 442 : 1923 Cal. 445.

—S. 23—*Bond for future adulterous intercourse—Validity.*

Where the consideration for a bond was future adulterous cohabitation, the agreement is void under S. 23 Contract Act and cannot be enforced. The fact that the defendant in a suit to enforce the bond has already received the consideration does not disentitle him to raise the plea, and the court should decline to enforce it. (*Phillips, J.*) *KANDASAMI GOUNDEN v. NARAYANASWAMI GOUNDEN.* 45 M. L. J. 551 : (1923) M. W. N. 566.

—S. 23—*Champtious agreement.*

There is nothing in India corresponding to the English law of Champerty and Maintenance. An agreement which in England would be champertous is not void in India. (*Prideaux A. J. C.*) *LATIF v. PANDHARI.* 1923 Nag. 214.

—S. 23—*Consideration—Abandonment of prosecution in non-compoundable case—Document void.*

Where the consideration for a bond is found to be an agreement to abandon the prosecution in a

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non-compoundable case the bond is void even if part of the consideration is good in law (*Newbould and Panton, JJ*) KARUNA KRISHNA CHAUDHURY v. RAKHALDAS MUKERJEE.

1923 Cal. 292 (1)

## —S. 23—Consideration—If lawful

A promissory note executed by a minor under the Court of wards though void, is not unlawful consideration for a bond executed by his son after his death and after the estate had ceased to be under the Court of Wards. (*Lindsay and Salaman, JJ*) BINDESHRI PRASAD v. SARJU SINGH. 21 A. L. J. 446 · L. R. 4 A. 241 · 73 I. C. 458 : 1923 A. 590.

## —Ss. 23, 24 and 25—Consideration—Legality of—Past co-habitation.

An agreement to pay a sum of money in consideration of services rendered by a kept mistress of the promisor is not enforceable because the consideration is illegal. 3 A. 387 followed (*MacLeod and Crump, J.*) HUSSEINALI CASAM MAHOMED v. DINBAI. 25 Bom. L. R. 252.

## —S. 23—Contract against public policy—Maintenance—Money advanced for purposes of litigation—Champerty—Enforceability of contract.

The specific law of maintenance and champerty has not been introduced into India and while fair agreements to supply funds to carry on litigation in consideration of having a share of the property if recovered should not be regarded as *per se* opposed to public policy yet such agreements should be carefully watched and if, extortionate, and unconscionable or made not with the *bona fide* object of assisting for a reasonable recompense a claim believed to be just, but for the purpose of gambling in litigation, or of injuring and oppressing others by encouraging unrighteous suits, should be held contrary to public policy and not enforced. The question is one essentially between the vendor and the vendee.

Reasonable compensation for the expenses incurred and the services rendered if substantial may, however, be awarded in such cases (*Duckworth and Po Han, JJ.*) U PE GYI v. MAUNG THEIN SHIN 1 R. 565 : 2 Bur L. J. 177

## —S. 23—Contract—Clause tending to defeat the provision of the Agra Tenancy Act—Enforceability. See (1922) DIG. COL. 371, BITHAL DAS v. RAGHUNATH DAS. 70 I. C. 601.

## —S. 23—Contract opposed to law or public policy—Contract legal according to French law but not according to law of British India—Enforceability See INTERNATIONAL LAW. 45 M. L. J. 59.

—S. 23—Fraud—Illegality—*Par delicto*—Applicability of the principle.

In all cases where a plaintiff is relying upon a deed, the defendant is entitled as of course to give evidence of the circumstances under which the document came into existence. When those circumstances embrace and include an allegation of a joint fraud by both plaintiff and defendant the particulars of that fraud must be pleaded; and it is then the duty of the court to look into the

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matter, and if the court comes to the conclusion that the parties were acting together with a view to perpetrate a fraud, and did in fact perpetrate that fraud and that there is no difference in the degree of guilt of the plaintiff (who is asking the court to give him some help) and that of the defendant, the duty of the Court is not to assist either party, in other words, the duty of the court is to dismiss the claim, because the Court having then in its knowledge that it has before it two persons equally guilty of fraud will not assist either of them. Once it is established that the parties are *pari delicto* the Courts will not assist an illegal transaction in any respect, that is to say the person who asks the Court to do something will fail. (*Mears, C. J., and Banerji, J.*) VILAYAT HUSAIN v. MISRA. 45 A. 396, 21 A. L. J. 303. 72 I. C. 92 : L. R. 4 A. 418 : 1923 A. 504.

## —S. 23—Illegal Contract—commissioner appointed by Court—Taking bond from party—Propriety of—Enforceability of bond

Where a pleader is appointed by Court in a suit as commissioner, the work done by the Commissioner is not work done for the party but for the Court. Consequently where a Commissioner who had been appointed at the instance of a party to a suit took a bond from that party for a certain sum of money and subsequently sued upon it held that the consideration for the bond was illegal and that it represented an improper advantage obtained by an officer of Court by abuse of his position as such. Consequently the bond was unenforceable, 4 M. 399 dist. (*Rankin and Panton, JJ*) PRAMATHA NATH SEN GUPTA v. SHEIKH ABDUL AZIZ MEAH. 27 C. W. N. 430 : 37 C. L. J. 406 : 75 I. C. 443 : 1923 Cal. 436.

## —S. 23—Illegal contract—Contract opposed to public policy—Restrictions on dealing in rice—Contract in contravention of—Enforceability

Where in contravention of the rules framed by the Government and of the terms of a license issued to one of them the parties entered into a contract for whole-sale supply of rice, the contract is illegal as opposed to public policy and where the plaintiff knew of restrictions on the defendants capacity to contract, both are in *pari delicto* and the plaintiff cannot recover monies advanced to the defendant on the basis of such contract. (*Phillips and Devadoss, J.*) JANU SAIT v. RAMASWAMI NAIDU.

(1923) M. W. N. 335. 32 M. L. T. (H. C.) 330 : 18 L. W. 564 : 72 I. C. 735 : 1923 Mad. 626.

## —S. 23—Illegal contract—money advanced Suit for recovery—Maintainability. (1922) DIG. COL. 371 NATARAJULU NAICKER v. SUBRAMANIAN CHETTIAR. 69 I. C. 939.

## —S. 23—Illegal Contract—Restitution of money taken under.

Where a person has taken money under an illegal transaction, he is bound to restore it and a court would not assist him to evade his obligation in that respect. Where a person mortgaged his occupancy holding to another and subsequently sued to eject him, Held that until he paid back the mortgage money he could not eject the defendant as an ordinary tenant. (*Fremantle, S. M. and Burn, J. M.*) SASTI DIN v. BANSIDHAR.

L. R. 4 A. 67 (Rev.)

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—S. 23—Insurance Policy—Clause cutting down—Limitation period for bringing suit for rejection of claim—If enforceable. *See* INSURANCE, 27 C W. N. 955.

—S. 23—Judgment-debtor—Transfer of decree—Object to defraud—If can be enforced

Where a judgment debtor got a decree against him assigned to a relation for a small amount with a view to induce other creditors to come to terms, and the understanding was that the transferee was not to sue on the assignment, the agreement is against public policy and no court should assist the transferee. The doctrine of *in pari delicto* will apply. (*Spencer and Venkata Subba Rao, JJ.*) *KALAGARA SRIRAMA RAO v. BAPAYYA.* 18 L. W. 453.

—S. 23—Legal contract—Plea of illegality—Duty of court to take notice.

If the illegality of a transaction is brought to the notice of the Court and the person invoking the aid of the Court is himself implicated in the illegality, the Court will not assist him.

Contracts which are expressly prohibited by Statute, contracts that are illegal at Common Law as involving the commission of a crime or tort, and contracts which are unlawful as being contrary to the public policy are distinguishable from contracts which are not actually unlawful but merely void, either by statute, such as gaming or wagering contracts or on grounds of public policy such as contracts in general restraint of trade (*Ross, J.*) *JHINGUR OJHA v. MEGHNATH PANDY.* 72 I. C. 653

—S. 23—Public policy—Money lending by Pleader.

Where a pleader took a mortgage in his wife's name as consideration for promissory notes held there is a wide distinction between a contract which it may be improper for a pleader to enter into without the sanction of J. C's Court and a contract the operation of which is so injurious to the public welfare that even as between the parties who have voluntarily entered into it, the Courts will refuse to enforce it. The question in such cases is really one of professional etiquette rather than of public policy and the contract cannot be regarded as invalid. (*Kanhaya Lal, J.C.*) *RAM SINGH v. MT. RAGHUBANSA.* 26 O. C. 201 : 9 O. and A. L. R. 29 : 72 I. C. 877 : 1923 Oudh 3.

—S. 23—Religious Office—Offerings—Agreement for division—Public policy.

An agreement between the panda and pariwal of a temple to share the offerings made by pilgrims is not contrary to public policy. (*Kanhaya Lal and Sulaiman, JJ.*) *KALLU TEWARI v. RAJINDER PRASAD.* 45 A. 79 : 70 I. C. 124 : 1923 A. 56.

—S. 23—Stifling prosecution—Non-Compoundable case—Consideration, if can be recovered.

Where in a case of theft, the complainant dropped the proceedings on account of an agreement to pay a sum of money, he cannot sue to recover the same, as the agreement is opposed to public policy. (*Campbell, J.*) *NAZAR v. MT. PARAS.* 73 I. C. 668 : 1923 Lah. 689 (2).

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—S. 23—Stifling prosecution—Non-compoundable case—consideration if valid.

Where the consideration for a promissory note was the stifling of a non-compoundable case, the agreement is void, though even apart from the stifling there was a debt due. (*Dalal, J.C.*) *BHOLE NATH v. RASSOL BAKSH.* 9 O. and A. L. R. 631.

—S. 23—Withdrawal of non-compoundable case—Consideration—Validity.

Where the consideration for a bond is the withdrawal of a non-compoundable case, the bond is unenforceable under S. 23, Contract Act. (*Miller C. J. and Kulwant Sahay, JJ.*) *BION v. SHEOGULAM LAL.* 74 I. C. 843.

—S. 24—Covenant opposed to law—Legality.

A covenant in a bond that on failure to pay the sum due by a certain date the creditor could enter into possession of a cultivatory holding as usufructuary mortgage is opposed to the Agra Tenancy Act and is hence illegal (*Walsh and Kanhaya Lal, JJ.*) *JARBANDHAN v. BADRI.* 45 A. 621 : 21 A. L. J. 480 : L. R. 4 A. 581 : 1924 A. 80.

—S. 25—Adequacy of consideration

Adequacy of consideration is not under explanation 2 to S. 25 Contract Act a matter to be taken into consideration in deciding whether an agreement is valid. (*Lindsay and Sulaiman, JJ.*) *BINDESHRI PRASAD v. SARJU SINGH.* 45 A. 590 : 321 A. L. J. 446 : L. R. 4 A. 241 : 73 I. C. 453.

—S. 25—Valid contract—Writing—Signed by agent—Pleader if authorised to admit liability.

In order that a valid contract may be constituted under S 25 (3) of the Contract Act it is necessary that the statement should be in writing and should be signed by the person charged therewith or by the agent generally or specially authorized. Where there was no proof at all that a pleader who made the statement relied upon as a contract had any general or special authority from the defendant which would entitle him to enter into a contract on their behalf to pay a time barred debt, and the pleader's authority was confined to the conduct of the case his statement that if during the pendency of the suit the plaintiff obtained a succession certificate, the defendants were ready to submit to a decree for the amount claimed together with interest for six months did not constitute unqualified admission of liability within the meaning of S 25 of the Contract Act. Nor could the court treat the statement as showing in any way that the pleader who made it had authority to bind the defendant by a fresh contract under section 25 of the Contract Act (*Lindsay and Sulaiman, JJ.*) *BANSIDHAR v. BABU LAL.* 21 A. L. J. 713 : L. R. 4 A. 473 : 75 I. C. 309 (2) : 1924 A. 12.

—S. 25 (3)—Scope of—If includes judgment debt.

S. 25 (3) Contract Act covers the case of a judgment debt, (*Newbould and Rankin, JJ.*) *IBRAHIM MULICK v. LALIT MOHAN ROY.* 50 Cal. 974.

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—S. 25 (3)—*Written promise to pay a barred debt under—Suit on.*

A suit on a written promise to pay a barred debt under S. 25 (3) of the Contract Act lies as it is a contract. 23 Mad. 94 foll. (*Abdul Raouf and Campbell JJ.*) DAVID SUTHERLAND CLARK v. ROSE GRIMSHAW. 73 I. C. 652 : 1923 Lah. 481.

—S. 27—Contract in restraint of trade—Partial restraint—Illegality—Damages. See (1922) Dig. Col. 373. MAHOMED v. ONA MAHOMED EBRAHIM. 70 I. C. 881.

—S. 28—Insurance policy—Clause cutting down period of limitation for suit—Rejection of claim—Terms if enforceable See INSURANCE 27 C. W. N. 955.

—S. 30—Collateral Contracts—If enforceable.

Even in the case of wagering contracts, S. 30 of the Contract Act does not prevent a person who is employed as agent in connection with them, from recovering sums due to him by his principal. (*Lindsav and Daniels, JJ.*) BIDHI CHAND v. KACHHU MAL. 45 A. 508 : 73 I. C. 477 : 1923 A. 585.

—S. 30—Contract to pay differences wagering.

Where the parties never intended to deliver the goods but only meant to pay differences and that was the understanding between the parties

Held ; that the contracts between the parties were wagering. (*Kotwal, A. J. C.*) HARNARAYAN JODH RAJ v. RADHAKISAN CHANDRABHAN. 1923 Nag. 324.

—S. 30—Sale of goods—No delivery contemplated—Wagering.

A transaction which is a sale of goods does not become a wagering agreement merely because both parties do not contemplate that delivery is likely to be demanded To constitute a gaming or wagering transaction there must be a definite agreement that delivery cannot in any event be demanded without a breach of the understanding between the parties (*Caults Trotter, J.*) SUKDEVADOSS RAMPRASAD v. GOBINDOSS CHATURBUDDH. 45 M. L. J. 716 : 18 L. W. 911 : 33 M. L. T. (H. C.) 223

—S. 30—Scope of—Collateral transaction—Co. partner—Right of reimbursement.

S. 30 of the Contract Act does not affect agreements or transactions collateral to wagers. Where two partners enter into a contract, even assuming it to be one of a wagering nature, and one of them satisfies the whole liability under the contract, he has a right of reimbursement against the other. (*Prideaux A. J. C.*) MOHAMMAD GULAM MUSTAFFA v. PADAMSI. 69 I. C. 186 : 1923 Nag. 48

—S. 30—Wagering contract—Essentials of—Sale of a crop. See. (1922) Dig. Col. 374 VITHOBA v. SITARAM 19 N. L. R. 21 : 1923 Nag. 291.

—S. 30—Wagering contract—Intention of parties—Question of fact.

The question whether the contracts between the parties are of a wagering nature is really a

## CONTRACT ACT, S. 38.

question of fact, that is to say, the part disputing that he was liable under the contracts would have to show that at the time the contracts were entered into, the parties did not intend to carry out the contracts but agreed to abide by the prices at the due dates, when differences would be received. (*MacLeod, C. J. and Crump, J.*) GANGA DAS v. JEKISONDAS. 25 Bom. L. R. 520 : 73 I. C. 1032 : 1923 Bom. 458.

—S. 30—Wagering contract—Speculative contract—Distinction between

A contract may be unenforceable, if it only amounts to a wager on the rise or fall of the market, and is not accompanied by an intention to sell or to purchase goods, at a given time and place at a certain rate To some extent, speculation forms an element in many transactions relating to the sale and delivery of goods at a certain rate, and because the market-rate for those goods may be liable to fluctuation ; but the existence of such an element does not make the contract void, because it may yet be accompanied by a real desire on the part of the vendor to sell and the buyer to purchase the goods agreed to be sold, at the contracted rate Where such an intention exists, the contract is not a wagering contract and can be enforced. (*Kanhaiya Lal, J. C.*) NARAYAN DAS v. MAHESHI LAL 73 I. C. 309 : 90. & A. L. R. 538 : 90. & A. L. R. 567.

—S. 30—Wagering contracts—Tejimundi Contracts when void as a wager. See (1922) Dig. Col. 375. MANILAL DHARAMSI v. AYYIBHAI CHAGLA. 47 Bom. 263.

—S. 30—Wagering contracts—Test of see (1922) Dig. Col. 376. FIRM OF KIRPALDAS v. FIRM OF GAJANMAL 70 I. C. 864

—S. 30—Wagering contract—What amounts to See (1922) Dig. Col. 1083. FIRM SANEHIRAM BAHNATH v. SURAJMAL MARWARI. 69 I. C. 769.

—S. 30—Wager—Speculative Contract—Contract to supply goods at a future date.

A contract for the supply of goods at a future date at fixed prices, though speculative, is not a wager and a suit for damages for its breach would be maintainable. 42 B. 373 Ref. (*Rives and Daniels JJ.*) FIRM OF HAZARI LAL v. FIRM OF KESHO DAS. L. R. 4 A. 119 : 21 A. L. J. 153 : 1923 A. 273.

—S. 38—Applicability—Joint Principals—Liability of agent to amount.

The liability of an agent to account to two principals who jointly appointed him is not a liability that arises by virtue of a contract between the parties but is a liability that is annexed by law to the office of the agent. S. 38 of the Contract Act does not apply to such a case. (*Nas and Kulwantahay, JJ.*) JAGDIP PRASAD SAHI v. MR. RAJU KUER. 2 Pat 585 : 4 Pat L. T. 531 : 1923 Pat. 177 : 1923 P. 464.

—S. 38—Applies to mortgages.

A tender to be valid must be a tender of the whole amount due and not of a part only and there is nothing to prevent this general law as to

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tenders applying to payments decreed in respect of a mortgage. (*Ashworth, J. C. and Simpson, A. J. C.*) NAWAB MIRZA FAGHUR MIRZA v. KAUSHAL CHAND, 28 O. C. 59 : 74 I. C. 246 1923 Oudh 241.

## —S. 38—Scope of—Payment to one mortgagee—Effect.

S. 38 of the Contract Act applies to an offer which has been accepted as well as to an offer which has been refused, whether S. 38 applies to payment to one of several joint mortgagees or not, the rule of equity applicable in India is that in the absence of fraud or an intention to defeat the rights of other mortgagees, payment to a single mortgagee discharges the mortgagor. (*Pipon J. C.*) GULMIRAN v. ABDUL RAHIM KHAN, 73 I. C. 682.

## —S. 39—Refusal to perform—Right to cancel.

To enable a party to a contract to be relieved from its future performance by the conduct of the other, the conduct must amount to a renunciation or absolute refusal to perform the contract, such as would amount to a revision if he had the power to rescind.

Where a party to a contract complains about the delay in carrying out the contract and protests against the other party's right to put an end to it, it cannot amount to a refusal to perform, (*Sanderson, C. J. and Richardson, J.*) BURN AND CO., LTD. v. THAKUR SAHEB SREE LUKHDIRJEE, 28 C. W. N. 104.

## —S. 43—Applicability—Debt due from firm—One of the parties or contributory—Liability to pay. See COMPANIES ACT, S 186.

4 Lah. 239.

## —S. 43, 44—Co-mortgagors—Release of one—Effect.

A release of one of two mortgagors does not release the other. (*Mookerjee and Rankin, JJ.*) CHAND MALL BABU v. BAN BEHARI BOSE, 50 Cal. 718 : 74 I. C. 1021.

## —S. 43—Handnote—Suit against one of two joint promisors

A suit on a hand note executed by several persons is not bad merely because one only of the joint promisors has been sued. In such a case each of those liable under the hand note is liable to the full extent of the loan unless there are some special terms in the contract which in some way limit or restrict their liability, and under the provisions of S. 43 of the Contract Act it is quite within the competency of the lender to sue all or any, as he may choose, of these who have incurred the liability. (*Miller, C. J. and Foster, J.*) BISHUNATH SAHAY v. NANKU PRASAD, 2 Pat. 466.

## —S. 43—Joint vendees—Major and minor—Enforceability.

A contract of sale entered into by a major and minor vendee, in which, shares were fixed but not the portion of purchase money to be paid by each, is a joint transaction and is enforceable against the major vendee. (*Harrison and Zafar Ali, JJ.*) SAIN DAS v. RAM CHAND, 4 Lah. 334.

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## —S. 43—Joint and several liability under decree—Apportionment in execution—Remedy.

Where a decree creates a joint and several liability, the judgment debtors cannot in execution claim an apportionment. It executed for the whole against any one, his remedy is to sue for contribution. (*Mullick and Bucknill, JJ.*) SIA SHACHARI PEARI v. RAM KISHORI KUR, 2 Pat. 796 : 74 I. C. 867

## —S. 43—Joint tenants Liability for rent.

Where one of several joint tenants is liable for the whole rent on the death of one of such joint tenants leaving several heirs no question can arise as to whether the liability is joint or several—All the parceners constitute in law one heir. (*CC Ghose and Panton J. J.*) ABINASH CHANDRA ROY v. FULCHAND CHAUDHURI, 74 I. C. 1032 : 50 Cal. 737.

## —S. 43—Rent and cesses—Lessees—Liability of heirs of original lessee

A suit for rent and cesses was instituted against the heirs of the original lessees without serving some of them by proper notices. Held that so far as the original lessees were concerned, their liability for rent was, in the absence of a contract to the contrary, joint and several and any one of them could be sued for the entire rent. 11 C. W. N. 1026 : 12 C. L. J. 591, 22 C. W. N. 289; 5 Pat L. J. 32 Rel. A suit for cesses is maintainable against all the heirs of one of the original lessees although the heirs of the other original lessees are not properly made parties. (*Chatterjee and Cuming, JJ.*) MAHENDRA NATH BOSE v. ABINASH CHANDRA BOSE, 27 C. W. N. 521 : 1923 Cal. 615.

## —S. 43 (3)—One judgment debtor paying full decree amount—Right to contribution—Basis of.

Where one of several judgment debtors satisfies the whole decree, he has a right to contribution founded not on contract but on a general principle of equity. The community of burden and benefit is the real ground of the right to contribution. (*Phillips and Venkatasubba Rao, JJ.*) ABOY NAIDU v. RAMCHANDRA NAIDU, 1923 M. W. N. 925.

## —S. 44—Discharge by one of two payees Effect.

Quære if a discharge by one of two joint payees is valid and binding on the other? 36 Mad. 544 doubted. (*Chandrasekhara Iyer C. J. and Plummer, J.*) SUBBA RAO v. SUBBA RAO, 1 Mys. L. J. 34.

## —S. 45—Partnership—Debt due to—Death of partner—Rights of surviving partners.

The rule of Law is firmly established that debts due to trading partnerships stand on a different footing from debts due under ordinary contracts and that when one of the partners in a firm dies the surviving partners can sue for the recovery of the debts due to the firm without making the legal representatives of the deceased partner parties to the suit. 9 A. 486; 17 C. L. J. 648; 20 A. 365, 32 A. 638; referred to 18 C. 86 dissented, (*Abdur Raof and Moti Sagar, JJ.*) MOOLCHAND v. SOHBA RAM, 4 Lah 142 : 71 I. C. 951 : 1923 Lah. 197.

## CONTRACT ACT, S 51

—S 51—*Vendor not bound to tender if vendee unwilling.*

Vendor is not bound to tender the purchase price unless the purchaser is ready and willing to perform his part of the promise. In a suit for specific performance the strict law as to tender is not applicable (*Kennedy, C. J. and Raymond, A. J. C.*) *BEGRAJ v ALISHER*, 1923 Sind 50.

—S 54—*Sale of goods—Delivery of telegram—Condition of contract—Breach—Rescission.*

Where on a contract for the sale of goods the seller agrees to give the buyer a delivery telegram for the goods sold, the provision as to the delivery telegram is a condition of the contract and if for any reason, it is broken the buyer is entitled to rescind the contract and sue the seller in damages. A covenant as to delivery is as much an essential part of a contract for the sale of goods as a covenant for payment of price or any other condition in the contract. (1919) 1 K. B. 198, (1920) 2 K. B. 1 (9). (*Schwabe, C. J. and Krishnan, J.*) *ADAM HAJI PEERA MOHOMED ISHAK v HUSSAIN AKBARI*. 70 I. C. 736 : 1923 Mad. 103.

—S. 55—*Option to repurchase land under contract of sale—Time if of the essence of the contract.*

Though in the case of a contract for sale of land, time may or may not be of the essence of the contract, in the case of an option for repurchase before a fixed date, time is of the essence and option must be exercised before that date. 42 Mad. 802 ; 30 M. L. J. 186 Ref. (*Maung Kin, J.*) *MAUNG POYIN v. MAUNG SHWE KIN*.

70 I. C. 126 : 1923 Rang. 24.

—S 55—*Time when of the essence—Waiver—Notice.*

In a contract to supply wagons, the price was to be made in 3 instalments, the last being on delivery. There was default in payment of the second instalment, still a number of wagons were completed and delivered. Held such delivery showed time was not of the essence of the contract. It is open to parties in such a case to give reasonable notice of the default and to make time the essence of the contract (*Sanderson, C. J. and Richardson, J.*) *BURN AND CO. LTD. v. THAKUR SAHEB SREE LUKHIRJEE*.

28 C. W. N. 104.

—S. 55, Cl. 2—*Contract for completion of building work within stipulated period—Default—Damages.*

Where under a building contract it was agreed that the work was to be completed within 4 months and a fine of Rs. 5—was to be paid for every day after that date that the work remained incomplete, held that time was not of the essence of the contract in the case. The very fact that a penalty was stipulated for in case of failure to complete the work within the stipulated time indicated that in case of such failure it was not the avoidance of the contract that was contemplated but acceptance of performance after the stipulated time subject to payment of damages which were fixed. (*Kotwal, A. J. C.*) *ROBERTS v. SHAIKH HYDER*.

6 N. L. J. 91 : 69 I. C. 894 : 1923 Nag. 140

## CONTRACT ACT, S. 62.

—Ss 56, 9 and 20—*Scope of—Frustration. See (1922) DIG. COL. 379 GOURI SHANKAR AGARWALLA v. MOITRA.* 70 I. C. 379.

—Ss 56, 35 (2)—*Surety for production of judgment debtor—Imprisonment—Effect.*

Where a person stands surety to produce a person in court on a particular day, but by that time the person had been convicted and lodged in jail, the promise becomes impossible to perform and the agreement becomes void. The agreement is not one falling under the second part of S 35 of the Contract Act. (*MacColl, J. C.*) *MAUNG KY WE v. MAUNG SAN TIN*, 70 I. C. 870 : 1923 Rang. 26.

—Ss. 59 and 61—*Decree debt—Payment of portion—How to be appropriated—Principal or interest. See (1922) DIG COL. 380 MALIK MOKHTAR AHMAD v. MT. BIBI RAHIMUNNISSA BEGAM*, 4 Pat. L. T. 58.

—S. 62—*Contract—Rescission—Stipulation empowering a party to rescind—Legality of.*

Parties to a contract may stipulate that one or both of them shall have the power to rescind the contract on the happening of some specified contingency. Such a stipulation is to be construed according to its natural meaning; subject to the principle of law that a party shall not take advantage of his own wrong. 1919 A. C. 1. Ref. The mere fact that the option to rescind the contract is not made defendant on the happening of any specified contingency, but an option to terminate the contract for any reasons whatsoever does not render the contract void for want of mutuality (*Mulla, J.*) *CHOTALAL LALLUBAI v. CHAMPSEY UMERSEY AND SONS*.

75 I. C. 233 : 1923 Bom. 75.

—S. 62—*Hundi—Renewal—Subsequent hundi not properly stamped—Right to sue on prior hundi.*

Where an insufficiently stamped hundi is given in renewal of a prior hundi and a suit on the basis of the subsequent hundi is not maintainable, the creditor can fall back upon the prior hundi, and S. 62 of the Contract Act is not a bar to his doing so.

The question as to the negotiability or non-negotiability of an instrument is quite distinct from the question of a party's discharge from liability to the holder, and that the liability of a bill of exchange is in no way affected by the document being negotiable or otherwise. Nor does the mere cancellation of a hundi can have the effect of discharging a party from liability unless it is made with the express intent on or discharging that party for it is made unintentionally or is made under a mistake it will be inoperative. This rule is laid down in a series of cases in England, and being a rule founded on equity, justice and good conscience, must be held equally applicable to India.

The grant of a negotiable security by a debtor to his creditor operates as a conditional payment only and not as a satisfaction of the debt.

Whether it is a note or a bill, it is a question of fact in either case whether the parties intended

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the same as absolute or conditional payment, and the presumption is that the effect of giving or taking a bill or note was that the debt was conditionally paid. (*Scott Smith and Meit Sagar, JJ.*) RAHMAT ALI MAHOMED FAIZI v. DIWA SINGH MAN SINGH. 4 Lah. 151: 5 Lah. L. J. 361.

## S. 62—Mortgage—Sale with a view to discharge mortgage—Nature of the transaction.

A suit was brought for foreclosure of a mortgage executed on 14th of August 1908. It was of the simplest possible character, being a claim for the amount still due on the mortgage after making allowance for a payment of Rs. 9,000 made on 17th October 1917. On that date the mortgagor sold a portion of the property and paid the Rs. 9,000 he received for the sale to the mortgagees towards satisfaction of the mortgage debt. The purchasers happened to be the mortgagees. The mortgagor originally agreed to sell the property for Rs. 9,000 on the 9th January 1913, and he agreed also that the purchaser might retain enough of the purchase-money to pay off the mortgage.

But the defendant mortgagor did not carry out his agreement till he was compelled to do so by a decree of a Civil Court in a suit instituted under the Specific Relief Act. The sale-deed was eventually executed by the Court for him on 17th October 1917, by which time the amount due on the mortgage was considerably in excess of Rs. 9,000. Held the effect of the sale was not to relieve the mortgagor of his liability to pay the mortgage debt. (*Halliday, A. J. C.*) NARAYAN v. VENKATA RAO. 72 I. C. 422: 1923 Nag. 213.

## S. 62—Novation—Essence of—

The essence of the novation of a contract lies not in the dissimilarity of the terms between the old and the new contract but in the intention of the parties to supersede the old by the new. (*Wazir Hasan A. J. C.*) BALDEO v. SHER BAHADUR SINGH. 9 O. & A. L. R. 761: 75 I. C. 42.

## S. 62—Settlement of damages is not novation.

Where the contract subsisted and had failed the cause of action would be the failure of the contract. The settlement that a certain amount of money was payable for the failure is not a new contract. (*Prideaux A. J. C.*) KAMAL NARAYANA v. BANIRAM. 75 I. C. 440: 1923 Nag. 352.

S. 63—Acceptance of performance—Cheque for smaller amount accepted and cashed—Effect of. See (1922) DIG. COL. 381 BASDEO RAM SARUP v. DILSUKH RAI. 44 A. 718.

## S. 63—Scope of—

S. 63 of the Contract Act does not entitle a promisee for his own purposes and without the consent of the promisor to extend time to his own advantage. There must be an agreement or mutual understanding to waive (*Abdul Raouf and Campbell, JJ.*) ASMAT ULLAH v. MESSRS BEHARI LAL AND SONS. 1923 Lah. 117.

Ss. 64 and 65—Scope of—Contract—Rescinding—Effect of—Further performance dispensed with. See (1922) DIG. COL. 382. MAHOMED MUMTAZ ALI KHAN v. ALTAF-UL RAHMAN.

10 O. L. J. 166: 69 I. C. 789.

## CONTRACT ACT, S. 65.

## S. 65—Agreement to transfer decree—Death of decreeholder—Recovery of earnest money.

A decree holder agreed to execute a transfer of his decree in favour of the plaintiff's predecessor in title to the proposed transferee, paid a sum of Rs. 2,000 out of the stipulated consideration to the decreeholder in advance. Subsequently the proposed transferee died and the original decreeholder realised the decretal amount by execution of the decree against the judgment debtor. The plaintiffs thereupon instituted a suit for recovery of the amount advanced with interest. It was found that the contract was a personal one. So that on the death of the proposed transferee it was incapable of fulfilment. Held that the pliffs. were entitled to recover the earnest money with interest. (*Das and Macpherson, JJ.*) MT. RAMDULARI KUER v. JANG BAHADUR SINGH. (1923) Pat. 247: 1923 P. 589.

## S. 65—Agreement discovered to be void—Suit for return of money—Limitation when commences.

Normally as law presumes every one to know the law an agreement which is void *ab initio* can be said to have been discovered to be void from the very moment the agreement is entered into. When however, an alienation of joint family properties is made, possession taken and properties enjoyed for a long time and then in a suit challenging the alienation the transaction is held not binding, the above principle cannot apply, and in a suit for a return of the consideration, limitation under Art. 116 runs only from the date when the transaction was held to be void. (*Wazir Hasan, A. J. C.*) RAM NATH v. DAMODER PRASAD. 9 O. & A. L. R. 1066.

## S. 65—Void contract—Sale of expectancy by Hindu Reversioner—Failure of vendee to get possession—Suit for recovery of money Limitation.

A Hindu reversioner to an estate in Oudh sued for a declaration that a will alleged to have been made by the last male owner directing his widows to adopt was invalid and void and obtained a decree to that effect. He was also declared entitled to succeed to the estate on the death of the last surviving widow. Subsequently the reversioner transferred his right to half the estate in favour of the plaintiff's predecessor in title, for a consideration of Rs. 25,100—agreeing to put the vendee in proprietary possession of the estate after the death of the last surviving widow. In a suit by the plaintiff after the death of the widow for recovery of the estate or for the purchase money held that there was no valid transfer of the estate in favour of the plaintiff's predecessor in title inasmuch as the vendor had at the date of the conveyance a mere *spes successionis* which he could not validly transfer under S. 6 of the Transfer of Property Act; that the suit for possession must therefore fail; that the plaintiff however was entitled to recover the consideration paid for the sale with interest thereon from the date of suit; and that the case was governed by S. 65 of the Contract Act, the cause of action having arisen after the death of the last surviving widow when alone the vendee discovered that the transfer was



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void and unenforceable (*Sir Lawrence Jenkins.*)  
*HARNATH KUAR v. INDAR BAHADUR SINGH,*  
 44 M. L. J. 489 : 9 O. L. J. 659.  
 45 A. 179 : 50 I. A. 69 (P. C.)

## —S. 67—Repudiation—Tender.

Where the defendants had practically repudiated the terms of the contract, it is not necessary that any actual tender of money should have been made to them and it is sufficient for the plaintiffs to show their readiness to pay the money. (*Shauji Lal, C. J. and Abdul Qadir, J.*) *FIRM RAM DYAL SHEO PERSHAD v. FIRM GHAMANDI LAL NARAIN DAS.* 1923 Lah. 56

## —Ss. 69 and 70—Payment made in good faith to preserve the property—Right of recovery.

When a person *bona fide*, believing himself to have a claim to a property, pays off the charges on the property, he is entitled to recover the amount. 7 C. 575 : 26 C. 826 F. 11.

Though a person's title in the property is subsequently found to be non-existent, he is still entitled to recover the money, which he has paid for the preservation of the property, from the persons who are the actual owners, under section 69 and 70 of the Contract Act. 31 B. 439 (Ref.) (*Banker, J. C.*) *THAKURSA v. BEHARI.*

1923 Nag 301.

## —S. 69—Person interested in payment—Usufructuary mortgagee in possession—Sale of property in execution—Deposit under O. 21, R. 89, C. P. Code—Right to recover.

In execution of a money decree against the debt, by a third person, property usufructually mortgaged to Plff. was sold. Plff. deposited the required amount to set aside the sale under O. 21, R. 89 and sued debt, for the same. Held that in the circumstances plff was not a mere volunteer but a person interested and therefore was entitled to be reimbursed (*Banerji, J.*) *BENI MADHO v. SANWAR DAT.* 1923 A. 127

## —Ss. 69 and 70—Right to reimbursement—Mortgagee purchaser—Rent decree prior to purchase.

The purchaser of a tenure buys it with incumbrances of rent due from the original tenant, which forms a first charge. Thus a mortgagee purchaser of the term, if he has to pay such arrears of rent accrued due before his purchase in order to save it from sale, cannot have a right of suing his mortgagor for reimbursement. (*Jwala Prasad and Ross JJ.*) *RANGLAL SAHU v. BABU KALI SHANKER* 1923 Pat. 353 : 2 Pat. 890.

## —S. 69—Scope of—Liability to pay—By whom enforceable. See (1924) Dig. COL. 384.

*UMED SINGH v. BIHARI LAL.* 70 I. C. 310.

## —Ss. 69 and 70—Scope of—Vendee aware of defect in title—Discharge of incumbrances—Right to amounts paid when title fails—Relief.

*Per Spencer, J.*—The vendee of properties who had received specific notice that the sale deed standing in the name of his vendor was only nominal, unenforceable and had not been given effect to, is not a *bona fide* purchaser without notice. But where after taking the sale deed, he pays off incumbrances and tries to preserve the

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property from the clutches of creditors, his payments are *bona fide* and he is a person "interested" within the meaning of S. 69 of the contract act—Though it is well established that Ss. 69 and 70 of the Contract Act were not designed for the benefit of persons who are mere volunteers a person who pays off incumbrances on the property purchased after his title is decreed in one court and before his title is declared bad by the court of appeal is entitled to claim the same in spite of the notice he had. In such a case, the ordinary relief he is entitled to is a personal decree and not a charge on the property.

*Per Devadoss, J.*—In order to claim payments made to discharge incumbrances on property, plaintiff must show he was a volunteer and did not make the payments officiously. The onus is heavily on him to show he paid the amounts *bonafide*. The equitable doctrine of subrogation cannot have any application to volunteers or persons whose conduct is officious. The distinction should always be kept in view of sales which are void, voidable and merely sham. The fact that the incumbrances were discharged after the vendee's title was declared to be good in the court of first instance but before the same was upset in appeal, will not make any difference as courts do not confer rights to property where the person had admittedly none. (*Spencer and Devdoss, JJ.*) *GOPALA IYENGAR v. MUMMACHI REDDIAR.* 17 L. W. 254 : 74 I. C. 416 : 1923 Mad. 392.

## —S. 70—Assets of a deceased person—Purchaser from an unauthorised person satisfying decree—Whether entitled to recover the decretal debt from the assets.

B. died leaving a widow R. and a son M. R. survived M., one S. the heir of B. after M's death sold the property to pliffs. One A. got a decree against S. and widow R. and attached the property in question. The deits. purchased the property from R and paid off the decretal amount. The pliffs. brought a suit to recover the property from the deits. without being required to pay the decretal amount. Held that as the deits. had purchased the property from a person who had no title to sell it, they cannot expect to be recouped for the amount which they paid to clear off the decree; because of their purchase they did not acquire any interest (*Gokul Prasad, J.*) *GAYA PRASAD v. METHAI LAL.* 1923. A. 404 (2)

## —S. 70—Payment for the benefit of plff. as well as defendant—Option to decline benefit—Suit for recovery of money—Limitation.

Under S. 70 of the Contract Act the party sought to be made liable must have not only benefited but must have had the opportunity of accepting or rejecting the benefit. 6 M. L. T. 375 Ref.

*Per Devadoss, J.*—Where a person does an act which is greatly beneficial to himself and which is sure to benefit another the former cannot claim contribution from the latter. In other words, where a person is bound to do an act, whether another consents to it or not, the former cannot claim contribution even though the latter derives benefit in consequence of the act. In short where the benefit to himself is great, a person cannot be said to do the thing for another within

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the meaning of S. 70 of the Contract Act 45 I. C. 786; 33 M L 15; 21 C 496; 16 M L T 875 Ref. The period of limitation for a suit under S. 70 of the Contract Act is that prescribed by Art. 120 of the Lim Act (*Odgers and Davados, JJ*) T M SUNADRA AIYAR v T M. ANANTHAPURMANABA IYER 70 I. C. 405: 1923 Mad. 64.

## —S. 72—Set off.

To append a consideration of the relation of parties *inter se* apart from actual circumstances which enforced the payment for the refund of which the suit was brought under Contract Act, S. 72 is simply to allow counter claim under another name, and a counter claim in the Punjab is not admissible (*Lord Dunedin*) KANHAYA LAL v. NATIONAL BANK OF INDIA

45 M L J 497: 4 Lsh. 284: 33 M L T 349 (P. C.): 25 Bom L R 1248: 75 I. C. 7: 50 I. A. 162: 1923 P. C. 114

—S. 72—Sale of goods—Delivery of excess quantity by mistake—Subsequent sale to third persons—Right to equitable restitution

Where plff sold 70 bales of grey mulls, each bale to contain 100 pieces, to deft and deft in his turn *bona fide* sold the bales as containing each 100 pieces to several persons, and it was eventually ascertained that plff had delivered an excess number of pieces Held, that deft was not liable to return or pay the price of the excess number of pieces The doctrine of equitable restitution has no application where the deft, labouring under the same mistake as the plff has *bona fide* parted with the goods to others (*Coutts Trotter and Ramesam, JJ*) K. M. P. R. FIRM MERCHANTS v. THE OFFICIAL ASSIGNEE OF MADRAS 1923 M. 17.

—S. 73—Awarding damages—Specific performance not granted for special reasons.

Where a party is entitled in law to specific performance, but the court for special reasons does not grant it, he is entitled to damages in lieu of the same. (*Moti Sagar, J*) GENDA RAM v RAM CHANDER. 73 I. C. 1013.

—Ss. 73, 54—Contract for the sale of goods—Term, whether essential justifying rescission or merely collateral—Damages for breach—When to be awarded.

In construing mercantile contracts it must be assumed that any clause in it was inserted by the parties to some good purpose and with some definite meaning as merchants are not in the habit of inserting in their contracts stipulations to which they do not attach some value and importance. In order that the latter part of S. 73 of the Contract Act may apply it has to be proved that not only the plaintiff but the defendant also knew when the contract was made that such loss was likely to result from the breach. *Remfrey on Sale of Goods*. (*Schwabe C J and Krishnan, J*) ADAM HAJI PEERA MOHAMED ISHACK v SAKAVATH HUSSAIN AKBARI. 70 I. C. 736: 1923 Mad. 103

—S. 73—Damages—Measure of.

In an action for damages for breach of contract to supply articles, the measure of damages is the difference between the contract price and the

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market price (*Lord Atkinson*) KESHAVALAL v. DIWAN CHAND

45 M. L. J. 630: 47 Bom. 563: (1923) M. W. N. 583: 27 C. W. N. 974: 33 M. L. T. 342 (P. C.): 1 Pat. L. R. 434: 74 I. C. 396: 50 I. A. 142: 25 Bom. L. R. 854: (1923) P. C. 105.

—S. 73—Damages—Measure of.

The measure of damages in a case of breach of contract to deliver, is the sum by which the contract price fell short of the price at which the purchaser might have obtained goods of like quality at the time when they should have been delivered (*Abdul Raof and Campbell, JJ*) ASMAT ULLAH v MESSRS BEHARI LAL & SONS. 1923 Lah. 117.

—S. 73—Damages—Measure of—Contract to convey immovable property—Breach.

When a person who has entered into a contract to convey a house is unable to fulfil it by reason of his having no title to the property, he is liable in damages, the measure of damages being the difference in the market price on the date agreed on for the completion of the sale and the contractual price. (*Banerji and Gokul Prasad, J*) PANNA LAL v HUSAIN BEG 21 A. L. J. 428: L. R. 4 A. 540: 75 I. C. 460.

—S. 73—Damages—Measure of—Infringement of right—Nominal damages.

Though every breach of duty arising out of contract gives rise to an action for damages without proof of actual damage the amount of damages recoverable is as a general rule, governed by the extent of the actual damages sustained in consequence of the defendant's act. In cases admitting proof of such damage the amount must be established with reasonable certainty. But this does not mean that absolute certainty is required: nor in all cases is there a necessity for direct evidence as to the amount. Damages are not uncertain for the reason that the loss sustained is incapable of proof with the certainty of mathematical demonstration or is to some extent contingent and incapable of precise measurement. Only such approximation to certainty is required as would satisfy the mind of a prudent and reasonable person. Cases on the subject reviewed. (*Mookerjee and Chatterjee, JJ*) KING-SLEY v. THE SECRETARY OF STATE FOR INDIA. 72 I. C. 270: 1923 Cal. 49.

—S. 73—Damages—Sale of goods—Breach—Late shipment—Late arrival.

Under a contract in writing dated 21-8-1919 defts. agreed to buy from plaintiffs 25 bales of yarn. The contract was in these terms: "This day we have purchased from you the under-mentioned goods in accordance with the bazaar rules cotton yarn of Jaran shipment for February, March 1918 is to be given whenever the same arrive earlier or later, and on the safe arrival of the same by steamer." On 25-9-1918 defts. wrote to plffs, that unless the goods were delivered in 8 days the contract was to be treated as cancelled. On 12-10-1918 the goods arrived in Bombay and the plffs required the defts to take delivery. On 15-10-1918 defts replied that the 8 days' period having already expired the contract was

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cancelled and that they were not bound to pay for the goods or take delivery of them. In an action for damages, *Held* that having regard to the express provisions of the contract with reference to late shipment, the September shipment was contract shipment which the defendants were bound to accept. The date of breach was 15-10-1918 when defendants improperly repudiated the contract. As the property in the goods had not passed to the defendants, plaintiffs were entitled to recover the difference between the contract price and the market price on the day of the breach. (*Mulla, J.*) *CHOTELAL LALLU BHAI v. CHAMPSFY UMERSEY & SONS* 75 I. C. 233 : 1923 Bom. 75

—S. 73—Damages—Sale of goods—Rescission—Right to return of advance—Further damages.

Where the plaintiff lawfully rescinds a contract he is entitled to the return of his advance and to such further damages as were within the contemplation of both the parties at the time when the contract was made. (*Schubert, C. J. and Krishnan, J.*) *ADAM HAJI PERA MAHOMED ISHAK v. HUSSAIN AKBARI.* 70 I. C. 736 : 1923 Mad 103

—S. 73—Damages—Sale of goods—Instalment delivery—Default—Breach—Damages—Right to sue for.

Where there is a contract by the plaintiffs to supply goods to the defendants from time to time as they required for their business, if the sellers clearly show their intention not to be bound by and to repudiate the contract, the buyers if they please may treat the notice of intention as inoperative and await the time when contract is to be executed and then hold the sellers responsible for all consequences of non performance; but in that case they keep the contract alive for the benefit of the sellers as well as their own the buyers remain subject to all their obligations and liabilities under the contract and enable the sellers not only to complete the contract if so advised notwithstanding their previous repudiation of it but also to take advantage of any supervening circumstances which would justify them in declining to complete it. On the other hand the buyers may, if they think proper, treat the repudiation of the sellers as a wrongful putting an end to the contract and may at once bring their action as on a breach of it and in such action they will be entitled to such damages as would have arisen from non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded them the means of mitigating their damage. *Frost v Knight* (1872) L. R. 7 Ex 111; 113; *Cost v Ambetgate etc Ry Co* (1851) 17 Q. B. 127; *Brailwhite v Foreign Hardwood Co.* (1905) 2 K. B. 543; *Melachrin v Nickoll and Knight* (1920) 1 K. B. 693 Ref. (*Mulla, J.*) *NAJAN AHMAD HAJI ALI v SALE MAHOMED PEER MAHOMED.* 1923 Bom. 113

—S. 73—Duty to minimise damages.

In a suit for damages for breach of contract the duty on the part of plaintiff to minimise damages arises only after a breach has occurred.

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(*Sanderson, C. J. and Richardson, J.*) *BURN AND CO. LTD. v. THAKUR SAHEB SREE LUKHDIRJEE* 28 C. W. N. 104.

—S. 74—Compromise decree—Power to relieve—Interest—Waiver.

The amount due under a compromise decree was to be paid up in instalments, and there was a stipulation that on failure to pay within the date fixed, the decree-holder was to get interest at 1 per cent per mensem from the date of default and he was at liberty to execute the decree. After the due date the judgment-debtor made payments to the decree-holder, who claimed appropriation first towards interest and then towards the decretal sum. *Held*, that the decree-holder was entitled to interest and the clause as to executing the decree was for the benefit of the decree-holder and the acceptance of part-payment did not amount to waiver of the right to interest. (*Jwala Prasad and Ross, JJ.*) *BARCLAY v. MT. DHANDEI.* (1923) Pat 194 : 71 I. C. 937 : 4 Pat. L. T. 112 : 1923 P. 322.

—S. 74—Contract—Breach of—Penalty—Damages ascertained by parties—Duty of Court

The idea is very common that what is called a "penalty clause" in a contract is a mere *brutum fulmen*, an agreement that neither party has any intention of enforcing at all to any extent. Such an agreement would certainly not be mentioned in the Contract Act, and in fact would not be agreement at all. A penalty clause merely fixes a maximum for damages which would be difficult to state in terms of money, and any how does not deprive the aggrieved party of his right to damages that can be so estimated. 12 N. L. R. 177 Ref (*Hallifax, A. J. C.*) *BALAJI v. SUKAMIYA* 1923 Nag 98

—S. 74—Enhanced rate from the date of default.

A mortgage-deed provided for the payment of interest at 8 annas per cent per mensem payable half-yearly and that if a default was made in making such payment the interest due was to be added to the principal and the whole sum was to bear interest thereon at 12 annas per cent. per annum; *held* that the contract is not penal. An agreement to pay interest at an enhanced rate for the breach of a contract may not be extravagant or unconscionable, if the original rate of interest was fixed low in order to enable the debtor to pay interest regularly at the stipulated time. A covenant to pay compound interest is by itself not penal. S. 74 Contract Act does not enact that the stipulation for the payment of enhanced interest from the date of default ought always to be considered penal. (*Kanhaiya Lal, J. C.*) *KANDHI v. HUSSAIN BIBI.* 26 O. C. 352. 1923 Oudh 158.

—S. 74—Forfeiture of deposit for breach of stipulation—Penalty

Neither S. 74 of the Contract Act, nor the principles of law laid down in decisions dealing with promises to pay specified sums in case of breach of contract, apply to cases of forfeiture of deposits for breach of stipulations. In such cases the rule is that where the instrument refers to a sum deposited as security for performance the

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forfeiture will not be interfered with, if reasonable in amount. (*Duckworth, J.*) SINGER SEWING MACHINE CO. v. MAUNG TIN.

11 L. B. R. 420 : 1 Bur. L. J. 158 : 70 I. C. 96 : 1923 Rang. 47.

—S. 74—*Grain bond—Damages—Undue influence.*

When a grain bond provided that on failure to repay at a certain date the debt would be liable to pay interest at 37½ p. c. per annum and the plaintiff waited for 6 years before enforcing the bond in which time the original claim for Rs. 400 had risen to Rs. 1,700. Held that in such cases the prayer is not for the performance of the contract but for the compensation for breach, and in such cases the courts are entitled and in fact it is their duty, to grant compensation, having regard to all the circumstances of the case. (*Le Rossignol and Harrison, JJ.*) TIKAYA RAM v. JIWAN. 1923 Lah. 452.

—S. 74—*Higher rate of interest by oral agreement not allowed.*

In order to avoid the consequences of S. 74 of the Contract Act all that a mortgagee need to do is to reserve the higher rate as payable under the mortgage and to provide for its reduction in case of punctual payments. (*Broadway and Harrison, JJ.*) FITZTHOLMS v. THE BANK OF UPPER INDIA, LTD. 4 Lah. 258 : 1923 Lah. 548.

—S. 74—*Interest on default of payment of principal—Penalty.*

Where a bond provides for payment of principal without interest by a certain time, but on default provides for 37½ p. c. interest from the date of bond it is a penalty and will not be enforced by Courts. (*Dalal, J. C.*) FAQIR CHAND v. BAI NATH. 9 O. & A. L. R. 873.

—S. 74—*Interest—Power to relieve against—Penalty.*

It is not open to the Court to interfere with the rate of interest stipulated between the parties unless the court is satisfied that the rate of interest charged is a penalty within S. 74 of the Contract Act. In other cases the court would be making a new contract between the parties. (*Greaves and Ghose, JJ.*) SATYABHAMA SUNDARI v. MAHOMED ESAHAKMEAH. 1923 Cal. 268.

—S. 74—*Interest—Rate of.* See (1922) DIG. COL. 391. NARAIN DAS v. ABINASH CHANDER.

44 M. L. J. 728 : 27 C. W. N. 299 : 21 A. L. J. 201 : 69 I. C. 273 : 37 C. L. J. 457. (P. C.).

—S. 74—*Penal clause—Compensation.*

Where a Court considers that a clause in a contract is penal, it has to give reasonable compensation for the breach not exceeding the amount of penal interest. But it cannot reduce the interest from the date of default below the rate originally fixed. (*Deniels, A. J. C.*) SHEO JIAWAN v. MT MITHANA. 1923 Oudh 162.

—S. 74—*Penalty—Compound interest from date of default at the same rate as simple interest.* See (1921) DIG. COL. 366. MALLI CHETTIAR v. VEERANNA TEVAN. 69 I. C. 812.

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—S. 74—*Penalty—compound interest—Relief against penalty.*

The Courts do not lean towards compound interest, they do not award it in the absence of stipulation but where there is a clear agreement for payment, it is in the absence of disentitling circumstances allowed.

Under a mortgage deed, it was agreed that if any of the monthly instalments of interest was not paid on its due date, such unpaid instalment of interest should be capitalised and added to the amount of the principal loan and would henceforth carry interest at the rate of twelve annas per month leviable as simple interest, and it was further provided that all such additions by way of capitalised interest should be chargeable upon the mortgaged property. Held, such a provision was not penal so as to bring the case under S. 74 of the Contract Act. (*Fawcett, J.*) NADERSHAW v. SHIRINBAI. 25 Bom. L. R. 839.

—S. 74—*Penalty—Fixation of price of paddy due under contract—No undue influence—Power of Court to reduce price.*

The plaintiffs advanced a sum of Rs. 500—and for this the defendant undertook to repay 172 maunds of paddy in the next year and the same amount in the following year. In default of delivering paddy the price was to be charged at Rs. 3—per maund. There was no suggestion that the defendant acted under any undue influence. It was found that the defendant had to pay under this agreement nearly double the amount advanced. Held that there was no ground for holding that the stipulation was a penalty and the Court had no power to reduce the price. It was in the interests of the party that a definite rate should be fixed for the paddy and it might have been to the advantage of the defendant if the paddy at the time of payment was selling at a higher rate to be able to pay cash instead of paddy itself. (*Newbould and Panton, JJ.*) ASHRAF ALI v. MAKBUL AHMED. 49 C. 1040 : 70 I. C. 931.

—S. 74—*Penalty—Mortgage—Enhanced interest.*

Where there is ample security as in the case of a mortgage an increase or the rate of interest from 24 per cent to 36 per cent from the date of default is a penalty. (*Robinson, C. J. and Macgregor, J.*) KO TAINE v. ISMAIL CASSIM MORAD. 69 I. C. 204 : 1923 Rang. 61.

—S. 74—*Penalty—Right of resale of goods—Power to sell on breach of conditions.* See (1922) DIG. COL. 393. NAZIRKHAN v. MIRZA MAHOMED ABID. 10 O. L. J. 38.

—S. 74—*Penalty—Stipulation for enhanced interest on default—When a penalty—Mortgage deed.*

Where the rate of interest stipulated for as payable in case of default is not unconscionable, though it is slightly in excess of the original rate, the Court may well award the enhanced rate as reasonable compensation. 20 I. C. 949 Rel. (*Kanhaya Lal, J. C.*) DULAM SINGH v. AJODHIA PRASAD. 9 O. & A. L. R. 366 : 72 I. C. 919 (2).

—S. 74—*Remissions.* (1922) DIG. COL. 1034. KESHEO RAO v. KRISHNA RAO. 70 I. C. 81.

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—S. 74—Scope of. See (1922) DIG. COL 193. *BUDH SINGH v. BALDEO SAHAI* 69 I. C. 681 (1).

—S. 74—Stipulation for enhanced interest on default—Penalty

A mortgage provided for payment of interest regularly at the rate of 21 per cent at the end of each month and on default the whole was to become due at once or to pay interest at 24 per cent. *Held* the question whether the provision for enhanced interest is a penalty must be decided on the facts of each case. Seeing that the interest is only 3 per cent, it was held it was not a penalty. (*Robinson. C. J., and May Oung, J.*) P. C. PAL v. K. A. L. R. FIRM. 1 Rang. 460.

—Ss. 76 and 121—Shares in a company—Contract for sale and delivery—Rights of transferee—Pledge.

Plaintiffs sold some shares to the 1st defendant who sold 25 of them to a third party and pledged 104 along with other similar shares to the second defendant. Defendant 2 put forward defendant 3 as a party who was willing to advance money. In fact defendant 3 was a mere nominee of 2nd defendant and defendant 2 got possession of 305 shares fraudulently. The fraud was that he deceived defendant 1 by false pretences that he would use these shares for the purpose of raising a loan for the benefit of defendant which he did not do and which he did not intend to do, his real object being to secure himself from loss as regards the moneys due to him from 1st defendant. The plaintiffs sued to recover the shares and damages from defendants 2 and 3. *Held* that the plaintiff's suit was unsustainable and the remedy of the plaintiffs was to sue the 1st defendant for the purchase money. The shares were moveables or "goods" within S. 76 of the Contract Act and the case therefore fell within S. 121 of the same Act. The plaintiffs had delivered all they had and they could not, therefore rescind the contract on the buyer's failing to pay the price unless it was stipulated by the contract that they should be so entitled. The plaintiffs as vendors agreed to sell and deliver transfers and certificates with the interests and rights which they conveyed. Such delivery passed not the property in the shares but a title legal and equitable which would enable the holder to vest himself with the shares. On delivery of the documents there was no interest left in the plaintiffs on which any equity can be founded. As between them and 1st defendant there was no fraud or misrepresentation which could vitiate the transaction, (*Macleod, C. J. and Crump, J.*) VADILAL v. MANEKJI. 25 Bom. L. R. 414 : 1923 Bom. 372.

—Ss. 78, 83, 107 and 118—Ascertained goods—Warrant.

Where goods were purchased on condition that they would be undamaged, and subject to inspection and approval, there is an implied warranty that they are such as fall under the denomination of undamaged goods. The goods cannot be said to be ascertained until the inspection and approval are over. (*Jwala Prasad and Ross, JJ.*) FIRM OF RAMDEYAL RAM NARAIN v. FIRM OF BHAIRO BUX GOURIDUTTA. 1 Pat. L. R. 398.

## CONTRACT ACT, S. 82.

—Ss. 78 and 114—Contract for purchase of motor car—Price agreed to be paid in instalments—Default—Breach of warranty—Damages.

Plff. entered into negotiations for the purchase of a motor car on the 5th of April and deposited Rs. 1,000 that day, signed the agreement to take delivery of the car on 27th April and paid the insurance money and Rs. 250 for the first instalment on 11th May. Under the terms of the contract the buyer was to pay the balance of the purchase money of Rs. 3,000 in monthly instalments of Rs. 250 from the month of May. After delivery of the car the seller had a right to enter upon the premises where the car was and inspect the car; the purchaser was not to dispose of the car before the full price was paid; the purchaser was to insure the car and assign the policy to the seller. In default of observance by the buyer of any of the conditions aforesaid the seller had the right to determine the contract and to seize and take possession of the car. The buyer did not make any payment after July and the seller determined the contract by notice in November. The buyer brought a suit for damages on the ground that the car was worthless and he had lost the earnings which he expected out of the car. *Held* that the intention of the parties as expressed in the conditions cited was that the property in the car should not pass until full price had been paid; that S. 78 of the Contract Act was subject to the intention of the parties, that the contract of sale, though of a second hand motor car, was subject to an implied warranty that the car was serviceable i. e., reasonably fit for the purpose for which it was brought; that there was a breach of such warranty for which the plff. was entitled to damages, notwithstanding deft's repudiation of it, (*Pratt, J.*) HURBUT JOHN AMIES v. JAL P. VIRJI. 25 Bom. L. R. 778 : 1924 Bom. 41.

—S. 78—Sale of specific goods—Position of buyer—Claim for price—Wholesale delivery.

Where specific goods are sold and agreed to be delivered wholesale to a certain person at a certain rate, it is for the buyer to get goods weighed and delivered to him. The weightment is only for the consideration of the buyer and the latter cannot by delay in weighing the goods prevent the transfer of the ownership to him. Where the contract was for the sale of the entire heap of bark stored in the godown amounting approximately to 446 maunds it was practically a sale of specific or ascertained goods and it was the duty of the purchaser to get the goods weighed and delivered on the due date. *Kanharya Lal, J. C.* ANNAN v. SHEIKH DUBAR. 26 O. C. 39 : 1923 Oudh 15.

—Ss. 82 and 83—When property in goods passes to buyer.

The combined effect of those sections is that where goods agreed to be sold are not ascertained at the time of making the agreement but goods answering the description in the agreement are subsequently appropriated by one party for the purposes of the agreement and that appropriation is assented to by the other, the sale is complete and the property in the goods passes to the buyer. In order that the property may pass to the buyer it is necessary that the goods appropriated to the contract by the seller must answer

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the description in the agreement. Mere appropriation by the seller does not pass the property in the goods to the buyer. The effect of appropriation is that the seller loses the possibility of withdrawing the goods from the contract and he would break his contract with the buyer if he offered any other goods to him, though the goods still remained his property. The appropriation must be assented to by the buyer to pass the property. (*Mulla, J.*) *N. BUCH AND CO v. GORDHANDAS MAVJI* 70 I. C. 877 : 1923 Bom 92.

—S. 83—*Passing of property to buyer.*

The defendants ordered twenty motor cars from the plaintiffs upon terms that the plaintiffs should send them by rail and that the defendants should pay for them to Messrs. King King & Co, at Delhi against the railway receipt. Messrs King King & Co. at Delhi were the plaintiff's agents to receive payment of the price from the defendants, and to deliver the railway receipt to them on payment. The railway receipt was made out by the plaintiffs in their name as consignees and endorsed by them in blank. The cars were consigned at owner's risk with the result that the railway could not be held liable for the loss thereof.

*Held* that the plaintiffs delivered the cars to the railway at owner's risk without the consent express or implied of the defendants, that the plaintiffs' intention was to retain the ownership of the goods until the defendants paid the price. That the plaintiffs having instructed their agents not to deliver the railway receipt till payment, the appropriation was not absolute and final, but conditional on payment by the defendants and that there was therefore no "appropriation" within S 83 of the Contract Act. That the property in the cars did not pass to the defendants on delivery to the railway company and that the defendants were not liable for the price.

S. 83 applies to a case where the seller is authorised to make the appropriation and the buyer has given a previous implied assent to the appropriation (*Mulla, J.*) *THE FORD AUTOMOBILES v. THE DELHI MOTOR AND ENGINEERING CO.* 70 I. C. 138 : 1923 Bom. 125.

—S. 91—*Consignment of goods—Property if passes—who can sue for loss.*

Where goods are consigned to a Railway company property passes to the consignee under S 91, Contract Act and he alone can thereafter sue the Railway Company for loss arising out of the contract of freight. (*Phillips, J.*) *M. AND S.M. RY. CO v. RANGASWAMY CHETTI.* 73 I. C. 537.

—S. 91—*Scope—English law.*

S. 91 does not provide for cases where the seller delivers the goods to a carrier and reserves the right of disposal. Therefore the Courts of British India resort to the rules of English common law so far as they are not inconsistent with the text of the Contract Act. One of those rules is that where in pursuance of the contract, the seller delivers the goods to a carrier, for the purpose of transmission to the buyer, but retains a *ius disponendi* until certain conditions are fulfilled, the property in the goods does not pass to the buyer until the conditions imposed by him

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are not fulfilled. This rule applies not only to delivery of goods to be carried by sea, but to delivery to carriers by land and to canal-boat companies (*Mulla, J.*) *THE FORD AUTOMOBILES v. THE DELHI MOTOR AND ENGINEERING CO.*

70 I. C. 138 : 1923 Bom. 125.

—Ss. 99, 107,—*Stoppage in transit—Nature of right—Assignment of document of title—Effect—Burden of proof.*

Per *Sanderson, C. J.* *Quare* whether the right of a seller of goods to stop the goods in transit is a mere equitable right.

Per *Richardson J.* It is too late in the day to argue that the right of stoppage is a merely equitable right.

Where the buyer of certain goods while they were in transit became an insolvent but had meanwhile assigned the document of title to a third party and the vendor exercises his right of stoppage in transit, it is for the assignee to show under S 102 that he acted in good faith and paid valuable consideration.

Origin and nature of the vendor's right of stoppage considered, (*Sanderson, C. J. and Richardson, J.*) *RASH BEHARI KARURI v. NARAIN DAS DORILAL.* 50 Cal. 399 : 27 C. W. N. 231 : 1923 Cal. 182.

—Ss. 102, 108 and 178—*Documents of title—Railway receipt—Assignment—Mode of—Rights of transferee and consignee—T. P. Act, S. 137.*

Railway receipts are not negotiable by law and are not rendered negotiable by S. 137 of the T. P. Act. Nor was there any thing to show that such receipts were negotiable by the mercantile custom of Rangoon. S. 137 of the T. P. Act merely provides that the methods of assignment in Ch. 8 of the Act shall not apply to the case of certain specified documents which are for the time being by law or custom negotiable. It merely deals with the manner in which the documents to which it relates can be transferred, but it does not affect the result of the transfer when made.

In order that such transfer should have in the case of railway receipts the effect of transferring the ownership of the goods, it must be established that they are not negotiable. (*Robinson, C. J. and Macgregor, J.*) *S. R. N. S. ARUNACHELLAM CHETTY v. Ko. Po YAN.* 1923 Rang. 1.

—S. 107—*Damages—Claim for difference of price at which plaintiff sold and that at which defendant bought.*

The plaintiff sold Masoor to the defendant who did not pay the price nor did he take delivery. The plaintiff therefore after giving him notice sold the grain. The price at which he sold was a lower price than that at which he had originally sold to the defendant and he claimed the difference as damages. *Held*, the case was clearly one under S. 107 and the plaintiff entitled to the damages. (*Coutts and Das, JJ.*) *BHAGWANDAS v. KESHWARLAL.* 1 Pat. 696 : 69 I. C. 681. (2); 4 Pat. L. T. 259 : 1 Pat. L. R. 186; 1923 P. 49.

—S. 107—*Sale of goods—Rights of vendor—Reasonable time for resale of goods.*

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Where a right of re-sale is given by the contract between the parties, it is not necessary that the property in the goods should pass to the purchaser to enable the seller to re-sell the goods and claim the difference between the price of the goods as originally contracted for and the price fetched at the re-sale.

If the goods have been resold by the vendor within a reasonable time after the breach of contract by the purchaser, the measure of the damages will be the difference between the price agreed to be given and the price realized on the re-sale, with the costs and expenses of the re-sale, but if the re-sale has been unreasonably delayed until the market has fallen, the price realized on such re-sale will not afford a true criterion of the damage.

If the seller elects to re-sell, he must do so within a reasonable time from the date on which the contract was finally repudiated by the buyer. Any other conclusion might cause undue hardship to the buyer, for it will then be open to the seller with the deliberate intention of causing loss to the buyer, to delay the re-sale until the market has fallen and then re-sell the property, and thereby cause to the buyer a loss which he might not have sustained had the re-sale taken place within a reasonable time from the date of the breach of contract. (*Abdul Raoof, J.*) FIRM OF ABDUL HAKIM MAHOMED SADIK v. JOHO JAUTZEN. 72 I. C. 772.

## S. 107—Time essence of contract-general rule.

The general rule is that time is the essence of mercantile contracts and particularly when a party agreed to make payment and take delivery as soon as the goods arrived. Provisions in the contract regarding payment of interest and liability for godown rent do not take the case out of the general rule. Where no evidence had been offered that the plaintiffs in fact took money to the Hindustan Mercantile Association when it was their duty to make an unconditional offer of cash to the defendants and wrote asking to be told where to make payment, several days after receipt of the defendants' warning.

Held, plaintiffs failed to make out any breach of contract by the defendants which would entitle them to damages. (*Martineau and Campbell, JJ.*) THE FIRM DURGA DAT JAGAN NATH OF DELHI v. THE FIRM RAM PARTAB SUKH DAYAL OF DELHI. 1923 Lah. 138.

## S. 108—Animals—Sale by person having qualified possession—Title to property when passes.

Where a hirer of certain buffaloes makes them over to another in settlement of a debt the latter does not get a title to the property, as the vendor had only a qualified possession and for a specific purpose. (*Duckworth, J.*) MAUNG NYAN v. KO MAUNG. 1923 Rang. 98 (1).

## Ss. 108 and 178—Gratuitous bailment of jewels—Bailee pledging goods and selling them—Bona fide purchaser without notice—Rights of

See (1922) Dig. Col. 367. See (1922) Dig. Col. 396 KATTA RAMASWAMI GUPTA v. KAMALAMMAL.

70 I. C. 448.

## CONTRACT ACT, S. 113.

## S. 113—Sale of goods—Merchantability—Test of—Damages to major portion of goods—Effect of.

The effect of S. 113 of the Contract Act is that when there is no express warranty in the sale of goods, there is an implied warranty of merchantability. The question whether goods are "merchantable" in law is a question of mixed fact and law. A bale of a thousand pieces of piece-goods of which nine-tenths are damaged, however slightly is radically unmerchantable and a seller cannot force such goods on an unwilling buyer. In such there is no room for the application of the principle of *de minimis*. 8 L. W. 192, (1910) 2 K. B. 937, (1910) 2 K. B. 831 Ref. (*Coutts Trotter and Ramesam, JJ.*) MESSRS. MALLI & CO. v. V. A. A. R. FIRM, 32 M. L. T. (H. C.) 158 : 69 I. C. 396: 1923 Mad. 252.

## S. 118—Acceptance

The question of acceptance does not arise when the property in the goods has passed to the buyer. The provisions of S. 118 do not apply where the property in goods has passed to the buyer, for where the property in goods passes by appropriation on the part of the seller and assent on the part of the buyer, since the appropriation can only be of goods of the contract description, the conditions of the contract are *ex-hypothesi* complied with. The case contemplated by S. 118 is one where there has been a contract with a condition and the condition is broken. In such a case the buyer may waive that right of rejection and accept the goods. The property in the goods then passes by the buyer's acceptance and if the buyer thereafter refuses to pay for and take delivery of the goods, the seller is entitled to sue the buyer for the price (*Mulla, J.*) N. BUCH & Co. v. GORDHANDAS MAVJI. 70 I. C. 877 : 1923 Bom. 92.

## S. 119—Sending more goods than was ordered—Right of rejection—Subsequent offer—Effect of.

A consignee of goods has got the right to reject the goods when more than what was ordered is sent. The fact that the consignor's agent subsequently offered to reduce the consignment cannot affect the legal position of the parties. (*Foster, J.*) JUGAL KESHWAR BHOLANATH v. KISHORI LAL BEHARI LAL. 74 I. C. 923.

## Ss. 128 to 135—Applicability of—Principal and surety—Liability of surety—Debt extinguished by merger—Effect. See C. P. CODE, S. 145.

44 M. L. J. 171.

## S. 128—Death of principal debtor—Liability of surety.

Under S. 128 of the Contract Act the death of the principal debtor does not discharge the surety from his obligation. (*Kotwal, A. J. C.*) LAXMAN v. GORAKHJI. 69 I. C. 557 (2).

## S. 133—Discharge of Surety—Variance in contract, what amounts to.

According to the terms of a compromise decree, the defendant was to put the decree debt in a certain number of instalments, and an attachment order obtained by the decree holder was to remain

## CONTRACT ACT, S. 134.

in force till the debt was paid. A certain person stood surety for the performance of the terms. The court subsequently without the knowledge or consent of the surety allowed the attached properties to be sold. *Held*, this did not discharge the surety as the court did only what the attachment order implied and hence there was no variation in the terms of the contract. (*Shad Lal, C. J. and Fforde, J.*) *FIRM OF DARSHAN RAM GANESH DAS v. FIRM KHAIR DIN ALLAH BAKSH.* 73 I. C. 353.

ON APPEAL FROM.

71 I. C. 783 (2).

—S. 134—*Discharge of surety—Change in relationship between debtor and creditor.*

Certain decree-holders attached the entire property of the judgment debtor and a person stood surety undertaking the liability to pay. Subsequently the judgment-debtors with the consent of the decree-holders obtained permission from Court to effect private mortgages or sales. *Held* that there was a change in the position of the debtor and the creditor by the release of the attachment and that the surety was discharged from his liability. (*Abdul Raouf, J.*) *DARSHAN RAM GANESH DAS v. KHAIR DIN ALLAH BAKSH.* 71 I. C. 783 (2).

—S. 134—*Sureties—Discharge of obligation—Two sureties for a pro-note—Discharge by one of the sureties—Execution of fresh pro-note by one of the sureties—Effect of.* See (1922) DIG. COL. 398. *KONDAPALLI LAKSHMINARASAYYA v. KONDAPALLI VENKATAKRISHNAYYA.* 70 I. C. 355.

—S. 142.—*Delivery of goods—What constitutes—Filling up forwarding note if sufficient.*

The mere fact that the loading clerk of a Railway filled up what is called the serial number in the forwarding note without doing any further would not amount to the delivery of goods to the railway by the consignor. (*Rafiq and Lindsay, J.J.*) *LACHMI NARAIN v. B. B. & C. I. RAILWAY COMPANY.* 45 A. 235; L. R. 4 A. 97; 21 A. L. J. 474; 74 I. C. 248; 1923 A. 449 (2).

—S. 151—*Bailee—Hotel keeper—Loss of goods belonging to guest—Liability for.* See (1922) DIG. COL. 398 *JAN AND SON v. A. CAMERON.* 44 A. 735.

—Ss. 151, 152 and 161—*Railway—Liability of, as carrier—Exemption—Risk-note Form B.*

Under Ss. 151 and 152 of the Contract Act read with S. 72 of the Railways Act, the liability of the Railway administration for the loss, destruction, or deterioration of goods delivered to the Administration to be carried on by railway is that of an ordinary bailee; that is to say, if the Railway Administration take as much care of the goods bailed to them as a man of ordinary prudence would under similar circumstances take of his own goods of the same bulk, quality and value as the goods bailed, they will not in the absence of special contract be responsible for the loss destruction or deterioration of the goods. The Railways Act of 1890 by repealing Ss. 7 and 10 of the Carriers Act and by also enacting in S. 72 Cl. (3) that nothing in the common law of England or in the Carriers Act of 1865 regarding the responsibility of common carriers with respect to

## CONTRACT ACT, S. 178.

the carriage of animals or goods shall affect the responsibility of a Railway Administration, leaves no room for doubt that the liability of the Railway Company must be measured and determined solely by the tests formulated in Ss. 151 and 152 of the Contract Act. The onus is therefore upon the bailee to show that he is exonerated from liability for loss to the bailor by means of a special risk note relieving him from such liability. (*Mullick and Bucknill, J.J.*) *THE GREAT INDIAN PENINSULAR RY., Co. v. JITAN RAM NIRMAL RAM.*

2 Pat. 442; 1923 Pat. 82; 4 Pat. L. T. 173; 72 I. C. 440; 1 Pat. L. E. 169; 1923 P. 285.

—S. 162—*Bailment—Deposit—Death of Depositary—Liability of heir—*(1922) DIG. COL. 399. *PROMOTHONATH MULLICK v. PRODYMANO KUMAR MULLICK.* 69 I. C. 900.

—S. 178—*Possession of agent for sale—Pledge—Validity of.*

Where a person is entrusted with certain machinery in order that he might dispose of it his possession is rightful and a *bona fide* pledgee of the property from him gets a good title thereto. (*Macgregor, J.*) *SINGER SEWING MACHING Co v. YEN KUN.* 1923 Rang. 68 (1).

—Ss 178 and 108—*"In possession" meaning of.*

It has been often held [that] possession required in S. 178 is similar to the possession required by S. 108 of the Contract Act in regard to sales that is to say, the possession must be juridical possession of the goods and not mere custody. Where P was given possession of the sewing machines by the owner in order that he might sell them for and on behalf of the owner and he pawned the machines with a pawn broker.

*Held*: his possession is not a mere custody for safe keeping, but for the definite purpose of sale. He would have such a possession of them as is contemplated by S. 178. The fact that he disposed of the goods contrary to the instructions of the owner makes no difference to the character of the possession which vested in him. If, therefore, the pawnee acted in good faith and had no ground for doubting the authority of P to pledge the goods he would be entitled to the protection granted by S. 178. (*Robinson, C. J. and May Oung, J.*) *EMPEROR v. NGO PO CHIT.* 1 Rang. 199; 2 Bur. L. J. 241; 74 I. C. 1050; 24 Cr. L. J. 858; 1923 Rang. 227.

—S. 178—*Possession may be lawful and yet appropriation may be dishonest—Proviso still applies.*

It is not necessary before the proviso to section 178 can be made applicable that the goods or documents should be obtained dishonestly in the first instance, and a subsequent misappropriation of them or any offence connected with them after they had been lawfully acquired prevents the possessor from making a valid pledge of them. To create a valid pledge the pledgor must be in juridical possession of the goods as distinguished from a bare custody. 12 Bom. L. R. 870 dist. (*Kennedy, J. C. and Raymond, A. J. C.*) *THE KARACHI BANK v. KODUMAL KALUMAL.*

1923 Sindh 54;



## CONTRACT ACT, S. 182

—Ss. 182 and 222—*Contract of agency—Limitation Act Art 83.*

Where evidence of witnesses showed that the contract was not simply for the purchase of grain by the plffs. for the defendant but a contract to purchase the goods, hold them for the debt and sell them upon his instructions at such times and in such lots as he might think fit. *Held* the transactions may be properly regarded as a contract of agency carrying with it the rights to indemnity conferred upon the agent by S. 222 of the Indian Contract Act. That being so art 83 of the Limitation Act was applicable to the case (*Scott Smith and Ffode, JJ*) *THE FIRM DEVI SAHAI RAMJI DAS v. TIRATH RAM*, 73 I. C. 143 : 1923 Lah. 473.

—S. 190—*Agent for sale—Appointment of sub-agent—Contract—Right to implement—Lien of agent—Retainer.*

Plaintiff contracted to supply mineral ore to defendant for sale on the London market at an agreed rate. Defendant who had no place of business in London appointed his London agents as sub-agents and they entered into forward contracts for the supply of ore. The plaintiff failed to carry out the terms of his contract and to supply ore whereupon the sub agents purchased ore from other sources and carried out their contracts with third persons, debiting the extra charges against plaintiff. The defendant retained moneys due to the plaintiff towards the expenses entailed by the latter's non fulfilment of the contract. *Held* that the defendant being a factor as well as an agent for sale, had authority under the circumstances to appoint a sub agent and that the defendant was entitled by way of general or particular lien to retain moneys belonging to the plaintiff in his hands. 39 M. 365; 42 Ch. D. 424 1911 A. C. 105; 1912 A. C. 673 foll. (*Pratt and Duckworth, JJ.*) *THE LAIBOAK SYNDICATE v. FINLAY FLEMING CO.* 1923 Rang. 84.

—S. 200—*Ratification—Melcharth by person without authority*

Where the only objection to the grant of a *melcharth* is that it was granted without proper authority it can be subsequently ratified by the person who has power to grant it. (*Oldfield and Ramesam, JJ.*) *KOZHICKOT PATHINHARE KOVILAGATH v. SANKARA MENON*.

73 I. C. 376.

—S. 215 and 19—*Principal and Agent—Dealing by agent in the business of the agency without the knowledge of the Principal—Contract voidable at the option of principal—English and Indian Law (1922) DIG. COL. 399.* *ACHUTA NAIDU v. OAKLEY BOWDAN & Co.* 69 I. C. 927.

—S. 230—*Contract to the contrary.*

An agent is not personally bound by a contract entered into by him on behalf of his principal in the absence of any contract to that effect. Such a contract, however, has to be presumed to exist where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad. (*Broadway and Zafar Ali, JJ.*) *THE FIRM DEOKI NANDAN v. RAM LAL QULAK*. 73 I. C. 885 : 1923 Lah. 296.

## CONTRACT ACT, S. 248

—S 235—*Purchase by agent—Liability—Repudiation by principal.*

The Court below found that the purchases in question had been made by the debt. on behalf of a Rani by representing himself as her agent, but as the Rani had repudiated her liability in a letter by her to the Court of Wards, which had assumed the superintendence of her estate in 1920, the plff (vendor) was entitled to recover the amount due from the debt. under S 235 of the Indian Contract Act (IX of 1872). *Held* that the decision was correct (*Kanhaya Lal, J. C.*) *RATAN SINGH v. HAFIZULLAH*.

90. & A. L. R. 820 : 72 I. C. 1011.

—S. 238—*Principal and agent—Liability of principal for fraud of agent—Misappropriation of goods.*

There is nothing in S. 238 of the Contract Act to show that in order to render the principal liable the fraud must be committed for the benefit of the principal. It is enough if the fraud is committed by the agent in the course of his business for his principal i. e. in matters falling within the scope of his authority. (*Chatterjee and Pearson, JJ*) *DINA BANDHU SAHA v. ABDUL LATIF MOLLA*. 50 Cal. 258 : 1923 Cal. 157.

—S. 239—*One partner having option to send another or take fresh partners—Nature of relation.*

A husband under an agreement took his wife in as a partner in his business fixed her share at X but he reserved liberty to take in fresh partners as he liked and to determine her share. On his death, she was to be at liberty to admit new partner. *Held*, the agreement evidenced a partnership within the meaning of S. 239 of the Act (*Shah, A. C. J. and Crump, J.*) *IN RE AMBALAL SARABHAL*. 25 Bom. L. R. 1225.

—S. 239—*Partnership—Intention of parties Commission and not profits.*

The question whether there is a real partnership must depend on the real intention and contract of the parties. Where the agreement recited that a certain person was to get a fixed pay and 10 per cent as commission on the net proceeds of the firm and not any share of the profits that person is a partner, as he sole sharer in the profits (*Sanderson, C. J. Mukerjee and Chatterjee, JJ.*) *RAGHUMALL KHAN DELWAL v. OFFICIAL ASSIGNEE, OF CALCUTTA*. 28 C. W. N. 34.

—S. 239 — *Partnership — Members — Whether one firm can be partner in another.*

A firm as such cannot be a member of a partnership. A partnership under Section 239 is a relationship which subsists between persons; but a firm is not a person; it is not an entity, it is merely a collective name for the individuals who are members of the partnership. It is neither a legal entity, nor is it a person, (*Page, J*) *SLODOYAL KHEMKA v JOHARMULL MANMULL*.

50 Cal. 549 : 75 I. C. 81.

—S. 239—*Remuneration varying with profits—Relationship. See (1922) DIG. COL. 431.* *MOULA BUX v. MUHAMMAD AFZAL*, 69 I. C. 781.

—S. 248—*Partnership—Minor member—Repudiation of liability.*

**CONTRACT ACT, S. 251.**

S. 248 undoubtedly is directed primarily to the protection of creditors of the firm. Where, however, one set of partners is indebted to another for the provision of capital, it must be clearly open for a minor liable under the deed of partnership, to repudiate his membership if he is to escape liability to the other partners. (*Rifon, J. C.*) **MIR AHMAD SHAH v. MUSHARRIF SHAH**  
72 I. C. 996.

——— **S. 251—Trading firm—What is—Liability of partners for money borrowed by another partner.**

Any partner in a trading firm has an implied authority to borrow money for the purposes of the business on the credit of the firm. A firm would be a trading firm if its business consists in buying and selling. In such a case there is no duty cast on the person advancing the money to make any further inquiries and the other partners are liable though the borrowing partner may misappropriate the money. (*Mulla, J.*) **SAREMAL PUNAMCHAND v. KAPURCHAND PUNAMCHAND.**  
25 Bom. L. R. 1093.

——— **S. 253 (10)—Family partnership—Dissolution—Death.**

Where a partnership consists of members of a joint Hindu family, it is not dissolved by the death of any of the partners, as a stipulation to that effect is ordinarily to be inferred, (*Piggel and Walsh, JJ.*) **FAKIR CHAND v. NANUG RAM.**  
74 I. C. 721.

——— **S. 263—Profits after dissolution of partnership—Partnership property.**

Where the account books produced unmistakably proved that the order for the purchase of goods was made on behalf of the firm and further that the payment of the price in two instalments was also made on behalf of the firm; but by mere accident, the goods were received after the dissolution of the partnership, held on principle of equity the plaintiff is entitled to his share of the profits made by the defendants in selling the goods in question. It may be that the terms of S. 263 of the Contract Act do not cover the case in its entirety. (*Wasir Hasan, A. J. C.*) **JANKI PERSHAD v. PT. SAMESHAR PRASAD.**  
74 I. C. 324; 9 O. L. J. 599: 1923 Oudh 23.

——— **S. 264—Dissolution of partnership—Notice—Publication.**

In the case of old customers of a firm the mere publication of notice of dissolution in the public press is not sufficient to relieve a retiring partner from liability. 8 C. 617 followed. (*Heald, J.*) **EZEKIEL v. THE RUSSA ENGINEERING WORKS, LTD.**  
1 Rang. 47; 2 Bur. L. J. 46:  
74 I. C. 16.

**COPYRIGHT—Costs—Co-defendants—Joint decree—Effect of.**

Where two or more persons join in an attack or in a common defence in an action, there is at least an implied contract that they will share the gain or the loss. At any rate equity will infer such a contract and there is a *prima facie* right of contribution among the litigants so joining in an attack or defence. But it may happen that the defendants to a suit may have different antagonis-

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tic and exclusive defences and in such a case in the absence of a contract or some equity between them there will be no contribution. Cases on the subject reviewed. (*Ryves and Stuart, JJ.*) **PARSOTTAM DAS KOLAPURI v. LACHMI NARAIN.**  
45 A. 99: 69 I. C. 688: 1923 A. 67.

**CONTRIBUTION—Tort—Joint-tortfeasors—No contribution—Scope of the rule**

To defeat a claim for contribution among co-defendants, it must be shown that the defendants in the former suit were wrong-doers in the sense that they knew or ought to have known that they were doing an illegal and wrongful act. In that case no suit for contribution would lie. But, on the other hand, if the defendants in the former suit were not guilty of a wrong in that sense, but acted under a *bona fide* claim of right, and had reason to suppose that they had a right to do what they did, then, no doubt, they might have a right of contribution *inter se*. (*Hallifax, A. J. C.*) **JHIBU v. BALAJI.**  
1923 Nag. 255: 73 I. C. 228.

**CONVERSION—Judgment—Effect of—Title.**

A Judgment in conversion does not pass the property unless and until the decree is satisfied. Distinction between detinue and conversion in English law considered. (*Schwabe, C. J. Oldfield and Ramesam, JJ.*) **SINNAN CHETTY v. ALIGIRI AIYAR.**  
45 M. L. J. 516: 18 L. W. 545:  
46 Mad. 852: (1924) M. W. N. 6.

——— **Ejectment—Trespasser.**

The principle that in a suit for the ejectment of a tenant from a joint holding all the co-sharers must act jointly or obtain partition is not applicable, where the defendant is not a tenant but a trespasser. (*Moti Sagar, J.*) **LEKHA v. BHANI.**  
1923 Lah. 647.

**CO-OPERATIVE SOCIETIES ACT, (2 of 1912) S. 43—Object of—Disputes between society and members—Cognizance by Civil Court.**

The object of the Co-operative Societies Act is to encourage thrift, selfhelp, co-operation among the agriculturists, artisans and persons of limited means, and it would be impossible to attain these objects if these people for the settlement of their disputes have necessarily to undergo all the troubles and worry of an extensive and protracted litigation. In the case of a dispute between a society and a member the substitutional remedy provided under the rules in the shape of a reference to the Registrar must be availed of and the common law remedy by an action in a Civil Court must by necessary application be deemed to have been taken away. (*Abdul Raof and Moti Sagar, JJ.*) **THE ZAMINDARA BANK, SHERPUR KALAN v. SUBA.**  
71 I. C. 722.

——— **S. 43 (2) (1)—Scope and applicability—Director and Society—Dispute between, arising out of particular transaction—If within section—"Touching the business of a society"—Meaning.**

The Words "touching the business of a society" in S. 43 (2) (1) of Act II of 1912 are not confined to disputes regarding the internal management of the affairs of a society or disputes in regard to principles which would regulate the conduct of the business.

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A dispute between a member who happens to be an officer of a co-operative society and the society in regard to sums of money entrusted to the former for purchase of certain articles is within S. 43 (2) (1) of the Act.

A dispute between a member who happens to be an officer of a co-operative society on the one hand and the committee or an officer thereof on the other falls within the words of the section (*Krishnan and Venkatasubba Rao, JJ.*) DASARATHA RAO v. CHEVVURU SUBBA RAO.

44 M. L. J. 382. 17 L. W. 346.

(1923) M. W. N. 222 : 32 M. L. T. (H. C.) 321 : 72 I. C. 838 : 1923 Mad. 481.

—S. 44—Rule providing for disputes to be referred to Registrar—If ultra vires—Jurisdiction of Civil Court—Business of Society—Meaning of.

Under a rule framed under S. 44 of the Co-operative Societies Act, disputes between members of a co-operative Society and the Society thereof were to be referred to the Registrar. Held, the rule though it ousts the jurisdiction of Civil Courts is not *ultra vires* or inconsistent with S. 44 (2) (1).

Where the rule gives a discretion to the Registrar to refer the dispute to a civil Court, *Quære* whether it was consistent with S. 44 (2) (1) ?

The expression 'Business of a Society' is not limited to the internal management of the affairs of a Society but includes any particular transaction carried on by the Society. (*Chandrasekhara Aiyar, C. J. and Subbanna, J.*) TIMMAJI GURUNATH v. VENKATAPPA. 1 Mys. L. J. 92

CO-OWNERS—Adverse possession—Considerations governing. See ADVERSE POSSESSION.

38 C. L. J. 220.

—Adverse possession—Ouster.

The possession of a co-owner is generally possession on behalf of all, but if there is ouster or acts equivalent to it, it will begin to be adverse. (*Walmsley and B. B. Ghose, JJ.*) BHAIKARABANDRA NARAIN ROY v. RAJINDRA NARAIN ROY. 50 Cal. 487 : 74 I. C. 193 : 1924 Cal. 45.

—Joint property—Registered mortgages by one co-owner—Effect on other co-owners.

Registration cannot be held to give to other co-owners notice of dealings with the property. It is not necessary for one joint owner of property to constantly examine the registers with a view to satisfying himself that his co-owner is not holding himself out as the sole proprietor of the property. (*Broadway and Moti Sagar, JJ.*) ISHAR DAS v. FAZAL ILAHI.

1923 Lah. 522

—Partition—Properties omitted in preliminary decree—Power of court to add.

Ordinarily a suit for enforcing partition of some only of the common property will not lie, if however by mistake, fraud or some other reason, some properties are left out, any of the co-owners can apply to have them divided. So also, even after preliminary decree, a court may direct discovery of properties still remaining joint and pass preliminary decrees in respect

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thereof. (*Mookerjee and Chotzner, JJ.*) BHUBAN MOHINI DASI v. KUMUDBULA DASI.

28 C. W. N. 131.

CO-SHARERS—Adverse possession—What act necessary. See ADVERSE POSSESSION. 73 I. C. 748.

—Common land—Cultivation by one of the co-sharers—Suit for possession by others.

Where one of the co-sharers brings parties, land under cultivation it is open to the other co-sharers to get a decree for joint possession in their favour. (*Gokul Prasad J.*) BADRI UPADHIA v. DWARKA UPADHIA. 71 I. C. 559 : 1923 A. 416.

—Common land—Erection of building—Injunction.

A proprietor may be restrained by his co-sharers from appropriating a vacant site to his own exclusive use by erecting a building thereon. It is not necessary for the other co-sharers to prove special damage. 1 Lah. 249 ; 2 Lah. 73 referred to. (*Martineau, J.*) RUSTAM KHAN v. RAHMAN. 1923 Lah. 289 : 71 I. C. 47.

—Common Land—Joint possession.

Held, following 44 A. 5 that no co-sharer who has been in physical or actual possession of any part of joint land is liable to be ejected by any of the other co-sharers except by means of a partition lawfully obtained. Where he has been ousted from the land occupied by him he is entitled to be restored to the actual possession which he had before and not merely to joint possession with the defendant co-sharer. (*Daniels, J.*) RAM HARAKH PANDAY v. CHUNI SINGH. 1923 A. 446 : 71 I. C. 649.

—Consent of one—Effect on others. See. C. P. LAND REV. ACT, S. 188 (2). 6 N. L. J. 231.

—Contribution—Rebuilding joint property by one.

Where one co-sharer rebuilds joint property at his own expense, the others are bound to contribute when they claim their share in the property. (*Dalal, J. C.*) JOKHU v. MUST. SARASWATI. 9 O. & A. L. R. 643.

—C-tenants—Improvements—Right of one cotenant to claim compensation.

A tenant in-common is not entitled to compensation for improvements effected by him on the common property as against the other co-tenants in the absence of any necessity for repairs or improvements or of the other co-tenants' concurrence, express or implied, in their execution. 2 C. L. J. 25 dissented from. *Swan v. Swan*, 8 Price 518 ; *Forington v. Forrester* (1893) 2 Ch. 461 ; *Leigh v. Dickeson*, 15 Q. B. D. 60 referred to. (*Oldfield and Devadoss, JJ.*) JAMBAPURAM SUBBIAH v. VENKATARAMAYYA. 44 M. L. J. 43 : (1923) M. W. N. 13 : 17 L. W. 77 : 46 Mad. 104 : 71 I. C. 374.

—Ejectment—Khudkasht—Exclusive operation—Partition.

Where a co-sharer suing for exclusive possession of a plot of land proves that it was his khudkasht and the defendant trespassed upon the property and dispossessed him, the plaintiff is entitled to a decree and he could not be driven to

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a suit for partition in the revenue Court. (*Gokul Prasad, J.*) KULDIP CHAUBE v. JAGNANDAN CHAUBE. 71 I. C. 299 : 1923 A. 363

—Government revenue—Default in payment of revenue—Purchase by defaulter or in connivance with him.

A co-sharer who has defaulted to pay the Government dues and has thereby brought about the sale of the estate, cannot be permitted if he purchases the estate at the sale, to hold it to his own benefit to the exclusion of his co-owner. The position is similar when a tenant, in violation of his agreement defaults to pay, on behalf of his immediate landlord, the dues of the superior holder and thereby brings about a sale of the interest of his land. 44 C. 373, 16 C. 194 : 15 C. W. N. 776 : 12 C. L. J. 336 : 10 M. I. A. 540 : 18 W. R. 240 : 20 C. L. J. 11 Rel. The essence of the matter is that the co-owner or lessee who thus acts in breach of his obligation contractual or fiduciary, cannot be permitted to profit by his own wrong to the detriment of the person whose interest it was his duty to protect. 12 C. L. J. 336 : 10 M. I. A. 540, 18 W. R. 240, 20 C. L. J. 11 : 24 C. W. N. 201 : 30 C. L. J. 475 Rel. (*Mookerjee and Chotzner, JJ.*) LALITMOHAN SEN v. MANORANJAN GHOSH CHAUDHURI.

72 I. C. 698 : 1923 Cal. 13.

—Injunction — Co-owners — Common wall—Re-building by one co-sharer—Effect.

Whatever the powers of the Court may be in adjudicating on the rights of parties and in passing injunction (or conditional injunctions) in consequence of such adjudications it is a different matter to say that where a party admittedly owns a piece of property the Court has any authority to create and impose conditions as to the enjoyment of the same, neither breach of contract nor the infringement of any right being alleged to have taken place. Consequently a co-sharer who had re-built at his expense a common wall belonging to him and the defendant, another co-sharer, cannot obtain an injunction restraining the latter from treating the half belonging to him as his property until he had paid his portion of the cost of re-building the wall. (*Harrison, J.*) TALIB HUSSAIN v. MAHOMED HUSSAIN. 69 I. C. 526.

—Joint possession—Right to—Partition suit.

Where a suit for partition is pending between the co-sharers and the rights of the parties to khas possession of different lands will be finally decided the court would be slow to disturb the existing possession of the lands by the co-sharers, unless compelled by cogent reasons. (*Newbould and Panton, JJ.*) MAHOMED HAIDER ALI KHAN v. MAHOMED WAJED ALI KHAN.

1923 Cal. 208.

—Joint possession—Right to ouster. See (1922) DIG. COL. 406. BHIRGUNATH RAI v. APNARAIN RAI. 45 A. 157 : 71 I. C. 455 : 1923 A. 445.

—Lambardar—Dues payable to—Agreement between co-sharers—Effect.

In a suit by a lambardar against the co sharers for the recovery of lambardari dues, the defence

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## CO-SHARERS.

was that the cosharers made collections themselves and paid revenue of their respective shares and that under the terms of the wajib-ul-arz of 1285 fasli the lambardar of the village was not entitled to any remuneration. At the settlement of 1285 fasli before the Board of Revenue had issued the rules under the U. P. Land Rev. Act, there was an agreement between the cosharers that the lambardar should receive no remuneration. At a subsequent settlement in 1312 Fasli the plff. lambardar contended that this agreement was abrogated. There was no evidence that it had been abrogated or reaffirmed. Held that if the cosharers as a body desired to contract themselves out of the rule framed by the Board of Revenue they ought to have agreed upon some nominal remuneration for the lambardar. The lambardar is placed in a strong position; he can bargain with the co-sharers for some reasonable remuneration, under threat of standing upon his extreme rights and claiming his full 5 per cent on the land revenue. The agreement relied upon by the defts. (cosharers) even if it survived the enactment of the Board of Revenue's Rules came to an end automatically at the close of the settlement for which it was made and could have no effect on the rights of the lambardar thereafter, at any rate, unless it was proved that it was expressly renewed. (*Mears, C. J. and Piggott, J.*) SHEO CHARAN v. PANNA LAL. 45 A. 84 : 70 I. C. 917 : 1923 A. 41.

—Lambardar — Power to grant leases.

The lambardar has authority to grant a lease of Zemindari property with due regard to the season. (*Gokul Prasad, J.*) HARDIAL v. ALAM. L. R. 4 A. 298 (Rev.) : 74 I. C. 177.

—Lambardar—Liability for profits—Burden of proof.

Where a co sharer wants to make a lambardar liable for more than what he admits to have collected or the basis of misconduct or gross negligence in collecting, the onus is on the co-sharer to prove how much more ought to have been collected. (*Wazir Hasan, A J C.*) GANGA PRASAD v. BACHCHU LAL. 90. & A. L. R. 910.

—Lambardar—Powers of—Notice of ejectment—Power to issue.

A lambardar can validly issue a notice of ejectment between the date of the confirmation of a partition and the date of its taking effect, in respect of land which, under the partition, has been assigned to another co-sharer. (*Fremantle, S. M.*) MAHANT RAM DAS v. JANGI SINGH. L. R. 4 A. 281 (Rev.).

—Partition wall—Rights inter se

Conditions attaching to party wall are not easy to define. Each party is entitled to act as owner of his half, but cannot compel the owner of the other half to bear any greater burden than he chooses to place on it. An encroachment cannot take place in defiance of the other's rights. (*Macleod, C. J. and Crump, J.*) DAUDKHAN MUSERKHAN v. CHANDULAL KANHAYALAL. 1923 Bom. 370.

—Power of—Lease of joint property by one—Effect.

## CO-SHARERS.

Where one co-sharer grants a perpetual lease of joint property, it is not binding as against the others. (*Ashworth and Wazir Hasan, J. C.*) LAL MAHOMED KHAN v. MT. AMATUL FATIMA  
26 O. C. 239

— *Rights in joint undivided property*

Every co-sharer in joint undivided property has a right to every part of that property until partition. What he can sell is his share or a fraction of his share in the whole of that undivided property. (*Le Rossignol, J.*) SARDAR ALI v. FAZIL.  
1923 Lah. 75.

— *Shamilat land—Encroachments.*

Where the land encroached upon had been reserved for the common purposes of the village body and in consequence of the encroachments there is hardly sufficient space left on the spot for the common purposes of the village body. Held a decree can be passed for restoration of the land to its original use as there will be no exclusion of the defendants from joint possession of a legitimate character. 2 Lah. 73 fol (*Campbell, J.*) PASAWA SINGH v. AMAR CHAND.  
1923 Lah. 308 (2).

— *Shamilat land—Long possession—Ejection.*

Where a co-sharer has been in exclusive possession of a portion of the common shamilat land, it is not open to the other co-sharers to sue to eject him or to obtain joint possession with him, so long as a partition of the shamilat does not take place. (*Scott Smith, J.*) MAHOMED AMIN v. KARIM DAD.  
69 I. C. 671.

— *Suit for arrears—Burden of proof.*

In a suit by co-sharers against lambardar for profits, the burden of proving amount of arrears lies on the lambardar. (*Pradeaux A. J. C.*) SARIJE RAO v. HAKK CHAND.  
6 N. L. J. 234 : 1923 Nag. 287.

— *Suit for share of profits—Right to interest.*

A co-sharer is not entitled to interest on his share of the profit unless there has been a refusal by the other co-sharers to pay the former his share of the profit. An offer to pay only a fraction of the sum due to the co-sharer is tantamount to a refusal. 15 N. L. R. 85 referred to (*Hallifax, A. J. C.*) YADO PRASAD v. GANGA RAM  
70 I. C. 72 : 1923 Nag. 211.

## COSTS—Discretion of Court—Change in the view of law—Successful party when to be deprived of costs.

The ordinary rule is that costs follow the event and that if the plaintiff finds himself unable to proceed with his suit and asks for leave to withdraw it, then the opposite party is entitled to the costs which he has been put to in defending the suit. The granting of leave to withdraw from a suit is a concession because the defendant is ordinarily entitled to ask the Court to decide the suit on the merits, and if he wins, he would be entitled to his costs. In a particular case it may be a sound exercise of discretion to refuse costs where the suit is based on a state of law, which has been afterwards altered either by statute or by the decision of a superior tribunal, and that might be a good ground for the decision in the

## COSTS.

case provided the Court considers the particular circumstances of the case and also the question as to who is responsible for the litigation. Where the Court below has not considered all the facts which it was bound to consider before exercising its discretion with regard to the award of costs and there was an omission to consider the necessary circumstances, there could not be a sound exercise of discretion and the appellate Court is entitled to interfere. 43 M. 61 explained, (*Macleod, C. J. and Crump, J.*) KHIMCHAND v. SOBHAG-CHAND.  
25 Bom. L. R. 242 : 72 I. C. 324.

— *Divorce—Liability of husband—Rule and exceptions—Appeal. See DIVORCE.*

45 M. L. J. 327.

— *Exceptional cases.*

Costs generally abide the result, if no valid reason has been assigned as to why an exception should be made in the case (*Moti Sagar, J.*) DES RAJ SAWHNEY v. FRAYS MOTOR WORKS.  
1923 Lah. 302 (1).

— *To follow result.*

Costs generally abide the result for where a pliff's suit is practically decreed in full, costs should be awarded to him. (*Moti Sagar, J.*) AGHA MAHOMED ASLAM v. JODH SINGH.  
1923 Lah. 513 (2).

— *Pleader—Professional misconduct—Vindictive proceedings on the part of a client—Costs disallowed though pleader's Conduct unjustifiable. See LEGAL PRACT. ACT, S 13 (B) (F).*

17 L. W. 358.

— *Point regarding costs not taken in lower Court—Effect.*

It is a bad practice to allow an appellant who has taken no objection to an award of costs against him in the lower Court to go to the High Court and argue that point there. (*Grimwood, C. J., and Piggott, J.*) JAINI LAL v. FIRM OF DURGA PRASAD DAU DAYAL.  
75 I. C. 527 : 1923 A. 334.

— *Practice—Proportionate costs—Mofussil and metropolis.* The practice in the mofussil is that costs should depend on the result of the case and it is usual when a suit partly succeeds for proportionate costs to be given. The important difference between cases in England and on the original side of the High Court and cases in the mofussil is that in cases in the mofussil costs are much more directly proportionate to the amount claimed. (*Newbould and Panton, JJ.*) KUMUD KANTA CHAKRABURTHY v. BIGNOLD.  
1923 Cal. 306.

— *Suit for contribution, if lies*

A suit for contribution lies in respect of costs awarded jointly against co-plaintiffs or co-defendants, when the same has been realised from one alone. (*Daniels and Dalal, J. C.*) SIDH GOPAL v. AVADH BIHARI LAL.  
26 O. C. 196

— *Witness—Travelling expenses—Liability of unsuccessful party to pay.*

No doubt the party who summons a witness pays his travelling expenses in the first instance. But, clearly, if it is successful he is entitled as against the unsuccessful party against whom costs are awarded to recover all proper expenses including travelling expenses, incurred by summons of the witness and paid in the first instance

## COURT FEE.

by the successful party. (*Greves, J.*) HARA SUNDER MAJUMDAR v. LAHAMBAR SINGH.

1923 Cal. 315 (1)

**COURT FEE—Appeal Advalorem Court fee—Decree passed against one of several defendants—Appeal so as to make other defendants liable.**

In a suit for recovery of money brought against several persons the trial Court passed a decree against one of them. The plaintiff preferred an appeal so as to make the other defendants jointly liable for the decree amount. On a question arising as to the amount of Court fee payable on the memorandum of appeal held that *ad valorem* Court fee ought to be paid. 86 P. R. 1912 followed. (*Shadi Lal C. J. Abdul Qadir, J.*) RAM-KISHEN v. HARDE RAM.

71 I. C. 737.  
1923 Lah. 135

—Court Fees—Application for refund—Unspent money after preparing record—How to be stamped. See COURT FEES ACT, S. 19 (XX) AND SCH II, ART. 1.

1923 Cal. 599.

—Cross-objections—Subject matter incapable of money valuation

Where the subject matter of certain cross-objection cannot be valued in money the Court should accept any reasonable valuation put by the appellant. (*Kanhariya Lal, J. C. and Lyle, A. J. C.*) RAJEO LOCHAN MAHARAJ v. RAM MANOHAR PRASAD.

70 I. C. 286 (1);  
1923 Oudh 44 (1).

—Declaratory suit—Property in the custody of Court—Court-fee payable.

The property was in the custody of the Court, all that the plff. had to do was to establish his title to the property. Therefore, it is only necessary for him to file a suit for a declaration of his title to the property, but not for recovery of possession. It is enough if the court fee is paid as in a declaratory suit. (*Das and Kulwant Sahay, JJ.*) SABURI PANDE v. RAM KHELAWAN PANDE.

72 I. C. 495.

—Interest — Future interest—*Ex parte* decree—Appeal—Interest after period of grace. See, (1922) DIG. COL. 412. BHAGWATI PRASAD SINGH v. BISHUN PRAGASH NARAIN.

70 I. C. 953 (1).

—Land acquisition Appeal—Calculation

In a land acquisition appeal court fee must be paid on the difference between the amount claimed and that awarded, inclusive of the statutory 15 p.c. under S. 25 Land Acquisition Act. (*Chandrasekara Aiyar, C. J. and Ramaswamy Aiyengar, J.*) ESACK SAIT v. SUB-DIVISION OFFICER, MYSORE.

1 Mys. L. J. 114.

—Partition suit — Appeal relating to certain items.

Where the memorandum of appeal from the final decree in a partition suit attacks various items allowed or disallowed in the final decree, *ad valorem* court fee should be paid on the items. (*Broadway and Martineau, JJ.*) MUHAMMAD MAJID ULLAH KHAN v. MUHAMMAD HAMID ULLAH KHAN.

69 I. C. 196.

**COURT FEES ACT (VII OF 1870)—Alternative claim.**

Where plff. has paid court fee on the smaller of two alternative relief, that relief alone should be

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tried (*Abdul Raoof, J.*) KUNDAN LAL v. ANUND SARUP.

73 I. C. 709 · 1923 Lah. 456.

—Alternative Relief—Stamp on larger relief.

Where a plff. sues in the alternative for one of two reliefs the larger of the two reliefs sought determines the amount of the stamp. (*Abdul Raoof, J.*) KUNDAN LAL v. ANUND SARUP.

73 I. C. 709 : 1923 Lah. 456

—S. 4—Letters Patent Appeal—Court fee payable on.

S. 4 of the Court Fees Act is not applicable to a Letters Patent Appeal from the judgment of a single Judge of the High Court and no Court fee is leviable thereon except Rs. 2 prescribed for an application to the High Court. 44 A. 13; 65 I. C. 675 followed. (*Shadi Lal, C. J. and Abdul Qadir, J.*) HAR DIAL SHAH v. SECY. OF STATE FOR INDIA

3 Lah. 420 : 69 I. C. 428 · 1923 Lah. 275.

—Ss 4 & 28—Memorandum of appeal—Decree or order appealed against—Omission to affix stamp.

Where a memorandum of appeal is filed without a duly stamped decree appealed against, the appeal is liable to be rejected if the deficiency is not made up within the limitation period for filing an appeal. (*Scott Smith, J.*) SHAHADAT v. HUKAM SINGH.

71 I. C. 736.

—S. 5—Appeal from original side of High Court—Dispute as to court-fee payable—Power of Judge to decide dispute—Madras High Court Rules, Original Side, Art. 36. See (1922) DIG. COL. 413. MAHOMED ISHACK SAHIB v. MAHOMED MOIDEEN.

70 I. C. 813.

—S. 5—Decision of Taxing Officer—Finality of.

Where the Taxing Officer of the High Court levies a fee upon a memorandum of appeal, that cannot be interfered with by the Bench bearing the appeal even if erroneous. (*Mullick and Bucknill, JJ.*) SHEOPUJAN RAI v. KESHO PRASAD SINGH.

2 Pat. 919.

—S. 5 — Taxing Judge if can refer to Bench.

A Judge to whom a Court fee matter is referred under S. 5 of the Court Fees Act cannot refer the matter to a Bench. (*Jwala Prasad, J.*) KULDIP SAHAY v. HARIHAR PRASAD

4 Pat. L. T. 638.

—S. 7 (iv) (c)—Consequential relief—Confirmation of possession—Arbitrary valuation.

Under S. 7 (iv) (c) of the Court Fees Act it is not open to the plaintiff to fix an arbitrary or incorrect valuation. 36 A. 500; 6 C. L. J. 427; 14 C. L. J. 47; 16 C. L. J. 194; 4 Pat. L. J. 703 Rel. A prayer for confirmation of possession is nothing more than a prayer that the fact of, and his right to possession may be declared but the words "confirmation of possession" have now acquired a technical meaning and include a prayer for recovery of possession if the court thinks the plaintiff is out of possession. Consequently a

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prayer for confirmation of possession has come to be regarded as consequential relief 19 W. R. 18, 22 C. L. J. 415; 23 C. L. J. 561 Ref. (*Mitler, C. J. and Mullick, J.*) RAM SEKHAR PRASAD SINGH v. SHEONANDAN DUBEY. 4 Pat. L. T. 71: 1 Pat. L. R. 25: 2 Pat. 198: 73 I. C. 43: 1923 P. 137.

—S. 7 (iv)—Suit for accounts—Appeal against preliminary and final decrees—Competency of—Court-fees See (1921) DIG. COL. 382, DAMODARA PADHANO v. HARIBANDHU PAT NAICK. 70 I. C. 392.

—S. 7 (iv) (b) and (v)—Suit for partition—Prayer for declaration of title—Removal of cloud on title—Court-fee.

Where in a partition suit the plaintiff distinctly prays for a declaration of his title to and confirmation of possession of certain land in order to disperse a cloud cast on his title by reason of an adverse entry in the Record of Rights an *ad valorem* Court fee is payable on the value of the plaintiff's share in the land in respect of which the cloud is cast in addition to the fixed fee for partition. (*Dawson Miller, C. J. and Coutts, J.*) RACHHYA RAUT v. MUSAMMAT CHANDO. 1923 P. 113.

—S. 7 (iv) (c) (v) (a)—Court fee—Mortgage Personal decree for sale—Suit to set aside. (1922) DIG COL 415 RADHA KANTA SAHA v. DEBENDRA NARAYAN SAHA. 70 I. C. 101: 27 C. W. N. 566: 38 C. L. J. 74.

—S. 7 (4) (c)—Declaration—Consequential relief—Administration of estate and appointment of receiver.

Plaintiff sued for a declaration of his right, to administration of the estate and appointment of an interim receiver. Held that the suit fell within S. 7 (iv) (c) of the Court Fees Act. In the absence of a prayer for possession of the property the plaintiff was not bound to pay court fee on the market value. (*Chatterjee and Walmsley, JJ.*) RUPCHAND GHOSH v. KSHIRODAMAYI DAS. 75 I. C. 567: 27 C. W. N. 457: 1923 Cal. 326

—S. 7 (iv) (c)—Declaratory suit—No party to decree.

A person who was no party to the decree may sue to have it declared void without asking for any consequential relief and the suit is not governed by S. 7 IV (c): (*Broadway and Zafar Ali, JJ.*) MT. NIHAL DEVI v. RAI CHUNI LAL. 5 Lah. L. J. 357: 73 I. C. 767: 1923 Lah. 373.

—S. 7, Cl. (iv) (c)—Suit for declaration and rectification of document—Court fee payable.

Where the plaintiff sues for a declaration that the maintenance due to defendant may be settled and for the amendment of a certain document between the parties, the suit is one for declaration with a prayer for consequential relief and it must be valued under S. 7 Cl. 4 (c) of the Court Fees Act. (*Batten, J. C.*) MT. BARI BAHU v. KUNDAN SINGH. 71 I. C. 31.

—S. 7 (iv) (c) and (v)—Suit for declaration of title and possession—Court-fee.

Where a challenge is directly thrown on the title of the plaintiff who comes to Court in order to

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meet that challenge, it is a suit clearly under S. 42 of the Specific Relief Act and if the Plaintiff asks for possession also in that suit, his suit comes under S. 7, cl. (4), Sub-cl. (c) of the Court Fees Act and not within Sec. 7, cl. (5) of the Act.

A suit for declaration of title as adopted son and for possession is a suit that comes within S. 7 cl. (4). Sub-cl. (c) of the Court Fees Act. (*Das and Foster, JJ.*) UGRAMOHAN CHOWDHRI v. LACHMI PRASAD CHOWDHRI. 1923 P. 100.

—S. 7 Cl. (iv) (d)—Suit for injunction—Valuation for purposes of Court fees and Jurisdiction.

A suit for injunction was valued at Rs. 4,000 for purposes of jurisdiction and at Rs. 110 for Court Fees. The suit was dismissed with costs. On a question arising as to the Pleadings fee payable, held that the valuation for the purposes of Court Fees should under S. 8 of the Court Fees Act determine the valuation for purposes of jurisdiction, that the Court below ought to have asked the plaintiff to re state his value and as it did not do so it must be taken to have accepted the valuation of Rs. 110 as correct. Consequently Pleadings fee was allowed on Rs. 110 only. 11 P. R. 1913 referred to. (*Scott Smith, J.*) AMIR CHAND v. HAKIM ALI. 69 I. C. 577.

—S. 7 (iv) (f)—Suit for accounts—Valuation by defendant in appeal—Right to give own value.

In an appeal by the defendant against a preliminary decree directing accounts where he disputes not the liability to render accounts but plaintiff's mode of doing so, the relief cannot be correctly valued and the appellant is at liberty to fix his own valuation without being bound by the valuation in the plaint. (*Jwala Prasad, J.*) KULDIP SAHAY v. HARIHAR PRASAD. 4 Pat. L. T. 638.

—S. 7 (iv) (i)—Partition suit—Joint trade—Suit for share—Valuation for court fees. See (1922) DIG. COL. 384 BALLA PATTABHI CHETTI v. SUBBARAYA CHETTI. 69 I. C. 17.

—S. 7 (v)—Suit against—Tenant holding over in defence of notice is governed by clause v.

Where the defendant remained in possession after the end of the period of tenancy, with express disagreement of plaintiff, as it was evidenced by the act that the latter gave him written notice to quit.

Held the defendant could not be called a tenant holding over, but that the suit was clearly for the possession of land held by a trespasser and fell under clause v and not under xi (cc) of S. 7 (*Halliday, A. J. C.*) NARAYAN v. TUKARAM. 1923 Nag. 310.

—O. 7 (v)—Sch. I, Art. 1.—Relief of reduction of redemption amount.

*Ad valorem* Court fee must be paid on the amount sought to be reduced from the mortgage decree in a redemption suit. 3 L. L. J. 370 Foll (*Campbell, J.*) RAMJI LAL v. SHIBBA. 75 I. C. 667: 1923 Lah. 309.

—S. 7 (v) and (xicc)—Suit for possession—Trespasser—Holding over.

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Where after the expiry of a tenancy, the tenant in spite of notice to quit refuses to hand over possession, a suit for possession against him is not one against a tenant holding over but against a trespasser and falls under S. 7 (v) of the Court Fees Act (*Halifax, A. J. C.*) *NARAYAN v. TUKARAM*, 1923 Nag. 310 : 74 I. C. 93.

—S. 7 Cl. (v) (b) and (v) (d)—*Suit for fraction of holding—Court fee payable.*

In a suit for recovery of land which is not an entire holding or a definite share or fractional part of a holding separately assessed to revenue but consisting of individual held plots which form part of a holding but which are not separately assessed, Court fees are payable under S. 7, Cl. 5 (d) and not under S. 7 Cl. 5 (b) of the Act. (*Heald, J.*) *MA SHA MA v. SOMASUNDARAM CHETTY*, 2 Bur. L. J. 39 : 70 I. C. 217. 1923 Rang. 246.

—S. 7 (v) and iv (c)—*Suit by Hindu reversioner to recover possession of property gifted by Hindu widow after her death—Court fee* See (1922) DIG. COL. 417 *KAM SUMRAN PRASAD v. GOBIND DAS*, 1 Pat. L. R. 1 : 2 Pat. 125.

—S. 7 (v) (d)—*Suit for possession as usufructuary mortgage—Valuation for court fees.*

The plff. sued for possession as usufructuary mortgage and valued the property on the amount of the mortgage-money. *Held* that the word "market value" in S. 7 of the Court-Fees Act must mean the market value of the subject-matter of the suit, which in this case is not a proprietary interest but a mere mortgage interest in the property. (*Daniels, A. J. C.*) *MAHDI v. GAJADHAR*, 9 O. & A.L.R. 85 : 73 I. C. 244 (1).

—S. 7, Cl. (v) (d)—*Suit for pre-emption—Market value of the property—Court-fee.*

The market value of the property in a suit for pre-emption is to be determined with reference to its value at the date of the sale and not with reference to its value at the date of the institution of the suit for pre-emption. 7 A. 778 followed. (*Scott-Smith, J.*) *SHER MAHOMED v. AHMAD SAID*, 69 I. C. 650.

—S. 7 (v) (e) and Sch. II, art. 17 (B)—*Suit for recovery of a Hindu temple—Valuation—Market value.*

There is no market value for a temple as such and for purposes of Court-fees, a suit for the recovery of possession of a temple falls under Sch. II, Art. 17 (B) of the Court-fees Act and not under S. 7 (v) (e) of the Act. (*Schwabe, C. J.*) *Oldfield and Ramesam, JJ.* *RAJAGOPALA NAIDU v. RAMASUBRAMANIA AYYAR*.

45 M. L. J. 274 : (1923) M. W. N. 550 : 18 L. W. 326 : 33 M. L. T. 21 (H. C.) : 46 Mad. 782 : 74 I. C. 198 : 1924 Mad. 19 (F. B.)

—S. 7 (ix) and Sch. I. Art. 1—*Appeal from final decrees.*

In a redemption suit the Court below passed a preliminary decree in which the amount payable by the plaintiffs was fixed at Rs. 39,240-11-7 on the 24th June, 1919. The plaintiffs having paid the amount fixed into the Court together with an

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additional sum of Rs. 409-6-0 interest accruing up to the date of payment, a final decree was passed on the 29th April, 1920. The plaintiffs filed appeals from both these decrees asking for reduction of the amount fixed in the preliminary decree by Rs. 32,225-11-7. On the appeal from the preliminary decree the plaintiffs paid Court-fees *ad valorem* on the sum by which they wished the amount fixed therein to be reduced. On the appeal from the final decree they paid a Court-fee of Rs. 2 only. *Held*, the preliminary decree decided what the amount payable was and in the appeal from it the appellants contested the amount and paid full Court-fee on the relief claimed by them. The final decree is a mere corollary to the preliminary decree and followed it as a matter of course, the plaintiffs having paid into Court the amount fixed, there was nothing fresh for the Court to decide before it passed that decree, and the appeal from that decree is really of a formal nature, and does not contest anything beyond what is contested in the appeal from the preliminary decree. (*Scott Smith and Forde, JJ.*) *BUDHU RAM v. NIAMAT RAI*, 4 Lah. 406 : 75 I. C. 375 : 1923 Lah. 632.

—S. 7 (ix)—*Mortgage suit—Appeal—Valuation—Interest pendente lite.*

Where a mortgage suit is dismissed, the plaintiff is entitled to value his appeal at the sum claimed in the plaint in respect of the principal and interest up to the date of filing the plaint and is not bound to value the future interest which he may claim from the date of the suit up to the date of realization or to pay court fee thereon. But if any future interest is determined by the trial court and is entered in the decree, additional court fee on such interest has to be paid. If the appellate court grants him a decree for an amount larger than that claimed in the court below, court fee must be paid on the difference and unless this is done the decree cannot be executed (*Jwala Prasad, J.*) *KALI PRASAD SINGH v. MATHURA PRASAD SINGH*, 1 Pat. L. R. 16 : 1923 P. 28.

—S. 7 (ix) (a)—*Contract of sale.*

Court fees payable in suits for the specific performance of a contract of sale will be levied according to the amount of the consideration. The suit is not a suit for possession of immoveable property so as to be liable to a stamp of value 10 times the jama. (*Abdul Raoof, J.*) *KUNDAN LAL v. ANAND SARUP*, 73 I. C. 709 : 1923 Lah. 456.

—S. 7 (x) (a)—*Exchange on same foot as sale.*

The frame of clause X of S. 7 of the Court Fees Act contemplated that for the purposes of court fee under this clause an exchange should also be dealt with as a sale, for otherwise that is no reason why separate provision should not have been made relating to exchange. (*Abdul Raoof, J.*) *KUNDAN LAL v. ANAND SARUP*, 73 I. C. 709 : 1923 Lah. 456.

—S. 7 (x) (a)—*Suit for specific performance—Calculation of court fees—Prayer for possession—Effect.*



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The fact that in a suit for specific performance of a contract of sale, an additional prayer for possession is added does not alter the nature of the suit, and for the purpose of court fees as well as jurisdiction, the suit falls under S. 7 (10) (a), (*Krishnan and Venkatasubba Rao, JJ*) SUNDARA RAMANUJAM NAIDU v. SIVALINGAM PILLAI

45 M. L. J. 431 : 18 L. W. 333.

—S. 7 (x) (a) — *Specific performance—Valuation for jurisdiction—Suits Valuation Act, S. 8.*

Valuation of a suit for specific performance of a contract of a sale for the purposes of Court Fee at the amount of the consideration is valid under S. 7 (x) (a) of the Court Fees Act. In such a suit, the valuation for the purposes of jurisdiction will be the same under S. 8 of the Suits Valuation Act (VII of 1887). (*Dalal, A. C. J.*) SAIYED ASHFAQ HUSSAIN v. SAIYED BUNYAD HUSAIN.

9 O. & A. L. R. 415 : 1923 Oudh 252

—S. 7 xi (cc)—*Suit for possession—Notice to quit—Tenant not giving up possession—Trespasser. See COURT FEES ACT, S. 7 (v).*

74 I. C. 93 : 1923 Nag. 310.

—S. 7 (xi) (cc)—*Thicadar—Suit to eject—Court fee payable.*

A suit to eject a thicadar on the expiry of his lease falls within S. 7 (xi) (cc) of the Court Fees Act. Wherever a landlord seeks to recover property from a person whose tenancy has come to an end either by the efflux of time or by reason of some breach of covenant, the case would be governed by S. 7 (xi) (cc) of the Court Fees Act, (*Miller, C. J. and Koss, J.*) RAM CHARAN SINGH v. SHEO DUTTA SINGH.

2 Pat. 260.  
4 Pat. L. T. 666 : 74 I. C. 619 : 1923 P. 380.

—Ss. 10 and 17—*Distinct causes of action.*

Where three declarations were sought arising from distinct causes of action, held Rs. 30 should be paid as court fee. (*Stuart, J.*) SHAMBHU DIYAL SINGH v. ISWAR SARAN.

75 I. C. 597 :  
1923 A. 306.

—S. 11—*Applicability to mortgage suits—Amount decreed higher than amount claimed—Additional Court fee if leviable before execution. See (1922) Dig. Col. 419* RAM BUJHAWAN PRASAD SINGH v. NATHO RAM.

70 I. C. 483.

—S. 17 *Subject—What is—Suit for specific performance and possession.*

*Per Krishnan, J.*—The word "subject" is of a somewhat uncertain connotation and is not capable of any precise definition.

In a suit for specific performance and possession, court fee need not be paid on the aggregate value of the two prayers. (*Krishnan and Venkatasubba Rao, JJ.*) SUNDARA RAMANUJAM NAIDU v. SIVALINGAM PILLAI.

45 M. L. J. 431 :  
18 L. W. 333.

—S. 17—*Suit on mortgage—Same person holding two mortgages—Valuation—Subject—Meaning of.*

A person holding two mortgages from the same mortgagor hypothecating the same properties and even when the due date in both is the

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same can bring suits separately on both bonds. In other words, there is nothing to prevent a mortgagee from suing on the first mortgage without joining the second and *vice versa*. If that is so, there can be no question that the mortgages were separate subjects and one under S. 17 of the Court Fees Act. The ordinary meaning of the word "subject" when used in law is a thing or matter, over which a right is exercised, and the two mortgages were certainly two distinct matters. They could be deemed to be one either by a covenant in the mortgage consolidating the two together, or by some provision in law.

Hence the suit to enforce the two mortgages is covered by S. 17 of the Court Fees Act. (*Jwala Prasad and Ross, JJ.*) NAWABA WAZIRI BEGAM v. BABU SHASHI BHUSHAN ROY.

2 Pat. 874 :  
4 Pat. L. T. 546 : 74 I. C. 820.

—S. 19 (D)—*Joint family—Letters of Administration—Application by son.*

Where a son applies for letters of Administration limited to joint family property left by his father, no court fee need be paid. (*Shah, A. C. J. Crump and Coyajee, JJ.*) KESHAVLAL PUNJIALAL SHETH v. COLLECTOR OF AHMEDABAD.

25 Bom. L. R. 1240.

—S. 19 (H)—*Enquiry by Court—Cause of—Power to order.*

A proceeding under S. 19 (H) merely decides a revenue dispute between the Collector and the holder of the probate. The Court has no power to award costs in a proceeding under S. 19 (H) of the Act. (*Chatterjee and Cuming JJ.*) HRIDAY MOHINI DAS v. SECRETARY OF STATE

50 Cal. 239 :  
72 I. C. 472 : 1923 Cal. 406.

—S. 19 (xvii)—*Petition on behalf of prisoner by counsel—If requires stamp.*

An appeal or revision petition put in on behalf of a prisoner by his counsel is none the less a petition by the prisoner and need not be stamped. (*Robinson, C. J.*) *In re* COURT FEES ACT, S. 19 (xvii).

1 Rang. 510.

—S. 19 (xx) and Sch. II Art. 1—*Application for refund—How to be stamped.*

An application for refund of the unspent portion of money deposited for the preparation of the paper book falls within Sch. II. Art. 1 of the Court Fees Act and is not an application for money due by Government within the meaning of S. 19 (xx). (*Sanderson, C. J. and Richardson, J.*) HARIDAS DEBI v. GOPESHWAR PYU.

27 C. W. N. 646 : 1923 Cal. 599.

—S. 31—*Scope of.*

Under S. 31 payment has only to be ordered when the offence is non-cognisable. (*Stuart, J.*) MINGAN v. EMPEROR.

1923 All. 86.

—Sch. I, Art. 1—*Application for personal decree—Order on—Appeal.*

A mortgage decree did not provide for the balance remaining due even after the sale of the properties and on an application being put in under O. 34, R. 6 a personal decree was passed. *Held*, on an appeal for such an order *ad valorem* court fees must be paid and not Rs. 2 on the basis

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that it was a matter in execution. (*Walsh and Ryve, JJ.*) *BINDHIACHAL RAI v. SITA RAM MISIR.* 74 I. C. 21.

—Sch. I, Art. 1—O. 20, R. 12 (2)—*Final decree—Mesne profits—Court fee.*

In case of appeals against a final decree under O. 20, R. 12 (2), C. P. Code, an *ad valorem* Court fee must be charged under Art. 1 of Sch. I of the Court Fees Act, calculated on the amount of mesne profits in dispute. (*Ayling, Offg. C. J. and Odgers, J.*) *P. BALARAMANAIIDU v. SANGAN NAIDU.* 69 I. C. 722 : 1923 Mad. 19.

—Sch. I, Art. 1—*Gross—Objections—Sale deed—Sunt to set aside—No legal necessity as to part.*

Where in a suit to set aside a sale deed the Court below found it was not for legal necessity to the extent of Rs. 1001., and on the suit being dismissed an appeal was filed whereupon the respondent filed cross objections as to the finding that Rs. 1001. was not for legal necessity, he must pay *ad valorem* Court fee on that amount. (*Piggott, J.*) *ISHDAT TIWARI v. TAMESHWAR TIWARI.* 45 All. 537.

—Sch. I Art. I and Sch. II Art. 17 (6)—*Partition Suit—Ad valorem on share claimed.*

In partition suits whether the plaintiff is in joint possession or out of possession the plaint or memorandum of appeal must bear *ad valorem* Court fees on the value of his share. Art. 17 (6) of Schedule will not apply. (*Pipon, J. C.*) *MURLI MAL v. VAISHNO DITTA.* 73 I. C. 788.

—Sch. I, Art. 1—*Redemption—Claim of arger amount—Ad valorem.*

In an appeal against a redemption decree on the ground more is due, *ad valorem* Court fee is payable on the excess amount claimed. (*Wazir Hasan, A. J. C.*) *SANT BAKHS v. DILDAR HUSAIN.* 74 I. C. 88 (1).

—Sch. I, Art. 1—*Redemption decree—Appeal from preliminary decree—If can be treated as on from final decree also. See APPEAL—REDEMPTION* 9 O. & A. L. E. 205.

—Sch. I, Art. 1—*Set off—Court fee*

Where the defendant claims right of set off, he has to pay *ad valorem* court-fee on the same. (*Piggott and Walsh, JJ.*) *CHAKKHAN LAL v. KANHAIYA LAL.* 45 A. 218 : 9 O. & A. L. E. 146 : 69 I. C. 921 : 1923 A. 118.

—Sch. I Art. 5—*Application for Review—Court-fee payable on.*

The proper fee payable on an application for review of judgment, if presented before the 90th day from the date of decree, is one-half of the fee leviable on the plaint or memorandum of appeal and not on the value of the subject-matter in respect of which relief was sought by the application for review. (*Daniels and Lyle, A. J. C.*) *NAGESHAR SAHAI v. SHIAM BAHADUR.* 26 O. C. 33 : 74 I. C. 255.

—Sch. II, Art. 1 (B)—*Cognizable case—Complaint—Process fee.*

A complaint in a cognizable case need not be stamped. No process fees are chargeable in such

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case, (*May Oung, J.*) *MAUNG SAN MYIN v. EMPEROR.* 2 Bur. L. J. 37. 1923 Bang. 245.

—Sch. II, Art. 6—*Surety bond—Duty payable.*

A security bond filed by a claimant in a claim case, being an instrument of obligation given in pursuance of an order of court is governed by Sch. II, Art. 6 of the Court Fees Act. (*Newbould and Panton, JJ.*) *SARBO MUSALMANI v. SAFAR MANDAL.* 49 Cal. 997. 1923 Cal. 269 (2).

—Sch. II, Art. 17—*Declaratory suit—C. P. Code O. 21, R. 58—Court fees.*

A suit under O. 21 R. 63 C. P. Code is one to declare the plaintiff's right to the property attached and the mere fact that the property has been sold in the meanwhile in execution does not affect the plaintiff's right of suit. The Court fee payable upon the suit is Rs. 10 under Art. 17, Sch. II of the Court Fees Act. (*Jwala Prasad, J.*) *MT. MANIK v. RAMJAS AGARWALLA.* 1 Pat. L. R. 51 : 70 I. C. 332 : 1923 P. 152.

—Sch. II, Art. 17 (4)—*Suit for declaration that money is jointly due.*

No *ad valorem* fee need be paid, when a suit is brought for a declaration that money is jointly due and that the plaintiff does not object to its being received by defendants. (*Scott Smith and Moti Sagar, JJ.*) *MT. UTTAM DEVI v. DINA NATH.* 1923 Lah. 359.

—Sch. II, Art. 17. (6)—*Mahomedan co-sharer—Suit for separate possession.*

Where a Mahomedan co-sharer sues the other co-charers for partition and possession of her share of her father's properties, alleging she is in possession of some items indicating a joint possession in law, the suit falls under Sch. II Art. 17 (6) of the Court Fees Act. (*Krishnan, J.*) *KURSHIT KATHUM v. HYDER KHAN SAHIB.* (1923) M. W. N. 564 (2) : 75 I. C. 93.

—Sch. II, Art. 17 (6)—*Partition suits—Court Fees payable. See COURT FEES ACT SCH. I, ART. 1.* 73 I. C. 788.

—Sch. II Art. 17 Clause (6)—*Suit for partition—valuation—Dispute as to share of the plaintiff—Court Fees Act S. 7 Cl. 4 (c)—Suits Valuation Act, S. 8.*

A suit for partition, pure and simple, where the plaintiff is in joint possession of his share and there is no dispute as to his title or share falls within Sch. II Art. 17 Cl. 6 of the Court Fees Act. A suit in which plaintiff prays for declaration of his title and partition as a consequential relief falls within S. 7 Cl. 4 (c) of the Court Fees Act. In the former case the suit must be valued for purposes of jurisdiction at the value of the entire subject-matter and not at the value of the plaintiff's share only. In the latter case the plaintiff's share becomes also the valuation of the suit for purposes of jurisdiction. (*Das and Kulwant Sahay, JJ.*) *RANJIT SAHI v. MAULAVI QASIM.* 2 Pat. 432 : 4 Pat. L. T. 257 : 72 I. C. 916 (2) : 1923 P. 342.

## COURT FEES (AMENDMENT) ACT (IV OF 1922)

—BENGAL ACT,—*if ultra vires—Grant of letters*

## COURT FEES ACT (IV OF 1922), Beng. Act.

*of administration—Property outside Bengal—Levy of fees—Legality.*

Under the provisions of sec. 80 A (1) of the Government of India Act the Local Legislature has power to make laws for the peace and good government of the territories of the Province, and under sec. 80 A (2) the Local Legislature may, subject as therein mentioned, that is to say, subject to the limitations mentioned in (3), repeal or alter as to that Province any law made before or after the commencement of the Act by any authority in British India.

The limitations imposed by S. 80 (3) relate (a) to the imposition of new taxes other than those set out in Sch. I of the Scheduled Taxes Rules. It is quite true that duties, which are collected by means of stamps are in a sense stamp duties, for instance in England, estate duty, probate duty and succession duty are stamp duties because they are so collected, but it is doubtful whether a Court fee becomes a stamp duty within the meaning of the Scheduled Taxes Rules, Sch. I because it is collected by means of stamps. The stamp duties referred to in Sch. I mean some such duties are imposed by the Indian Stamp Act, and do not comprise court-fees comprised in the Court-Fees Act, even although in a sense they are stamp duties as being paid by stamps.

The sum charged upon a grant of probate or of letters of administration is not a tax or duty levied upon the property upon which the probate or administration operates, and it is not charged thereon as is estate duty in England, but it is merely a fee levied by the Court issuing the probate or letters of administration for the work done in this connection. This is so in spite of the fact that the fee is levied upon the value of the property. Courtfee on probate or letters of administration is rightly levied at the enhanced rate on the value of all assets whether in the province or outside. (*Greaves, J.*) *GEORGE THOMAS WILLIAMS IN THE GOOD OF.* 50 Cal. 597 : 27 C. W. N. 812 : 75 I. C. 466.

—(As Amended by Bengal Act IV of 1922) Sch. II Art. 17 (iii)—*Suit for mere declaration—Appeal—Court Fee—Basis of calculation—What appellant ought to have claimed—If to be considered*

Where a plaint or a memorandum of appeal asks only for a pure declaration, the court in computing court fees cannot go into the question whether he should also have asked for consequential relief. The effect of failing to claim consequential relief is for the final decision of the court. A fixed fee under Sch. II, Art. 17 (ii) is sufficient. (*B. B. Ghose, J.*) *IDOL SRI SRI GOKUL NATH JIN v. NEW BIRBHUM COAL COY. LTD.* 27 C. W. N. 972.

**COURT FEES AMENDMENT ACT (BIHAR AND ORISSA), ACT II of 1922 S. 1—*Applicability of—Appeal filed during long vacation before Assistant Registrar—Court-fee on memorandum—Vakalat judgment and decree—C. P. Code, O. 41, R. 1—Patna High Court Rules, Ch. II, R. 14.***

A memorandum of appeal was filed before the Assistant Registrar of the High Court of Patna on 18—1—1922 when the old Court Fees Act was in force with the Court-fee prescribed by that Act. The new Bihar and Orissa Court-Fees Act (II of 1922) came into force on 24—8—1922 under

## CR. P. C., S. 4.

which a larger court fee should have been paid by the appellant. The High Court of Patna was closed for the long vacation from 4—8—1922 to 22—10—1922 though the offices were open and the Registrar was on duty. Under Ch. II, R. 13 (3) of the Patna High Court Rules the Registrar is the proper person to receive memorandum of appeals. The appeal was filed and numbered only after the re-opening of the Court and the Taxing Officer required payment of the full court-fee under the Amending Act II of 1922.

*Held* (1) that there was nothing to prevent the presentation of the appeal during the vacation to a proper officer and such presentation is a valid presentation. 9 A 366 Ref.

(2) that under the Rules of the Patna High Court coupled with O. 41, R. 1, C. P. C., the Registrar was the proper person to receive appeals presented during the vacation, and in his absence, the judge.

(3) that the presentation during the vacation was not a valid presentation.

(4) that the appeal memorandum and the vakalat should be stamped under the new Court Fees Act; and

(5) that the copies of judgment and decree having been obtained before the Amending Act came into force, need only bear the court-fee required by the old Court-fees Act as it stood before the amendment. (*Jwala Prasad, J.*) *ANAND RAM PRAMHANS v. RAMGULAM SAHU.* 2 Pat. 264 : 1 Pat. L. R. 122 : 71 I. C. 426 : 1923 P. 150.

**CRIMINAL LAW AMENDMENT ACT, S. 17 (2)—Proceedings under—Prima facie case—Police report. See (1922) DIG. COL. 422. PARMANANDA AGARWALA v. EMPEROR.** 71 I. C. 49 (1) : 24 Cr. L. J. 1

**CRIMINAL PROCEDURE CODE, (V OF 1898)—Appeal—Dismissal for default—If proper—Procedure See PRACTICE—CRIMINAL APPEAL.** 21 A. L. J. 100.

—Ch. VIII—*Proceedings under—Nature of.*

Proceedings under Ch. VIII Cr. P. Code do not constitute a trial nor is the person who is proceeded against an accused person who has committed any offence. (*C. C. Ghose and Cuming, JJ.*) *BINODE BEHARI NATH v. EMPEROR.* 50 Cal. 985.

—S. 4 (1) (b)—*Complaint—Nature—Sworn statement—Written complaint.*

The sworn statement and written Complaint may be read together for the purpose of ascertaining the real nature of the complaint in any particular case. (*Spencer, J.*) *ARUNACHALAM CHETTY, Inve.* 45 M. L. J. 543 (2) : (1923) M. W. N. 876 : 74 I. C. 949 : 24 Cr. L. J. 837.

—S. 4 (h)—*Application to Court Inspector—If a complaint.*

Where a Superintendent after inquiring into various allegations against a Sub-inspector found they were untrue and sanctioned prosecution under S. 195 Cr. P. Code and directed the sub-inspector to submit an application by way of complaint, whereupon he sent the necessary

## CRIM. PRO. CODE (1898), S. 4.

papers to the Court Inspector who took proceedings, there is in effect a complaint. (*Lumsden, J.*)  
MEHR CHIRAGH DIN v. EMPEROR.

4 Lah. 359

—S. 4 (h)—*Report of Trial Magistrate.*

Where a Magistrate who tried a case sent up a report to the District Magistrate that the accused had made a certain alteration in a document filed in Court and had thus committed an offence, the report amounts to a complaint. (*Sulaiman J.*)  
SURAJ PRASAD v. EMPEROR. 21 A. L. J. 825 :

L. R. 4 A. 248 (Cr.) : 9 O. &amp; A. L. R. 1049.

—S. 4 (j)—*High Court—What is—European British subject—Plea of.*

The mere fact a person is an European British subject is not sufficient to make the first part of S. 4 (j) apply to him. He must plead the fact that is an European British subject, if he does not or cannot plead it, the Court can take no notice of it. In such cases the second part of S. 4 (j) will apply (*Krishnan, J.*)  
JEREMIAH v. JOHNSON.

45 M. L. J. 800 : 18 L. W. 895.

—S. 5 (2)—*Madras Abkari Act, Ss. 41 to 47*  
—Offence under Abkari Act—Mode of investigation—Inquiry under Cr. P. Code—Irregularity.  
See MADRAS ABKARI ACT Ss. 40, 47.

44 M. L. J. 231.

—Ss. 10 (2) and 197—*Power of Additional District Magistrate to give sanction under S. 197.*

The local Government having empowered all District Magistrates to pass orders of sanction under S. 197, the appointment of an Additional District Magistrate and the conferring on him of "all the powers of a District Magistrate under this Code" under S. 10 (2) imply that he can pass orders of sanction under S. 197. (*Wallace, J.*)  
KAKARLA CHINA CHENDRAYYA v. MADDUKURI SUBBARAYADU. 17 L. W. 226 :

71 I. C. 244 : 24 Cr. L. J. 116 : 1923 Mad. 338

—S. 16—*Bench magistrate—Changes during trial—Effect.*

Where the rules framed under S. 16 Cr. P. Code required a quorum of two in trials by Bench Magistrates, and a trial was commenced before two such persons, but in the course of the trial after some days one of them absented himself, his place being taken by another for the rest of the trial and finally all the-e joined in the judgment, the trial is vitiated and a retrial must follow. Case law referred to. (*Kanhaya Lal, A. J. C.*)  
BRIJ BHUKHAN v. RAM KIRAT.

1923 Oudh 163.

—S. 17—*Power of District Magistrate to direct a stay.*

There is no provision in the Cr. P. Code which would give the District Magistrate the power to stay proceedings in a Criminal Court subordinate to him and the High Court's power to pass such an order can only be exercised under its general powers of superintendence 23 Cal 610 : 30 M 216 Ref. (*Ayling, J.*)  
KRISHNA RAO v. SESHASUBRAMANIA IYER. 1923 Mad. 688.

—S. 30—*Offence not punishable with death—Magistrate if can try offence under S. 304, Penal Code—Practice.*

Y. D.—30

## CRIM. PRO CODE (1908), S. 69.

A magistrate empowered under S. 30 Cr. P. Code can try a case under S. 304 I. P. Code, though it would be more proper for him to commit the case to the Sessions. Proceedings before him are not *ultra vires*. (*Pipon, J. C.*)  
MIR ALAM v. EMPEROR.

69 I. C. 454 : 23 Cr. L. J. 726.

[See also 69 I. C. 459 where the scope of the ruling is explained by the same Judge, Ed.]

—S. 32—*Sentence—Enhancement in appeal—Powers of.*

A conviction by a second class magistrate under S. 406, I. P. C. and sentence of 3 months' simple imprisonment was changed in appeal to a fine of Rs. 400 or in default to rigorous imprisonment for a certain period—*Held*, the powers of an appellate Court to vary a sentence must be measured by those of the court of first instance and the variation was against S. 32, Cr. P. Code. (*Walsh and Kanhaya Lal, JJ.*)  
EMPEROR v. MUHAMMAD YAKUB ALI 45 All. 594.

—Ss. 145 and 225—*Offences under.*

The offences under Ss. 147 and 225, I. P. C. are not distinct offences and a person convicted of both offences is not liable to a separate punishment for each offence. 8 C. W. N. 305 : 8 C. W. N. 483 referred to. (*Newbould and Suhrawardy, JJ.*)  
SARAT CHANDRA GHOSH v. EMPEROR.

37 C. L. J. 171 : 74 I. C. 1043 : 24 Cr. L. J. 851 : 1923 Cal. 280.

—S. 54—*Attempt to arrest by police—Absence of warrant—Effect.*

On a complaint being made, a constable was sent after the accused, but he had no warrant with him. *Held*, he had sufficient authority under S. 54 Cr. P. C. to arrest, on the suspicion of having committed the offence. (*Kanhaya Lal, J.*)  
MAHADEO RAI v. EMPEROR. 21 A. L. J. 791 : 9 O. & A. L. R. 900 : L. R. 4 A. 251 (Cr.).

—S. 59—"In his view"—*Meaning of—Private arrest—Not handing over accused to policeman on the way—Effect.*

The words "in his view" in S. 59, Cr. P. Code should not be construed too strictly. Where three persons were engaged in stealing toddy, two of them upon the tree and another down below collecting the same and he was arrested by private persons, he can be said to have committed theft "in their view".

The mere fact that on the way to the Police station, they met a police constable on duty, but the accused was not placed in his charge does not constitute unnecessary delay within S. 59 (1). (*Krishnan, J.*)  
ARUMUGA COUNDAN IN RE 18 L. W. 818.

—Ss. 61, 167—*Production before court.*

The intention of the legislature is that an accused person should be brought before a Magistrate competent to try or to commit with as little delay as possible (*Mookerjee and Chatterjee, JJ.*)  
NAGENDRANATH CHAKRABARTI v. EMPEROR. 38 C. L. J. 388.

—Ss. 69, 70 and 71—*Notice to accused—Substituted service.*

## CRIM. PRO. CODE (1898), S. 77.

Where sufficient steps are not taken to serve the accused personally and there is want of reasonable diligence in that behalf, substituted service of a summons is improper (*Prideaux, A.J. C.*) JADHO v MANIK LALA.

6 N. L. J. 63 : 69 I. C. 627 : 23 Cr. L. J. 739 : (1923) Nag. 55 (1).

—S. 77—Warrant for search and arrest—Form of—Warrant not addressed to any particular person. See (1922) DIG. COL. 424. EMPEROR v SHANKAR DAYAL.

9 O. L. J. 667 : 24 Cr. L. J. 14 : 71 I. C. 62.

—S. 88—Absconding accused—Confiscation of property—Re-grant—Suit to recover—Maintainability

Plaintiff who had committed an offence absconded and his property which consisted of vatan lands were confiscated and sold under S. 88 of the Criminal Procedure Code. The plaintiff still failed to appear and the Government granted the property to the defendants. The plaintiff subsequently turned up and instituted a suit for recovery of possession of the property. Held, that by the confiscation the title of the plaintiff had been put an end to and the plaintiff had no right to sue. (*Macleod C. J. and Crump, J.*) DATTAJI NANA PATIL v. NARAYAN RAO.

25 Bom. L. R. 228 : 1923 Bom. 198

—S. 89—Sale of property—Right to sale proceeds.

Where property has been sold and subsequently an application under S. 89 Cr. P. Code is made and allowed, the applicant can only get the net proceeds of the sale of the property. (*Campbell, J.*) EMPEROR v. FAZAL DAD. 73 I. C. 269 : 24 Cr. L. J. 573.

—Ss. 90 and 537—Issue of warrant—Statutory form—Omission to record reasons—Effect of—Provisions if mandatory.

*Per Curiam*: (N. R. Chatterjee, J., dissentiente) If a Magistrate under section 90 of the Code of Criminal Procedure issues a warrant drawn up in the terms of Form VII of Schedule V of the Code, for the arrest, of any person as therein specified but does not first record his reasons in writing (that is, apart from the statement in the warrant), the warrant so issued is valid 38 C 789 overruled.

*Per Sanderson C. J.*: The words of section 555 of the Code of Criminal Procedure are not intended to supersede the provisions of section 90

The principle to be applied in considering whether the provisions of a statute or an Act, are imperative or directory is this: The Court must look to the subject-matter, consider the importance of the provisions that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act; and upon a review of the case in that aspect decide whether the matter is what is called imperative or only directory (*Sanderson, C. J., Chatterjee, Richardson, Buckland and Panton, JJ.*) THE GOVERNMENT OF ASSAM v. SAHEBULLA.

27 C. W. N. 857 : 38 C. L. J. 77 : 75 I. C. 129 : 24 Cr. L. J. 881 : 1924 Cal. 1. (F. B.)

—S. 103—Discrepancies.

Two of the witnesses present at the search stated that the articles produced, viz., silver bank

## CRIM. PRO. CODE (1898), S. 106

and band were produced from a *tind*, but a third witness stated that the *tind* contained a silver bank and made no mention of the other articles. No explanation was even suggested as to how the other article came to be there: Held that the circumstances under which these things were produced were not altogether beyond suspicion. (*Fforde, J.*) SAUDAGAR SINGH v. EMPEROR.

1923 Lah. 683.

—S. 103—Search—Independent witness.

One of the essentials for a valid search is the presence of independent witnesses to the search. (*Abdul Qadir J.*) SHER ALI v. EMPEROR.

1923 Lah. 79.

—S. 106—125 Chap. VIII Proceedings under nature of. See 50 C. 985.

—S. 106—Breach of the peace.

The expression "breach of the peace" implies some offence against the public 8. O. L. J., 318 Foll (*Wazir Hasan, A. J. C.*) MAHANT DURGA BHARATHI v. EMPEROR.

72 I. C. 955 : 24 Cr. L. J. 491 : 1923 Oudh 37.

—S. 106—Case referred by second class magistrate—Order passed, but trial directed to be conducted by second class magistrate

A joint magistrate, to whom a case was referred by a second class magistrate as the latter thought an order under S. 106, Cr. P. C. was necessary, passed the necessary order, but sent the accused for trial back to the latter. Held, the order was wrong. (*Daniels, J.*) DUKHI v. EMPEROR. 74 I. C. 448 : 24 Cr. L. J. 784.

—S. 106—Conviction for assault—Election Campaign—Troublesome character—Order if legal.

Where during an election campaign, the accused was convicted for assault and the magistrate holding he would prove troublesome, bound him over under S. 106, Cr. P. Code, the order was quite legal. (*Sulaiman, J.*) JAFAR HUSAIN v. EMPEROR. L. R. 4 All 259 (Cr.)

—S. 106—Execution of bond—When to be ordered.

An order under S. 106 must be passed at the time of conviction and passing of sentence. If it is passed at a subsequent stage it would be without jurisdiction. If the magistrate decided to start proceedings only subsequently, the only procedure open to him is under S. 107, Cr. P. C. (*Sulaiman, J.*) RAM ADHIN v. EMPEROR. 21 A. L. J. 839 : L. R. 4 A. 240 (Cr.) : 9 O. & A. L. R. 1085

—S. 106—Offence involving breach of the peace—Assault—Security for peace.

An offence under S. 325 I. P. C. involves the use of Criminal force and is, in that sense an assault, but the word "assault," as used in S. 106 of the Cr. P. Code refers to offence of assault as defined in S. 351 I. P. C. and is made punishable by S. 352. An offence under S. 325 does not always involve the breach of the peace.

(*Lindsay, J. C.*) DUBRI v. EMPEROR 71 I. C. 691 : 24 Cr. L. J. 227.

—S. 106—Offence under S. 323 I. P. C.—If involves breach of the peace.

## CRIM. PRO. CODE (1898), S. 106.

An offence under S. 323 I. P. C. involves a breach of the peace and action can be taken in respect thereof under S. 106 Cr. P. Code (*Dalal and Simpson, A. J. C.*) SHEO RAM v. EMPEROR

90 & A. L. R. 191 :  
72 I. C. 79 (2) : 24 Cr. L. J. 319 (2).

—S. 106—Order to give security to keep the peace—Offence under S. 323, I P. C.—Finding as to breach of the peace.

The Sessions Judge convicted a person of an offence under S. 323, I. P. C. and ordered him to give security to keep the peace without expressly finding that the accused caused a breach of the peace. It was found that the accused had assaulted a prosecution witness in a public place and caused him hurt which was the subject of the charge against the accused. Held that the offence of which the accused had been convicted implied the use of violence and a breach of the peace and that the order for security was proper (*Spencer J.*) RAMASWAMI THEVAN *In re*. 44 M. L. J. 485 :  
17 L. W. 499 : (1923) M. W. N. 314 :  
32 M. L. T. (H. C.) 297 : 72 I. C. 615 :  
24 Cr. L. J. 455 1923 Mad. 618.

—S. 106—Order for security for keeping the peace—Conviction for wrongful confinement.

S. 106 of the Cr. P. Code can only be applied when the person concerned has been convicted of an offence involving a breach of the peace. The offence must be one of which a breach of the peace is in law a necessary ingredient. It cannot be said that a breach of the peace is necessarily involved in the commission of the offence of wrongful confinement (*Broadway, J.*) MAHOMAD AFZAL v. EMPEROR.  
71 I. C. 879 :  
24 Cr. L. J. 271.

—S. 106—Security for good behaviour—Rejection of sureties—Grounds for—Right of appeal.

Sureties who have been rejected in a case of security for keeping the peace or for good behaviour has no *locus standi* to challenge the order.

Sureties should not be rejected merely because they are not close neighbours. But inability to control is a good ground. The nature of security required is personal and not of property. (*Ashworth, A. J. C.*) EMPEROR v. MOHAMMAD BAKSH.  
26 O. C. 284.

—S. 106—(1 and 3)—Security to keep the peace—Jurisdiction of Appellate Court.

Held following 35 C. 434 that the appellate Court cannot exercise the power given by S. 106 (3) Cr. P. Code, where the conviction has not been by a Court specified in sub S. 1, (*Newbould and Suhrawardy, JJ.*) EUSAFALI AHMED KHAIKARAJ v. EMPEROR.  
72 I. C. 68 : 24 Cr. L. J. 308

—S. 106 (3)—Appellate Court—Powers of—If limited by powers of trial court.

The powers of an appellate court to take action under S. 106 (3) are not limited by the powers of the trial Court to take action under the section, so that even if the trial court could not demand security, the appellate court can exercise the power. (*Prideaux, A. J. C.*) HASANBEG v. EMPEROR.  
19 N. L. R. 154.

## CRIM. PRO. CODE (1898), S. 107.

—S. 106 (3)—No finding as to breach of the peace—Appellate Court—If can pass order under.

In the absence of a finding that any breach of the peace occurred, an appellate court has no power to direct the accused to enter into a bond under S. 106 of the Cr. P. Code (*Kumaraswamy Sastry, J.*) THIRUMAL REDDY v. EMPEROR.  
1923 Mad. 133.

—S. 106 (3)—Order requiring security—Power of appellate court to demand

On an appeal from an order of a second class magistrate an appellate court cannot pass an order requiring security. 5 P. R. 1018 foll. (*Harrison, J.*) KARAM SINGH v. EMPEROR.  
1923 Lah. 91.

—Ss. 107, 118 and 406—Appeal when lies.

An order under S. 107 directing security for good behaviour to be given can be appealed against under S. 406 Cr. P. Code, but no appeal lies against an order for security for keeping the peace under S. 107 read along with S. 118, Cr. P. Code. (*Prideaux, A. J. C.*) SHAMRAO v. EMPEROR  
19 N. L. R. 160

—S. 107—Consent to be bound over—Effect.

A court is perfectly entitled to act upon a solemn consent given before it by the accused person. (*Walsh, J.*) GHARIBA v. EMPEROR.  
21 A. L. J. 881.

—S. 107—Joint trial—Contending parties.

It is not illegal to hold a joint trial under S. 107 Cr. P. Code of two persons who were not contending parties, but were on the same side. (*Stuart, J.*) GANGA PRASAD v. EMPEROR.  
1923 All. 476.

—Ss. 107, 110—Joint trial of members of gang—Propriety of.

Though there is no legal prohibition in trying a number of persons under S. 107, Cr. P. C. it is highly unfair and unjust to proceed against them jointly unless it is apparent they form a gang. The case of each has to be considered separately and this is not likely to be effected if the trial is joint. (*Sulaiman, J.*) MUHAMMAD ISMAIL v. EMPEROR.  
21 A. L. J. 841 :  
L. R. 4 A. 241 (Cr.).

—S. 107—Joint trial of several accused.

If a gang of disorderly persons join together in jointly committing acts of violence or criminal intimidation, proceedings under the security section against the whole gang in the same case are proper and it suffices in such cases that some members of the gang committed various acts. It is not necessary that the evidence should establish that on every occasion the whole gang were together. It is sufficient if the evidence established that there is a gang of persons joining together to commit such acts as the security section exists to prevent. (*Prideaux, A. J. C.*) BAKARAM v. EMPEROR.  
69 I. C. 629 : 23 Cr. L. J. 741 :  
1923 Nag. 53.

—S. 107—Nature of bond under—Order refusing to forfeit—Who can appeal.

A bond under S. 107 is not given to any particular person but to the Court and no pp

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party is entitled to appeal against an order refusing to forfeit it. An order of forfeiture can only be passed after notice to the party affected. (*Daniels, A. J. C.*) SARJU v. THAKURAIN JAI RAJ KUAR. 9 O. & A. L. R. 119

—Ss. 107, 110—Order passed on insufficient material. If can be interfered with by High Court. Cr. P. Code, S. 435. 38 C. L. J. 198.

—S. 107—Proceedings under—Limitation of—Breach of the peace—Direction by District Magistrate.

If a District Magistrate thinks it necessary, in order to prevent a breach of the peace, to take proceedings under S. 107, Criminal Procedure Code, against the petitioners he should himself draw up such proceedings and he might then transfer the case to a Subordinate Magistrate for hearing. But he should not direct proceedings to be drawn up by a Subordinate Magistrate nor should the Subordinate Magistrate draw up proceedings merely because the District Magistrate has ordered him to do so. He has full power under S. 107, Criminal Procedure Code, to take action under that section when he thinks it is necessary to do so to prevent a breach of the peace. But in deciding as to the necessity for action he must come to a conclusion of his own accord on the materials before him and act accordingly. (*Newbould and Suhrawardy, JJ.*) HANIF SHEIKH v. JABANI MANDAL

72 I. C. 367 : 24 Cr. L. J. 367.

—Ss. 107 and 145—Proceedings under S. 107—Power of District Magistrate to interfere.

A District Magistrate has no power to set aside an order made by a Sub-Divisional Magistrate under S. 107 Cr. P. Code or to direct the Sub-Divisional Magistrate to take proceedings under S. 145 Cr. P. Code. It is open to the District Magistrate to refer the matter to the High Court. (*Bucknill, J.*) BANSIDAR MARWARI v. INDAR NARAIN SINGH 1 PAT. L. R. 93 (Cr.) :

78 I. C. 161 : 24 Cr. L. J. 545 : 75 I. C. 65.

24 Cr. L. J. 865 : 1923 P. 438.

—S. 107—Scope of. See (1922) Dig. Col. 426. AINUDDIN v. EMPEROR

71 I. C. 694 : 24 Cr. L. J. 230

—Ss. 107 and 125—Security for keeping the peace—Powers of the District Magistrate on appeal—Evidence to sustain an order for security. See (1922) Dig. Col. 427. BAINES v. EMPEROR 6 N. L. J. 274

—S. 107 (3) and (4)—Bail when to be refused.

Where the proceedings have been instituted against a person under section 107 it is only in the special circumstances referred to in Sub-Sections (3) and (4) of that Section that the law empowers a Magistrate to detain a person in custody until the completion of the enquiry. The Sub-section can only be put into operation. When a Magistrate, who has no powers to proceed under Sub-section (1) of Section 107 is led to believe that a person is likely to commit a breach of the peace or to disturb the public tranquillity or to do any wrongful act which might possibly occasion a breach of the peace or disturbance and cannot, by

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any other means, prevent the possibility of such an occurrence, that he with his limited powers can arrest a person and send him then to another Magistrate who has got adequate powers for dealing with the case 32 C. 80 add 31 M. 315 Ref. (*Bucknill, J.*) WAHARI MANDER v. EMPEROR. 74 I. C. 857 : 24 Cr. L. J. 825 : 1923 P. 527.

—Ss. 108 and 397—Applicability of—Sentence of imprisonment—Withdrawal of security.

On 23—5—1921 the applicant was ordered to furnish security for a period of one year under S. 108, Cr. P. C. In default of finding security it was directed that he should undergo rigorous imprisonment for the same period. The accused furnished the security required so that the alternative sentence of rigorous imprisonment did not come into operation. On 31—7—1921 the applicant was convicted of a substantive offence under S. 500, I. P. C. and sentenced to three months' simple imprisonment. He however remained on bail until 23—11—1921 when the bail bond was cancelled. In the meanwhile on 16—10—21 the applicant had withdrawn his security under S. 108, Cr. P. Code and had been committed to prison under that section. Held that the substantive sentence of three months' imprisonment should commence on the date when the bail bond was cancelled namely 23—11—1921. 30 A. 334 dist (*Daniels, A. J. C.*) GANESH SHANKAR v. EMPEROR. 73 I. C. 321 :

24 Cr. L. J. 577 : 1923 Oudh 56 (2)

—S. 108—Security for good behaviour—Dissemination of seditious matter—Proof of authorship, publication and dissemination—Declaration under S. 18 of the Press and Registration of Books Act.

Three petitioners were proceeded against under S. 108 Cr. P. Code as the author, printer and publisher respectively of a pamphlet which offended Ss. 124 A and 153 A, I. P. C. The names of the three persons were printed on the pamphlet as its author, printer and publisher. There was no direct evidence to connect any of the three persons with the pamphlet in question or of the dissemination thereof. From the written information furnished by the second petitioner under S. 18 of the Press and Registration of Books Act it appeared that the three petitioners were the author, printer and publisher of the pamphlet. The declaration made under S. 4 of the Act mentioned the second petitioner as the keeper of the press. Held that on the evidence there was nothing to prove that the first petitioner was the author of the pamphlet. Though the second petitioner was the printer, yet as he was not shown to have had any knowledge of the matter published in it, there was no case against him. The third petitioner as publisher having abetted the dissemination of the objectionable matter the proceedings against him were justified. (*Shah, A. C. J. and Crump, J.*) EMPEROR v. PITRE, 47 Bom. 438 :

25 Bom. L. R. 97 : 1923 Bom. 255.

—S. 109 (a)—Giving false name and then correcting it—If concealing presence.

Action cannot be taken under S. 109 (a), Cr. P. C. in a case where a person on being asked his name by the police first gives a false name and then corrects it and there is nothing else to show

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he was taking precautions to conceal his presence  
(*Sulatan, J.*) SHEO PRASAD v. EMPEROR.

21 A. L. J. 847 : L. R. 4 A. 237 (Cr.).

—S. 110—*Action taken on police diary—Binding over accused—Evidence.*

Where the accused was arrested on a charge of dacoity but an account of want of evidence he was not even placed before Court, it is contrary to all principles of law to make use of this evidence to bind him over as a bad character.

A magistrate cannot in proceedings under S. 110 Cr. P. C. act on information not given in evidence but obtained from a perusal of special police dairies, (*Daniels, J.*) JHANDU SINGH v. EMPEROR, L. R. 4 All. 216 (Cr.).

—S. 110—*Association with persons of bad character.*

The evidence against the petitioner consisted of the statements of a Sub-Inspector of Police and some others who stated that the petitioner was a habitual thief and that he associated with persons of bad character. In 1922 the petitioner was suspected on three occasions under section 457, Penal Code, and on two of these occasions his house was searched. It was however, admitted that though the petitioner's house was searched on two occasions no stolen property was ever found in his house and as to his having been suspected of having committed an offence under section 457, the petitioner was never criminally prosecuted and no written complaints were ever made to the police against him. The petitioner produced many witnesses of respectable position who testified to his good character and who deposed that he was not a habitual thief by reputation. *Held* that the evidence on the record was not sufficient to justify action being taken against him under section 110. Cr. P. Code. (*Moti Sagar, J.*) ABDULLH v. EMPEROR. 1923 Lah. 419

—S. 110—*Enmity of prosecution witnesses—Failure to consider—Effect.*

Where in passing an order under S. 110, Cr. P. C. the court fails to consider the fact that the prosecution witnesses were the enemies of the accused and also failed to advert to the facts which rendered it unlikely that the accused should be a burglar, the order cannot be sustained. (*Dalal, J. C.*) GUR DAYAL v. EMPEROR, 9 O. & A. L. R. 918

—S. 110—*Evidence of bad character—Nature of—Private enquiry by the Magistrate—Effect.*

Where the evidence for the prosecution is partly inadmissible, partly inconclusive and hearsay, vague and unsubstantial and there is nothing definite proved against them and no evidence called against them from their own village, but there are a number of persons of good character and position from their village itself and from the neighbouring villages who speak well of these men while nobody has been able to suggest that they have got resources for living as they do live, without support from theft or bad means of livelihood, *Held*, that it would be unfair to brand these men as bad characters upon this evidence. No doubt a Magistrate is compelled in the performance of his duties to make private enquiries as to

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the character of his neighbourhood and as to the persons reputed to be of bad character and likely to cause trouble. These enquiries are necessary to an executive officer having to inform himself of the nature of the population committed to his charge but where it is shown, that the Magistrate has allowed actual information *ad hominem* to influence his judgment in a judicial decision against particular individuals brought before him by process of law, his order would be quashed as being vitiated by the admission of such information. (*Walsh, J.*) ASHIQ ALI v. EMPEROR. 21 A. L. J. 513 : L. R. 4 A. 126 (Cr.) : 73 I. C. 337 : 24 Cr. L. J. 593 : 1922 A. 596.

—S. 110—*Evidence of suspicion.*

Evidence as to the accused having been suspected in particular cases is clearly not evidence on the basis of which any person could be bound over, yet when evidence of general repute has been given, the facts that the accused have been suspected in a large number of cases may be admissible as corroboration. Conversely the fact that the accused had never been suspected in any case might tend to weaken the evidence of general repute. (*Daniels, J.*) GUDRI KHATIK v. EMPEROR. 1923 A. 595.

—Ss. 110 and 117 cl. (4)—*Joint trial of several accused—Evidence of bad repute—Prejudice.*

Ordinarily under S. 110 of the Cr. P. Code every person has to be tried separately for the offences enumerated therein. A joint trial is only permissible when two or more persons have been associated for the purpose of committing the offences mentioned in S. 110 cl. (a) to (f) which are under enquiry. Unless this circumstance is established, a joint trial is illegal and the conviction would be set aside. In a case under S. 110 of the Cr. P. Code in which the evidence of bad character of the accused persons and of the individual notorious acts committed by them form integral part of the offence, it is impossible to conceive that the evidence led against one will not prejudice the case of the other accused persons assembled together in the same dock (*Jwala Prasad and Ross, JJ.*) JAI SAO v. EMPEROR. 1923 Pat. 8 : 1923 F. 104.

—S. 110—*Order based on vague statements—Legality.*

The prosecution evidence in a case under S. 110 Cr. P. C. consisted of witnesses who said that according to the opinion of the neighbourhood, the accused was a thief and dacoit. In the absence of details, *held* the evidence was too vague to base an order under S. 110, Cr. P. C. (*Dalal J. C.*) RAGHU LATT v. KING EMPEROR.

9 O. & A. L. R. 517 : 74 I. C. 536 : 24 Cr. L. J. 791.

—Ss. 110 and 423—*Powers to enhance security.*

Any accused in a *badmashu* case who is able to produce a large number of defence witnesses is not necessarily entitled to a discharge. Although the word "alter" in section 423 (c) literally includes an alteration which increases the severity of the order, still the whole tenor of the Section



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is that the appellate Court can make any necessary alteration in the terms of the order of the Court below but it has no power to increase the severity of the penalty imposed by the trial Court. Under S. 123 imprisonment follows automatically on failure to furnish the security. Such a result cannot be within the intention of the Legislature (*Daniels, J. C.*) *RAMESHWAR BAKSH SINGH v. EMPEROR.* 1923 Oudh 44 (2).

—S. 110—Order under—If can be revised by Sessions Judge. See CR. P. C., S. 435. 1923 All. 596

—S. 110—Power of the Magistrate—Information—S. 192 it applies. See (1922) DIG. COL. 1085 *HIRANAND OJHA v. EMPEROR.*

4 Pat. L. T. 44 : 1 Pat. 621 : 71 I. C. 79 : 24 Cr. L. J. 31.

—Ss. 110 and 439—Proceedings under—Several accused—Legality of—Evidence of friends and relations—Value of Evidence—Duty of High Court to consider.

In proceedings under S. 110, Cr. P. Code against a particular individual evidence should be confined to his case alone unless the case is that he has a confederate or partner to whom all the evidence is equally applicable. Where witnesses voluntarily come forward as friends or associates of the accused and give evidence it ought not to be brushed aside unless the witnesses are discredited as regards their good faith and honesty. Evidence of general repute by persons having no personal knowledge of the accused is insufficient. It is open to a District Magistrate to lay down rules for the guidance of his subordinates so as not to allow an unnecessary large number of witnesses to be examined. In revision the High Court would weigh the evidence and see whether the case has been considered from the point of view of the accused and if the evidence for the defence is equally good as that of the prosecution, the High Court would quash the conviction. Mere repetitions unaccompanied by direct evidence personally affecting each accused or accompanied by direct evidence which is worthless and incredible, is insufficient in a case under S. 140, Cr. P. C. (*Walsh, J.*) *ANGNOO SINGH v. EMPEROR.* 45 A. 109 : 71 I. C. 865 : 24 Cr. L. J. 257 : 1923 A. 25

—S. 110—Proceedings under—Evidence of repute—Suspicious occurrences.

Evidence of instances in which the accused has been suspected is certainly not evidence of general repute, nor evidence on which the Court could bind the accused over under S. 110, Criminal Procedure Code but when independent, evidence of the accused's reputation has been given, evidence that he has been suspected in a number of instances may be admissible as corroboration. (*Daniels, A. J. C.*) *SANKU v. EMPEROR.*

9 O. & A. L. R. 269 : 73 I. C. 352 : 24 Cr. L. J. 608.

—S. 110—Security proceedings—Evidence—Private information.

Where proceeding under S. 110 of the Cr. P. Code are initiated against a person before a Magistrate, although the trying magistrate cannot use the information which he already possesses

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as regards the accused as evidence in the case. Yet he can use it as a check to test the nature of the evidence with which he has to deal (*Walsh, J.*) *EMPEROR v. DARBARI SINGH.* 45 A. 749.

—S. 110—Successive proceedings under the section.—When justified.

Where the accused was a substantial cultivator and the only witness of his own neighbourhood who deposed against him has admitted enmity with him, and the previous proceedings against the accused which resulted in his discharge, and only a short interval had elapsed between that order and the institution of the present proceedings. Held that an order under S. 110 Cr. P. Code was not justified. (*Daniels, A. J. C.*) *SHAKUR v. EMPEROR.* 26 O. C. 242 : 9 O. & A. L. R. 90 : 73 I. C. 261 : 24 Cr. L. J. 565.

—S. 110—Witnesses—Time to produce.

Where witnesses are cited for the defence in proceedings for security for good behaviour time and opportunity should be given to have them produced and then only should orders be passed (*Buckland and Cuming, JJ.*) *PONTHIRAM JOAB v. EMPEROR.* 38 C. L. J. 285

—S. 114—Arrest when justified—Order—What to contain

S. 114, Cr. P. Code, contains two stringent elements obviously directed against any ill-considered precipitancy on the part of the magistrate. He must be of opinion that the only way of preventing a breach of the peace is to commit the person to custody, and he must put on record the substance of the Police or other report by which he is influenced. (*Foster, J.*) *MANIRUDDIN v. EMPEROR.* 74 I. C. 861 : 24 Cr. L. J. 829.

—S. 118—Security for good behaviour—Forfeiture—Commission of offence—Proof of

When security is given for good behaviour, neither the principal nor surety can be made liable for an offence which occurred before the security was given. The period for which a person is bound over to be of good behaviour begins from the date on which he was bound over.

The conditions under which a security bond taken under Chapter VIII, Criminal Procedure Code, may be forfeited are given in S. 121. In the case of a bond for good behaviour taken under the provisions of S. 110, Criminal Procedure Code, the commission or attempt to commit, or the abetment of any offence punishable with imprisonment, wherever it may be committed, is a breach of the bond. The word "commission" in this section does not necessarily imply a conviction. It is true that the conviction is ordinarily considered necessary to establish that an offence has been committed.

At the same time there is no authority for the extreme view that the commission of an offence cannot be proved otherwise than by a conviction, the flight of a person accused of dacoity to the independent Afridi territory raises the strongest possible presumption of the absconder to join a band of dacoits. In such cases, a bond for good behaviour given under S. 118, Criminal Proce-

## CRIM. PRO. CODE (1898), S. 122.

Code, on proceedings taken under S. 110 of the same is clearly liable to forfeiture, provided that the evidence is produced to show either that the person bound over committed an offence in British India prior to his absconding and during the currency of the bond, or that during the currency of the same he committed any offence during his outlawry punishable with imprisonment (*Pipon, J. C.*) **EMPEROR v. EMPEROR.**

73 I. C. 332 : 24 Cr. L. J. 588

## S. 122—Sureties—Competence of—Residence.

In considering whether a proposed surety is fit under S. 122 Cr. P. C., the magistrate has to consider whether he would be in a position to exercise suitable control and supervision over the accused. Mere solvency of the surety may not invariably be sufficient to ensure the good conduct of the accused, any more than his residing at a district place may be a sufficient ground for rejecting him. If the sureties undertake to keep the accused within the area of their observation supervision and control, there can be no inherent objection to their being accepted, though they live 18 miles from the place of the accused (*Kanhaya Lal, J. C. and Simpson, A. J. C.*) **EMPEROR v. RAMESHAR TEWARI**

10 O. L. J. 299 : 9 O. & A. L. R. 526 :  
74 I. C. 539 : 24 Cr. L. J. 795 : 1923 Oudh 165

## S. 122—Surety for good behaviour—Rejection of—Grounds for.

The applicant was bound over to be of good behaviour for a period of one year. He furnished two sureties, one of whom was accepted by the trying Magistrate, and the other was not accepted on the ground that he had already stood surety for some other man. Held that that ground was clearly insufficient (*Kanhaya Lal, J. C.*) **GHISA v. EMPEROR.**

9 O. & A. L. R. 40 :  
73 I. C. 53 (1) : 24 Cr. L. J. 517 (1).

## S. 123—Reference under—If can be transferred to Additional Sessions Judge. See CR. P. CODE S. 193 (2).

27 C. W. N. 996.

## Ss. 123 (2) and 193 (2)—Sessions Judge—Transfer of case under S. 123 (2) to Additional Sessions Judge.—Bengal Government notification.

Under the notification of the Government of Bengal judicial No. 113, J. D. of the 19th of June 1916, purporting to be an order under S. 193 (2) Criminal Procedure Code, a Sessions Judge has power to transfer a bad livelihood case referred to him under S. 123 (2) of the Criminal Procedure Code, to the Assistant Sessions Judge. (*Walmsley and Chotzner, JJ.*) **BINODE BEHARI NATH v. EMPEROR.**

50 C. 229 : 1923 Cal. 649.

## S. 125—Application under power of District Magistrate to cancel bond.

An application under S. 125 Cr. P. Code is not an appeal and does not give power to the District Magistrate to review an order passed by a Deputy Magistrate on the ground that it was improperly passed. 35 A. 143; 39 A. 466; 41 A. 651, 44 A. 614 referred to. (*Daniels, J.*) **RAM DIN SINGH v. NAUJADAK SINGH.**

1923 A. 484 (1) : 71 I. C. 668 : 24 Cr. L. J. 204.

## CRIM. PRO. CODE, (1898), S. 133.

## S. 125—Powers of District Magistrate—Reference to High Court, in the absence of appeal to District Magistrate.

The jurisdiction of a Dt. Magistrate under S. 125 Cr. P. C. is neither appellate nor revisional and his power is merely confined to examining the record to satisfy himself whether it was any longer necessary to keep the parties under the bond. The act is not a judicial act which he is called upon to exercise even before proceedings are submitted to him, a reference can be made to the High Court as to the propriety of the proceedings. (*Dalal, A. J. C.*) **EMPEROR v. BALWANT SINGH.**

9 O. & A. L. R. 344 : 73 I. C. 504 :  
24 Cr. L. J. 616.

## Ss. 125 and 107—Scope of—Powers under See (1922) DIG. COL. 431. MONMOHAN DASS v. BABU LALL.

73 I. C. 515 : 24 Cr. L. J. 627.

## S. 132.—Police officer in charge of patrol—Boat—Firing on crowd—Prosecution—Sanction if necessary.

A police officer in charge of a patrol boat who holds a rank below that of an officer in charge of a police station has no power to disperse by force an unlawful assembly. Consequently no sanction is required for his prosecution for having fired on an unlawful assembly for the purpose of dispersing it. (*Newbould and Suhrawardy, JJ.*) **MAHOMED YUNUS v. EMPEROR.**

50 C. 318 : 1923 Cal. 517.

## Ss. 133 and 135—Appointment of Jury—No verdict—Order under S. 141—Rights of petitioner.

On an application under S. 133, Cr. P. Code for removal of an encroachment the opposite party moved for the appointment of a jury under S. 135 Cr. P. Code and a jury was appointed. The foreman of the jury simply returned the papers without the verdict whereupon the Magistrate made the order absolute under S. 141 Cr. P. Code. Held that the magistrate had jurisdiction to pass the order, but he should have done after giving the party an opportunity of showing cause and producing such evidence as he wanted, 13 C. W. N. 367 foll. (*Adami, J.*) **JIBLAL TELI v. GENA SAHU.**

4 Pat. L. T. 15 : 1 Pat. L. R. 164 (Cr.):  
72 I. C. 956 : 24 Cr. L. J. 492.

## S. 133—Bona fide dispute—Procedure—Report of another Magistrate—Action on,

A Magistrate is competent to make a conditional order absolute upon the report of a subordinate magistrate to whom the matter had been referred.

Where there is a bona fide question as to the public nature of the subject of dispute, the question should be left to a civil court for adjudication. But whether there is a bona fide question is for the magistrate to decide. (*Bucknill, J.*) **CHANDRIKA KOERI v. BUDHU DUSADH.**

73 I. C. 802 : 24 Cr. L. J. 690

## S. 133—Essentials of—Railway land.

There is no warrant for the view that railway land is necessarily a public place with regard to which action under S. 133 Cr. Code can be taken. There must be a finding that the land encroached upon is in a way which is or may be lawfully

## CRIM. PRO. CODE (1898), S. 133

used by the public (*Macpherson, J.*) RANGI  
SAH v B, N. W. RY. CO 4 Pat. L. T. 402 :  
1 Pat. L. R. 154 (Cr.) 74 I. C. 1047 :  
24 Cr. L. J. 855 : 1923 P. 540.

—Ss 133, 134 and 135—*Highway—Obstruction—Duty of Magistrate to determine whether a place is highway—Communication of order*

When an order under S. 133 Cr. P. Code is communicated to those concerned, it is immaterial that the method in which it was served on them is not strictly in accordance with the provisions of S. 134 Criminal Procedure Code.

The duty of determining whether the site of the obstructions is a public place or a public way is cast by statute on the Magistrate in the first instance, and under no circumstances can it be left to the Jury. If the Magistrate finds on the parties appearing before him to show cause against the conditional order that a question of title to the *locus in quo* is involved, he must refuse to act in the particular case unless he comes to the conclusion that the claim of title is not *bona fide*. Further, unless he finds that the place or the way, as the case may be, is public, he has no power to proceed with the investigation, where it is apparent on the face of the order itself that this question which goes to the root of the Magistrate's jurisdiction, has been wrongly left to the jury the proceedings are bad.

Where questions as to public nature or private ownership of the *locus* of an obstruction are left to a jury, the order of the Magistrate referring to the determination of such a question to the jury is bad and should be quashed.

This has been held even in cases where the defect in the proceedings does not appear, that is, where a want or an excess of jurisdiction is apparent on the face of the proceedings themselves. Where the order of the Magistrate is itself indefinite or ambiguous, the objection to allowing an order in such a case to stand is far stronger (*Scott Smith and Forde, JJ.*) KHUSHI RAM v EMPEROR. 4 Lah. 224 : 5 Lah. L. J. 420 : 72 I. C. 617 : 24 Cr. L. J. 457 : 1923 Lah. 525.

—S. 133—*Order for removal of obstruction—Inquiry—Impropriety of.*

An order under S. 133 Cr. P. Code for removal of a building on the ground that it obstructs a street cannot be made without taking evidence. 32 P. R. 1917 Cr. Ref. (*Zufar Ali, J.*) BHEDU v. EMPEROR. 5 Lah. L. J. 81.

—S. 133—*Procedure under—Order based on oral enquiry—Legality.*

The procedure to be followed in cases regarding public nuisance is as in a summons case and evidence and must be recorded. An order based on an oral enquiry is illegal. (*Moh Sagar, J.*) MAM CHAND v. EMPEROR. 73 I. C. 503 : 24 Cr. L. J. 615.

—S. 133—*Public nuisance.*

The existence of a genuine dispute as to title suitable for decision by the Civil Court is a sufficient ground for holding that the conditional order is not reasonable and proper. (*Dalai, A.J.C.*) BHAGWAN DAS v. EMPEROR. 9 O. & A. L. R. 35 : 73 I. C. 523 (2) : 24 Cr. L. J. 635 (2) : 1923 Oudh 152.

## CRIM. PRO. CODE (1898), S. 137.

—S. 133—*Public way—Existence of, disputed—Jurisdiction of Magistrate.*

It cannot be said that the moment a *bona fide* dispute as to title is raised by the defendant, the jurisdiction of the magistrate is ousted and the magistrate is bound to stop the proceedings and to refer the parties to a civil suit. 28 A. 98 not foll. ; 49 C. 682 foll.

The Magistrate must deal with an alleged "public" way even though it is disputed. But it is obvious that these summary powers were or mainly intended to be exercised in cases where there was no question that the way was one vested in the public, and when that question is seriously disputed, and its decision becomes a difficult matter of mixed fact and law, a Magistrate clearly has jurisdiction to exercise his discretion by declining to decide it, and sending the parties to a civil court. It is not open to the Magistrate to convert private property into public merely because it looks as though it ought to be, and because to do so would be convenient to a section of the public who have enjoyed permissive user over it. (*Lindsay, Daniels and Walsh, JJ.*) ABDUL WAHID KHAN v. ABDULLAH KHAN.

45 A. 656 : 21 A. L. J. 529 : L. R. 4 A. 105 (Cr.) : 74 I. C. 849 : 24 Cr. L. J. 817 : 1924 A. 1

—Ss. 133, 135 and 141—*Reference to jury—No report-order without enquiry by magistrate—Legality of the procedure.*

Where a magistrate made a conditional order under S. 133 Cr. P. Code absolute without making any enquiry on the failure of the jury appointed to submit its report within the date fixed, Held that the order was illegal. If for any reason the jury does not return its verdict, the magistrate must enquire into the case before passing an order. (*Bucknill J.*) AJODHYA TEWARI v. EMPEROR. 4 Pat. L. T. 13 : 1 Pat. L. R. (Cr.) 22 : 73 I. C. 327 : 24 Cr. L. J. 583 : 1923 P. 131

—Ss. 137 and 138—*Bona fide dispute.*

Where there is *bona fide* dispute as to whether an encroachment exists or not, S. 138 should not be applied in order to relieve the Government of the necessity of filing a civil suit. The existence of a genuine dispute as to title suitable for decision by the Civil Courts is a sufficient ground within the meaning of S. 137 for holding that the order under S. 137, where, the alleged encroachment has been in existence for over 20 years, is not reasonable and proper. 15 Cal. 564 toll. (*Danies, J. C.*) RAM LAKHAM v. EMPEROR. 72 I. C. 958 : 24 Cr. L. J. 494 : 1923 Oudh 22.

—S. 137—*Duty of Court.*

In taking evidence under S. 137 Cr. P. C. in a case where the public nature of the way is disputed, it is incumbent on the Magistrate to determine whether the claim is a *bona fide* one and if he finds it to be so, to stop proceedings and give the party time to establish his right in the Civil Court. (*Macpherson, J.*) RANGI SAH v. B. N. W. RY. CO. 4 Pat. L. T. 402 : 1 Pat. L. R. 154 (Cr.) : 74 I. C. 1047 : 24 Cr. L. J. 855 : 1923 P. 450.

## CRIM. PRO. CODE (1898), S. 137.

—Ss. 137 and 140—*Order of Magistrate regarding nuisance—Disobedience—Power of successor of Magistrate to declare order to be illegal.*

An order for removing a nuisance from a tank by filling it or re-excavating it was made absolute by a Sub-Divisional Magistrate on 29-10-1920. The respondent did not obey the order and thereupon the petitioner applied to enforce the order to the successor of the Magistrate. The succeeding magistrate rejected the application on the ground that the prior order was an illegal order. *Held* that the succeeding Magistrate had no power to go behind the order of his predecessor or to question its legality. The prior order having been made with jurisdiction was not a nullity and it was not open to the succeeding Magistrate to sit in judgment over it as a Court of appeal. (*Newbould and Suhrawardy, J.J.*) KIRAN CHANDRA CHOWDHURY v. RAMESH CHANDRA CHOWDHURY. 72 I. C. 77 : 24 Cr. L. J. 317 : 27 C. W. N. 459 : 1923 Cal. 589

—S. 144—*Authority to act.*

In passing orders under S. 144, Cr. P. C., the record should show in clear and unmistakable terms the authority under which a Magistrate taking action professes to act. (*May Oung, J.*) U. THUDAMAWARA v. EMPEROR. 1 Rang 49 : 74 I. C. 65 : 24 Cr. L. J. 737.

—S. 144—*Breach of the peace—Power to stop prayers in a mosque—Jurisdiction of Magistrate.* See (1922) DIG. COL. 433. MAHOMED ISMAIL v. BARKAT. ALI. 71 I. C. 507 : 24 Cr. L. J. 154.

—Ss. 144 and 145—*Difference between.* See (1922) DIG. COL. 436. KAMLA PRASAD SINGH v. GOBIND SAHAY. 71 I. C. 785 : 24 Cr. L. J. 241.

—S. 144—*Ex parte orders—Legality—Adjournment.* See (1922) DIG. COL. 434. BENO WARI LAL RAM v. PROTAB KRISHNA MAJUMDAR. 71 I. C. 516 : 24 Cr. L. J. 164

—S. 144—*Orders under—Temporary injunction of Civil Court—Effect of*

Successive extensions of an order under S. 144 Cr. P. Code are invalid but they can be supported as fresh orders. Such successive orders may amount to an abuse of the process of court especially when the civil court has passed an order of temporary injunction against one party. It is the duty of the criminal courts to respect the opinions of civil courts and in taking steps to preserve peace, to take action only against those who are infringing the rights of others and protect those who wish to exercise their right and not prohibit the latter's lawful enjoyment of rights. 27 M. L. J. 628 : 22 M. L. J. 251 : 20 C. W. N. 758 Ref. (*Ramesam, J.*) MURARI NAICKEN v. AIYASAMI NAICKEN. 69 I. C. 369 : 23 Cr. L. J. 689 : 1923 Mad. 15.

—Ss. 144, 145 and 146—*Preliminary order—Attachment—Restoration of property to one of the parties—Effect.* See (1922) DIG. COL. 435. PALANI GOUNDAN v. KULANDA VELU GOUNDAN. 72 I. C. 541 : 24 Cr. L. J. 429.

## CRIM. PRO. CODE (1898), S. 144.

—Ss. 144 and 145—*Scope of—Dispute as to possession—Bona fide dispute—Jurisdiction of magistrate.* See (1922) DIG. COL. 436. SHEBALAK SINGH v. KAMRUDDIN. 2 Pat. 94 : 1 Pat. L. R. (Cr.) 2.

—S. 144—*Scope of—Jurisdiction.*

Under S. 144 Cr. P. Code, a magistrate has no jurisdiction to make any order unless he is satisfied there is an apprehension of a breach of the peace and that immediate prevention or speedy remedy is desirable. If he has made up his mind it is so, he must state the material facts in the order. The section is applicable only to temporary orders in urgent cases of nuisance or apprehended danger and not to cases where there is a dispute as to land for the settlement of which S. 145 provides the proper remedy. (*Kulwant Sahay, J.*) AKAL MAHTON v. MAHABIR MAHTON. 1 Pat. L. R. 223 (Cr.).

—S. 144 (4)—*Order made by subordinate Magistrate without jurisdiction—Revision before High Court without going to District Magistrate—Competency of—Interference*

Under S. 144 (4) Cr. P. Code, when an order is passed by a subordinate Magistrate, the District Magistrate has full power to rescind or alter the order and the ordinary practice is that parties should in the first instance approach the District Magistrate before going up to the High Court. But where the order passed is one entirely outside the scope of the section and thus made without jurisdiction, it must be taken as an order unauthorised by the Code, and as such revisable under S. 107 Government of India Act by the High Court. (*Kulwant Sahay, J.*) AKAL MAHTON v. MAHABIR MAHTON. 1 Pat. L. R. 223 (Cr.) : 75 I. C. 531 : 24 Cr. L. J. 947.

—Ss. 144, Cl. 4 and 145—*Power to alter or rescind order—Special jurisdiction.*

There is neither revisional nor appellate jurisdiction in the Magistrate under S. 144, Cl. 4, Cr. P. Code but there is still a special jurisdiction vested in him by the Statute to rescind or alter any order made under S. 144 either by himself or by a Magistrate subordinate to him or by his predecessor in office. (*Das, J.*) MAHANTH SATRUHAN DAS v. MAHANTH DAS. 1 Pat. L. R. 53 (Cr.) : 72 I. C. 171 : 24 Cr. L. J. 331.

—S. 144 (4)—*Power of Court to rescind or modify order—Reasons for.* See (1922) DIG. COL. 438. SHEBALAK SINGH v. KAMRUDDIN MANDAL. 1 Pat. L. R. (Cr.) 2 : 2 Pat. 94.

—S. 144 (5)—*Extension of period—If reasons to be stated—Period of extension*

When a Local Government extends the period of duration of an order passed under S. 144, Cr. P. C., it is not concerned with the reasons given by the Magistrate but only with the order itself. If need not state grounds on which it considers an extension of the period necessary, nor need the extension be limited to any definite period. (*Daniels, J.*) BHURE MAT v. EMPEROR. 45 A. 526 : 73 I. C. 801 : 24 Cr. L. J. 689 : 1923 A. 606.

## CRIM. PRO. CODE (1898), S. 145.

—S. 145—Applicability of—Discontinuous possession—Market Stalls—Possession once a week—Proceedings under S. 145 Cr. P. Code. See (1922) DIG. COL. 438. NAYAN MANJARI DASI v. FAZLEY HUQ SARDAR. 71 I. C. 527 : 24 Cr. L. J. 175.

—S. 145—Applicability of—Mines and minerals—Right to work See (1922) DIG. COL. 439. MAHADEO DUTT v. SARKAR. 71 I. C. 871 : 24 Cr. L. J. 283

—S. 145—Applicability of—Mining rights—Dispute as to, See (1922) DIG. COL. 438. BIMALA PRASAD MOOKERJEE v. TATA IRON AND STEEL CO. LTD. 71 I. C. 237 : 24 Cr. L. J. 108.

—S. 145—Evidence—Absence of—Effect  
A Magistrate has no jurisdiction to make an order under S. 145, Cr. P. C., without any evidence being adduced before him. (C. C. Ghose and Cuming, JJ.) HATEMALI CHAPRASI v. OSIMADDY. 73 I. C. 814 : 24 Cr. L. J. 702.

—S. 145—Breach of the peace—No likelihood—Magistrate refusing to pass final order—Order for delivery of crops.

Where a magistrate finds there is not likelihood of a breach of the peace and refuses to take action under S. 148 CrI. Procedure Code, he has no jurisdiction to pass an order directing the proceeds of the sale of crops pending the proceeding, to be handed over to a particular party 16 M. L. T. 42 followed (Ramesam, J.) MAHALAKSHMI v. SUBBARAYADU. 17 L. W. 429 : 74 I. C. 447 : 24 Cr. L. J. 783 : 1923 Mad. 472 (1)

—S. 145—Breach of the peace—Successive proceedings—Legality of—Submerged land.

Where possession proceedings have once been started and one of the parties has been declared to have been in possession of the disputed property, it is the duty of the Magistrate to see that his possession is not thereafter disturbed. The order of the Magistrate is binding on all the parties and the unsuccessful party cannot be allowed to disturb the possession of the other party without having recourse to law. It is not proper for a magistrate to initiate fresh proceedings under S. 145 for keeping the peace. The mere fact that the lands in respect of which a previous order under S. 145 has been made, have been submerged does not affect the force of the order under the section (Ghose and Chotzner, JJ.) ARAN SARDAR v. HARA SUNDAR MAJUMDAR. 27 C. W. N. 171 : 37 C. L. J. 30 : 71 I. C. 225 : 24 Cr. L. J. 97 : 1923 Cal. 95

—S. 145—Compromise of proceedings—Continuation—irregularity.

Pending proceedings under S. 145 Cr. P. Code, parties reported to court that they had agreed that the first party was to be in possession, whereupon the file was consigned to the record room. On a complaint made a few days later by the first party of dispossession, the Court revived the proceedings and ordered possession to him Held the proceedings were in continuation of the old order and there was nothing irregular. (Zafar Ali, J.) BANARGIR v. JAMNAGIK. 69 I. C. 452 : 23 Cr. L. J. 724 : 1923 Lah. 46.

## CRIM. PRO. CODE (1898), S. 145.

—S. 145—Different plots of land Different parties interested—Single proceedings—Legality of.

Proceedings under S. 145 Cr. P. Code are not without jurisdiction because some of the parties are concerned only with possession of a portion of the lands in dispute. To require a magistrate to hold separate proceedings in respect of each plot of land claimed by each of the ryots would be to require him to undertake what would be almost impossible from the intricate character of such proceedings. The jurisdiction of the Magistrate would depend on the nature of the information, on which he has acted. If the dispute so brought to his notice is one likely to cause the breach of the peace, it would be impossible to characterise his proceedings as without jurisdiction because in the course of the judicial enquiry subsequently held the claim of some of the parties related only to particular plots of land out of the entire area in question (Newbould and Suhrawardy, JJ.) SAJANI KANTA ROY v. SHAMSHER ALI SHEIKH. 71 I. C. 699 : 24 Cr. L. J. 235.

—S. 145—Duty of Magistrates—Land in the possession of tenants—Parties.

In taking action under S. 145, Cr. P. C., Magistrates should state the grounds on which he is satisfied about the likelihood of a breach of the peace. Otherwise his proceedings are without jurisdiction. Where the dispute is regarding lands in the possession of tenants, they too should be made parties. (May Oung, J.) MA MA GYI v. KING EMPEROR. 2 Bur. L. J. 295.

—S. 145—Enquiry into possession by Civil Court—Effect of.

A Magistrate in deciding the question of possession under S. 145 Cr. P. Code is not in every case bound by the previous order of a Civil Court or Criminal Court relating to the possession of the subjectmatter of the dispute. The weight to be attached to any such previous order depends on the facts and circumstances of the case before him. When there is a recent order of a Civil Court delivering possession to a particular party, the order ought ordinarily to be respected and given effect to by a Magistrate under S. 145, Cr. P. Code unless and until there is something shown which might induce the Magistrate to hold that subsequent to the delivery of possession something had happened which had the effect of dispossessing the party to whom possession had been delivered by the Civil Court. (Kulwant Sahay, J.) RAMBARAI RAI v. SAGINA RAI. 4 Pat. L. T. 333 : 75 I. C. 363 : 24 Cr. L. J. 939 : 1923 P. 437.

—Ss 145 and 350—Enquiry under—Entries in Survey and Settlement Register—Decision of officer under the Survey and Settlement Act—Value of—Decision on evidence given before another magistrate—Propriety of.

It is open to a Magistrate in deciding a case under S. 145 of the Cr. P. Code to go behind the orders passed in favour of a party under the Survey and Settlement Act and the Bengal Tenancy Act. It is also open to the magistrate to hold that on the evidence the presumption arising from an entry in the record of rights has been rebutted.

## CRIM. PRO. CODE (1898), S. 145.

S. 350. Proviso A. of the Criminal Procedure is limited to Criminal Trials and does not extend to enquiries under S. 145. Consequently a magistrate has jurisdiction to proceed with the further trial of a case under S. 145 Cr. P. Code even though a portion of the evidence has been recorded by his predecessor and an application is made to him on behalf of one of the parties to start proceedings *de novo* (*Newbould and Suhrawardy, JJ.*) SYED SADEK REZA *v* SACHINDRA NATH ROY.

37 C. L. J. 128 : 73 I. C. 265 : 24 Cr. L. J. 569 :  
1923 Cal. 483 (2).

—S. 145—Enquiry under—Evidence—Agreement to dispense with oral evidence—Recent decree of Civil Court—Effect on Criminal Court.

As the Magistrate is required in disputes under S. 145, Cr. P. Code to come to a conclusion on the fact of actual possession at the date of order or 2 months prior to it, an agreement between the parties to get the case decided on documents or without adducing evidence of possession is outside the scope of the section. Where however there is a decree of a civil court in execution of which possession has been recently delivered the Criminal Court is bound thereby. The Criminal Court must uphold a recent delivery of possession by the Civil Court. (*Adami, J.*) MAHARAJA PRATAP UDAI NATH SAHI DEO *v* BHAIJAIN SUNDERBAS KOER.

71 I. C. 999 :  
24 Cr. L. J. 279 : 1923 P. 76.

—Ss. 145 and 439—Enquiry—Finding as to possession—Finding based on evidence in another case. See (1922) DIG. COL. 441. MIRZA RAZA HUSSAIN *v* MEHDI HASAN. 10 O. L. J. 157 :  
69 I. C. 268 : 23 Cr. L. J. 684.

—Ss. 145 and 439—Evidence—Consideration of—Declining to exercise jurisdiction.

A general remark in an order under S. 145 Criminal Procedure Code, that the oral evidence is not reliable, without referring to it, and without giving any reason is not a disposal on the evidence upon the record. It amounts to a refusal to exercise the jurisdiction vested in a Magistrate by law and is remediable by the High Court in revision. (*Kulwant Sahay, J.*) LAKHPAT GOPE *v* EMPEROR.

1 Pat. L. R. 152 (Cr.) :  
4 Pat. L. T. 579 : 72 I. C. 544 : 24 Cr. L. J. 432 :  
1923 P. 588.

—Ss. 145 and 146—Evidence of possession on both sides equally unreliable—Order under S. 145 based on presumption of possession arising from the title, if valid—Such presumption when applicable—Interference by High Court—Magistrate directed to act under S. 146.

Where in a proceeding under S. 145, Cr. P. Code a Magistrate found that the evidence of possession on both sides was equally unreliable, but declared the second party to be in possession relying on the presumption as to possession arising from title ;

Held that the order of the Magistrate under S. 145 was bad and he was directed to act under S. 146, Cr. P. C.

Where a Magistrate finds the evidence on both sides, which in itself is reliable, equally balanced,

## CRIM. PRO. CODE (1898), S. 145.

and he is unable to conclude from such evidence which party is in possession then he is entitled to corroborate the evidence of possession given by one side by the presumption as to possession arising from the title which he finds in that side. But this principle does not apply in a case where the Magistrate finds that the evidence of possession on both sides is equally unreliable. (*Sanderson, C. J. and Chotzner, J.*) AKSHOY KUMAR BHATTACHARJIA *v* BROJESWAR GHATTAK.

71 I. C. 365 : 24 Cr. L. J. 141 :  
1923 Cal. 303.

—S. 145—Finding about breach of peace necessary in final order.

The finding of breach of peace is necessary for the purpose of the preliminary order, when a Magistrate assumes jurisdiction, but once he is satisfied that there is an apprehension that peace will be broken, it is unnecessary that he should record a finding to the effect again when passing his final order. (*Abdul Qadir, J.*) GANGA RAM *v* MURAD SHAH.

73 I. C. 519 :  
24 Cr. L. J. 631 : 1923 Lah. 253.

—S. 145—Joinder of claims relating to various plots—Propriety of.

Where a Magistrate in one proceeding dealt with various plots as regards which there were disputes between various sets of parties, the proper procedure would be to make each the subject matter of a separate proceeding, but in the absence of actual prejudice to any party there is nothing in law to prevent a joinder of all these in one proceeding. Even the failure to allocate particular plots to particular individuals does not vitiate the proceedings, although it would have been more proper to do it. (*Bucknill, J.*) GAJADHAR MULL MARWARI *v* THAKUR SINGH.

1 Pat. L. R. 135 (Cr.) : 1923 P. 545.

—S. 145—Jurisdiction—Apprehension of—Breach of the peace.

The apprehension of a breach of the peace is the first condition necessary to give a Magistrate jurisdiction under S. 145, Cr. P. Code, and if it is found there is no longer any such apprehension, the jurisdiction ceases, and he is bound to cancel the initial order and stay all further proceedings under clause (5) (*Newbould and Suhrawardy, JJ.*) MAHOMED KHANDU SARKAR *v* SADAKALI SHEIKH.

38 C. L. J. 284 : 1923 Cal. 577.

—S. 145—Jurisdiction of Magistrate—Dispute concerning a limited area—Order affecting larger area—Legality of.

Where a Magistrate had dealt with a larger area of land than is included in the order drawn up in the case, he exceeds his jurisdiction and the whole order may be set aside. 7 C. W. N. 558 followed. (*Ross, J.*) SUKHARI NONIA *v* RAM KHELAWAN THAKUR.

4 Pat. L. T. 372 :  
1 Pat. L. R. 255 (Cr.) : 72 I. C. 69. (2) :  
24 Cr. L. J. 309 (2) : 1923 P. 528.

—S. 145—Jurisdiction—Omission to mention source of information.

A magistrate's jurisdiction to pass an order under S. 145, Cr. P. Code is not taken away by his omission to state the source of his information as regards the likelihood of a breach of the

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peace. (*Dalai, J. C.*) SHER RAHADUR SINGH v. FAZAL A. J. 90 & A. L. R. 865.

—S. 145—Oath if can be administered to parties

The parties to a proceeding under S. 145, Cr. P. C. are not accused persons and there is nothing illegal in examining them under oath (*Dalai, J. C.*) MOHAMMAD AYUB v. CHOUDHURI SARFARAZ AHMAD. 90 & A. L. R. 514.

—S. 145—Order under Effect of—Party against whom order made transferring property—Transferee starting proceedings

Where an order is passed against a party under S. 145 Cr. P. Code he cannot merely by transferring the property in respect of which the order was made evade the binding effect of the order. It is not proper for the Magistrate to initiate fresh proceedings under S. 145 Cr. P. Code on the application of the transferee but he must maintain the party previously declared entitled in possession. (*Ghose and Chotzner, JJ.*) ARAN SARDAR v. HARI SUNDAR 27 C. W. N. 171 37 C. L. J. 39; 71 I. C. 225; 24 Cr. L. J. 97; 1923 Cal. 95

—S. 145—Order under—If can be passed by a Magistrate after handing over charge.

Where a Magistrate who has tried a case under S. 145, Cr. P. Code, is transferred and hands over charge, he cannot thereafter deliver the final order, having become *functus officio* at that time. (*Newbould and Suhawardy, JJ.*) JAGAT BHANDHU SAHA v. JAGABANDHU SAHA SARDAR 38 C. L. J. 201

—S. 145—Order under—Suit for possession in Civil Court—Parties.

Where the cause of action alleged in the plaint is the dispossession by the defendant on account of the proceedings under S. 145 of the Code of Criminal Procedure, and in that proceeding the defendant (the manager of a company) was declared to be in possession the plaintiffs have got a cause of action against the person who has actually dispossessed them. Moreover, the suit cannot be defeated on account of non joinder of the proprietors of the Company who could have added them as parties (*Das and Kulwant Sahay, JJ.*) CHATTRAPAT PRATAP BHADUR SAHI v. C. G. LEES. 4 Pat. L. T. 487. 1923 P. 558.

—S. 145—Possession—Effect of order of Court. See (1922) DIG. COL. 443. KAMLA PRASAD SINGH v. GOBIND SAHAY. 71 I. C. 785; 24 Cr. L. J. 241

—Ss. 145 and 537—Possession case—Judgment—Contents of.

A magistrate after holding an enquiry under S. 145 Cr. P. Code instead of pronouncing a judgment with reasons for his conclusion merely passed an order in these terms "counter petitioner is declared to be put in possession of the lands described hereunder fill up schedule form accordingly". A printed form was filled up declaring counter petitioner to be in possession

Held, that the order of the magistrate was without jurisdiction and that he ought to have written a judgment giving a finding as to the possession of the property on the date of the

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preliminary order. 18 M. 41; 49 C. 187 Ref. (*Venkatasubba Rao, J.*) PERIA SUBBA GOUNDAN v. SINNA SUBBAYYA GOUNDAN 45 M. L. J. 56. 1923 M. 142.

—Ss. 145 and 146—Possession proceedings—Finding as to possession—Absence of—High Court—Interference in revision.

Where the magistrate in proceedings under S. 145 Cr. P. Code did not even attempt to deal with the question of possession and gave no finding thereon but declared the possession to be with the party whom he considered to be lawfully entitled, his order is an obvious infringement of S. 145 Cr. P. Code and the High Court could set it aside in revision 29 M. 561; 17 Bom. L. R. 382; 18 C. W. N. 700, 36 M. 275 Ref. (*Venkatasubba Rao, J.*) SANNANAN SHUKULATHI ROWTHEN v. GULAM MOIDEEN ROWTHER. 71 I. C. 508; 24 Cr. L. J. 156; 1923 Mad. 24.

—S. 145—Possession proceedings—Determination of Civil Court—Delivery of possession—Value of.

Where a magistrate has initiated proceedings under S. 145 Cr. P. Code he has jurisdiction to pass final orders even though one of the parties has produced a decree of a Civil Court or writ of delivery of possession. It is the duty of the magistrate to maintain the auction purchaser in possession free from the disturbance of the judgment—debtor. The delivery of possession under O. 21, R. 95 C. P. Code does not affect persons who are not parties to the decree e.g. persons having encumbrances which have not been annulled under S. 167 of the B. T. Act. In proceedings under S. 145 Cr. P. C. the magistrate may well maintain the decision as to title passed, and possession delivered by a Civil Court in execution of its decree if such possession had been given within a reasonable time from the initiation of proceedings under S. 145, (*Adami, J.*) KEDAR NATH CHAUBEY v. JALESWAR RAMTEWARI. 4 Pat. L. T. 248; 1 Pat. L. R. 166 (Cr.); 72 I. C. 883 (2); 24 Cr. L. J. 467 (2); 1923 P. 364.

—S. 145—Power to go behind decree of Civil Court—Symbolical possession.

In a proceeding under S. 145, the Magistrate cannot go behind the decision of the Civil Court in the matter, if there is one such. The fact that the Civil Court had no jurisdiction or that the delivery in pursuance of the decree inter-partes is symbolical is immaterial. It is not for the magistrate to question the validity of a decree that has not been set aside by a competent court. (*Newbould and Suhawardy, JJ.*) ABHOY MONDAL v. BASU RAI. 27 C. W. N. 267; 1923 Cal. 176 (1).

—S. 145—Powers of Magistrate—Order for restoration of case.

In proceedings under S. 145, Criminal Procedure Code, a Magistrate has no jurisdiction to order restoration of possession. The section itself contains no provisions to the effect that party in whose favour the order is made, is to be put into possession nor does this section provide any machinery by which the successful party can

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have his possession restored by the Court. All that the Magistrate is empowered to do is to declare that he is entitled to possession.

At the same time, if a party is declared to be entitled to possession, and the world at large is forbidden to disturb his possession, he would be entitled to take possession and no one would have any right to interfere with his doing so. (*Broadway, J.*) *BAHAWALA v. EMPEROR*

72 I. C. 621 : 24 Cr. L. J. 461.

—S. 145—*Preliminary order—Failure to record—Enquiry as to rightful possession—Revision.*

Where a Magistrate fails to record a preliminary finding that he is satisfied that the dispute likely to cause a breach of the peace exists, he is not justified in taking any action under S. 145, Cr. P. Code. A Magistrate is not justified in deciding the question of possession without reference to the actual facts of possession before the date of the preliminary order (*Pratt, J.*) *NGA PO TIN v. NGA PO SAUNG.* 1 R. 53.

2 Bur. L. J. 32 : 74 I. C. 68 : 24 Cr. L. J. 740 : 1923 Rang 211

—S. 145—*Proceedings under—If can be transferred.*

Proceedings under S. 145, Cr. P. Code, can be transferred to another court, if sufficient grounds are shown (*Simpson, A. J. C.*) *MAHOMMED NAGI KHAN v. RANI RAHAMATUNNISSA.*

1923 Oudh 161.

—S. 145—*Proceedings under—Duty of Magistrate to finish enquiry.*

Once a Magistrate initiates proceedings under S. 145 Cr. P. Code and passes a preliminary order under the section it is his duty to complete the enquiry after taking the evidence offered by the parties. 2 L. W. 1208 Ref. (*Ramesam, J.*) *VIRAPPA CHETTIAR v. KATHAYEE AMMAL.*

71 I. C. 112 : 24 Cr. L. J. 64 : 1923 M. 180 (2).

—S. 145—*Proceedings under—Jurisdiction to initiate—Breach of the peace—Omission to put in written statement—Effect of—Transfer of case.*

In order to give jurisdiction to a Magistrate to proceed under S. 145 Cr. P. Code all that is necessary is that he should be satisfied of there being a likelihood of a breach of the peace and he should make a note stating his ground of his being so satisfied and require the parties to attend and put in written statements of their claims. When that is done and the Magistrate being satisfied on a police report made an order calling for written statements, the mere fact that party did not put in a written statement would not take away the jurisdiction of the Magistrate to proceed with the case. The proceeding being properly initiated, it was incumbent on the Magistrate to make the inquiry and to take such evidence as the parties offered irrespective of the fact that one or other of the parties failed to put in a written statement. The Magistrate would not be justified in refusing to proceed with the case because the parties neglected to file a written statement on the date fixed; he has to take evidence if offered by any of the parties and to decide the case upon such evidence. The basis

## CRIM. PRO. CODE (1898), S. 145.

of a proceeding under S. 145, Cr. P. Code is not the written statement but the police report or other information from which the Magistrate is satisfied about the fact of the likelihood of a breach of the peace.

If no written statement is put in, the Magistrate is bound nevertheless to hear the parties and take the evidence produced by them. The non filing of the written statement does not take away the jurisdiction of the Magistrate to make an order in his favour. It is open to a Magistrate to transfer the case to any other competent Magistrate for disposal where after the issue of a notice no written statement has been filed.

Where each party claims exclusive possession of one half of the plots in dispute, it cannot be said that it is a case of a claim for joint possession rendering S. 145 Cr. P. Code inapplicable. (*Kulwant Sahay, J.*) *MR. RAMJHARIA v. PIAR KOERI.* 4 Pat. L. T. 308 : 73 I. C. 173 :

24 Cr. L. J. 557 : 1923 P. 369.

—Ss. 145 and 435—*Proceedings without jurisdiction—Breach of the peace—Preliminary order—Revision—Interference by High Court.*

The omission to pass an order under S. 145(1) of the Criminal Procedure Code stating that the Magistrate is satisfied of the existence of a dispute likely to cause a breach of the peace is not a mere technical defect. Where the Magistrate has not made the initial order prescribed by that sub-section and has also not made at any subsequent stage of the proceedings an order which essentially complies with the requirements of that sub-section, the proceedings are without jurisdiction and cannot be regarded as proceedings under S. 145 of the Criminal Procedure. Accordingly S. 435 (3) of the Criminal Procedure Code does not preclude the High Court from entertaining an application for revision in such a case (*Martineau, J.*) *HAKAM v. RALLA RAM.*

4 Lah. 66 : 74 I. C. 79 : 24 Cr. L. J. 751.

—Ss. 145 and 439—*Proceedings under—Revisional power of High Court—Jurisdiction—Material irregularity—Evidence of possession not considered—Effect of—Government of India Act, S. 107.*

Where there is initial want of jurisdiction proceedings, though they may purport to be under S. 145 Cr. P. Code are not really proceedings under it and the High Court can interfere under S. 439 Cr. P. Code but if the proceedings were properly started all interference on the ground of serious irregularity amounting to improper exercise of jurisdiction or improper refusal to exercise it can be only under S. 107 of the Government of India Act. 36 M. 275 ; 286, 41 A. 302 ; 37 M. L. J. 589 ; 27 M. L. J. 169 ; 17 C. W. N. 205 : 40 C. 982 ; 32 C. 249 ; 2 L. W. 107 ; 3 L. W. 164 ; 12 L. W. 939 ; 38 M. L. J. 73 Referred to.

Pattas and kist receipts are evidence not merely of legal right but of possession also. Where the Magistrate comes to a perverse conclusion on the question of possession after getting rid of the oral and documentary evidence in the case the High Court can interfere in revision. (*Ramesam, J.*) *THYLAYEE AMMAL v. SRIRANGAROYA GOUNDAN.* 71 I. C. 228 : 24 Cr. L. J. 100 :

1923 Mad. 60.



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—S. 145—*Procedure.*

The object of S. 145 is to prevent a breach of the peace by a summary decision as to the possession of the contending parties leaving them to decide their title and right to possession in a competent Civil Court where naturally the proceeding has to be a protracted one. It is therefore incumbent upon Magistrates to dispose of proceedings under S. 145 as quickly as possible and with due regard to the rules of procedure prescribed by that self contained section. The procedure for the trial of a case under S. 145 is that laid down for the trial of summons cases where witnesses are examined, cross-examined, and re-examined, and then discharged. The Magistrate is wrong in treating the case as if it was a warrant case. (*Jwala Prasad and Coutts, JJ.*) MOTI SINGH v. DHANUKDHARI SINGH.

73 I. C. 339 : 24 Cr. L. J. 595 : 1923 P. 53.

—S. 145—*Proof of possession—Title of first party—No other proof, wanted.*

If the first party shows that the land in dispute is within the boundaries of the land leased to him and if on the oral evidence he establishes possession, it is immaterial that the land was subsequently leased to the second party. Moreover the Magistrate is bound to decide on a consideration of the lease of the first party itself, whether the disputed land was within the land leased to the first party; he is not entitled to go outside that document in order to interpret its terms. (*Coutts and Das JJ.*) LACHMI NARAIN AGARWALA v. MUKHRAM MARWARI.

72 I. C. 971 :  
24 Cr. L. J. 507 : 1923 P. 31.

—S. 145 and 146—*Property in joint possession—Order under the Sections incompetent.*

Where the Magistrate finds that the property is joint and presumably in the joint possession of both the parties he cannot make an order under section 145 or under Section 146. (*Bucknill, J.*) NAND KISHORE MISHRA v. KALIKA MISSIR.

75 I. C. 69 : 24 Cr. L. J. 869 : 1923 P. 546.

—S. 145—*Question of possession—Decree of Civil Courts—Value of.*

In proceedings under S. 145 Cr. P. Code, the magistrate in considering the question of possession should not go behind the decision of the Civil Court between the same parties. Where a Magistrate acts in disregard of an order of a Civil Court directing delivery of possession he acts with material irregularity justifying interference by the High Court in revision. Where the decree of the Civil Court is between the same parties it does not matter whether the delivery of possession is actual or symbolical (*Newbould and Suhrawardy, JJ.*) AKHOY MONDAL v. BASU RAI.

37 C. L. J. 256 :  
73 I. C. 53 (2) : 24 Cr. L. J. 517 (2).

—S. 145—*Renewal of proceedings—If allowed.*

Proceedings under S. 145 Cr. P. Code cannot be renewed after the dispute has been settled and an order has been made that the case be struck off. Under such circumstance, a new proceeding which is based merely on the materials on which

## CRIM. PRO. CODE, (1898) S. 146.

the prior proceeding was struck off would not be justified. (*Shadi Lal, C. J.*) GHULAM MUHAMMAD v. THE CROWN.

71 I. C. 512 :  
24 Cr. L. J. 160 : 1923 Lah. 81 (1).

—S. 145—*Scope of order—Possession on the date of preliminary order.*

Under S. 145, Cr. P. Code, a Magistrate has to decide only which of the parties was in possession on the date of the preliminary order. (*Chandrasekhara Aiyar, C. J.*) NARAPPA v. SIVAKKA.

1 Mys. L. J. 61.

—S. 145—*When to be applied—Difference between and S. 144. See Cr. P. Code, S. 144.*

1 Pat. L. R. 223 (Cr.).

—S. 145 (1)—*Breach of the peace—Evidence of—Police report—Statement of parties.*

Where there is no police report the statement of interested parties as regards the existence of a breach of the peace must be received with great caution, but if a magistrate has reason to believe such a statement it cannot be said that he acts without jurisdiction in taking proceedings under the section. (*Newbould and Suhrawardy, JJ.*) JOYMANGAL SINGH v. KANTA GOPE.

72 I. C. 32 :  
24 Cr. L. J. 304.

—S. 145 (3) — *No service of notice — Failure to draw up proceedings—No evidence recorded—Whether affects the jurisdiction of the Magistrate—Irregularity. See (1922) DIG. COL. 445. BASAWAN PANDEY v. TILAK GOPE.*

4 Pat. L. T. 723 : 1 Pat. L. R. 130 (Cr.) :  
72 I. C. 345 : 24 Cr. L. J. 345.

—S. 145 (4)—*Attachment of—Subject of dispute—House and moveables. See (1925) DIG. COL. 446. GAJRAJ SINGH v. EMPEROR.*

71 I. C. 213 : 24 Cr. L. J. 85.

—S. 145 (4)—*Possession case—Land attached—Dropping of proceedings—Declaring party to in possession without evidence.*

Where a magistrate attached the lands which had been the subject of dispute under S. 145 (4) he cannot declare one of the parties to be in possession merely because the other party did not choose to adduce any evidence. Once a magistrate drops the proceedings under S. 145 he ought not to re-open them and even if he has jurisdiction to go on with the case without a fresh proceeding, he ought to put the parties on the same footing. (*Walmsley and Suhrawardy, JJ.*) SAMAD ALI v. ABDUL MAJID. 1923 Cal. 314.

—S. 146—*Attachment of property—Criminal Court—Jurisdiction of.*

Under S. 146 of the Code of Criminal Procedure the Criminal Court after attaching the property is *functus officio* unless the subsequent event occurs of a competent Court determining the rights of the parties to the property or the person entitled thereof (*Ashworth, J. C.*) SURENDRA BIKRAM SINGH v. EMPEROR.

73 I. C. 153 :  
24 Cr. L. J. 537.

—S. 146—*Attachment of property by Magistrate—Enquiry—Duty to make—Interference by High Court—Revision.*

## CRIM. PRO CODE (1898), S. 146.

- An attachment under S. 146, Cr. P. Code can only be made after the Magistrate has made a reasonable effort varying of course with the circumstances of each particular case, to decide the question as to possession. 40 C. 105 Ref. When a magistrate influenced by extraneous considerations and without considering the evidence in the case, attaches the property the High Court can interfere in revision with the order of the Magistrate (*Macpherson, J.*) *WAYEZUL HUQ v. SHOBRATI JOLAH.*

74 I. C. 258 : 24 Cr. L. J. 754 : 4 Pat. L. T. 441 :  
1 Pat. L. R. (Cr.) 161 : 1924 P. 47.

—S. 146—Dispute about immovable property—Attachment—Effect of—Release of property in favour of a particular party—Order *ultra vires*. See (1922) DIG. COL. 446 *RAMKUMAR LAL v. THAKUR OJHA.* 1 Pat. L. R. (Cr.) 1.

—S. 146—Judgment—Contents of—Statement of reasons.

No hard and fast rule can be laid down as to when the High Court should interfere with the judgment of a magistrate under S. 146, Cr. P. Code on the ground that the order is brief and does not state reasons at length. Where the High Court is satisfied that the magistrate has given full consideration to the evidence on the record the High Court would not interfere with an order under S. 146 on the ground of its being brief. (*Newbould and Suhrawardy, JJ.*) *KANAI LAL DAS v. HYDER ALI KHAN RAM,*

37 C. L. J. 127 : 73 I. C. 271 : 24 Cr. L. J. 575.  
1923 Cal. 483 (1).

—S. 146—Order under—Proceedings under S. 145 necessary.

There must be a proceeding under section 145 Cr. P. Code before an order under section 146 can be passed. (*Kotwal, A. J. C.*) *NILKANTH v. SURYABHAN.*

75 I. C. 80 :  
24 Cr. L. J. 880 : 1923 Nag. 297.

—S. 146—Power to attach subject of dispute when to be exercised

Where the first party, a widow and her mortgagee were found to be in possession of the disputed garden and the second party was not found to be in possession, a Magistrate is not entitled to attach the subject of dispute merely on the ground that the widow had, in her written statement, stated that she was not in possession but the mortgagee was, because the possession which she had may be exercised through her mortgagee. (*Ross, J.*) *MT. MAHODRA KOER v. KHUBAN PANDY.*

1923 P. 363.

—S. 146 (1)—Witnesses present not examined—Effect. See (1922) DIG. COL. 447 *SITA NATH BHAGAT v. RAMKISHORE MONDAL.*

69 I. C. 272 (2) : 23 Cr. L. J. 688 (2)

—Ss. 147 and 148—Proceedings drawn up by one Magistrate—Power to transfer to another Magistrate—Local inspection—Procedure.

Proceedings under Ss. 145 and 147 are criminal cases and a Magistrate has power to transfer such cases under Ss. 192 and 528 of the Cr. P. Code. S. 148 of the Cr. P. Code provides for local inspection whenever such enquiry is deemed necessary for the purposes of Chapter

## CRIM. PRO CODE (1898), S. 148

XII of the Code. Such enquiry can be made either by any Magistrate subordinate to the Magistrate before whom the case is pending or by that Magistrate himself. The rule that in criminal cases the Court is only justified in holding a local inspection in order to explain the facts appearing in the evidence does not apply to S. 147 of the Cr. P. Code. Special provision is made in the Code for local inspection in these cases and, in cases, where rights of irrigation and rights of taking water through particular channels from particular reservoirs are concerned, a local inspection is immediately necessary. Although as a rule it is better to have such an investigation made by some other person there is nothing in law to prevent the presiding Magistrate from making the investigation himself provided he records what he saw and does not act upon hearsay evidence.

It is a salutary principle of law that the finding of a Court must be based upon evidence duly recorded by it and not upon the impression formed by the Judge on a local inspection of the locality. He can in order to elucidate the evidence make a local inspection and the object of a local enquiry would be only with a view to understand the evidence actually adduced in the case. Moreover, it is absolutely necessary that if a Magistrate makes a local enquiry he must make a note of what he saw and must place it on the record so that the parties may be in a position to know what impression the Magistrate had got by the local enquiry. It is possible that the Magistrate may have formed a wrong impression, and, if the results of his inspection are recorded, the parties would be in a position to know if there has been an error and will be in a position to remove the wrong impression formed by the Magistrate. (*Kulwant Sahay, J.*) *ABDUL HAMID v. HASAN RAZA.*

4 Pat. L. T. 297 :  
1 Pat. L. R. 195 (Cr.) : 72 I. C. 951 :  
24 Cr. L. J. 487 : 1923 P. 366.

—S. 148—Costs—Assessment of—Scale of Costs. See (1922) DIG. COL. 447, *HERA MAHTON v. RAJ KUMAR MAHTON,* 1 Pat. L. R. (Cr.) 15.

—S. 148—Order for costs—Order made without notice to parties—Jurisdiction.

An order for costs passed some time after the termination of an enquiry under S. 145, Cr. P. Code without notice to the petitioner is without jurisdiction. 29 Mad. 373 Ref. (*Ayling, J.*) *PALANIANDI SHERVAI v. SAMMANDI AMMAL.*

71 I. C. 128 : 24 Cr. L. J. 80 : 1923 Mad. 87 (2).

—S. 148—Scope of

Before a Magistrate began to take evidence, he went to the place in order to see the exact land in dispute and the features of the disputed property. He restricted his inquiry very closely to those points and it did not appear that he directed his inquiry to any matter which could be proved by oral evidence. No evidence was taken at the local enquiry and all that was done was to inspect the locality, make a note of what the disputed area was and prepare a plan. Everything was placed on the record. *Held* : In holding a local inspection of this sort the Deputy Magistrate did not in any way act outside the jurisdiction vested in

## CRIM. PRO. CODE (1898), S. 148

him by law. (*Coutts and Das, JJ.*) LACHMI NARAIN AGARWALA v. MUKHRAM MARWARI.  
72 I. C. 971 : 24 Cr. L. J. 507. 1923 P. 31.

———S. 148 (3) and 386—Order for costs—Execution of—Distress warrant—Discretion of magistrate.

The wording of S. 148 (3) Cr. P. Code does not give the magistrate a discretion to refuse to recover the costs. It merely points out the way in which those costs are to be recovered and the reference is merely to S. 386 Cr. P. Code. The use of the words "may in his discretion" in S. 386 cannot be used for the purpose of interpreting the words "may be recovered" in S. 148. The discretion in S. 386 Cr. P. Code only refers to cases where there has been a conviction and sentence and the sentence directs that in default of payment of fine the offender shall be imprisoned (*Adami, J.*) HARENDRA KRISHNA BHAGCHI v. BALKUMAR KUMAR.  
71 I. C. 254 :  
24 Cr. L. J. 126. 1923 P. 57

———Ss. 154 and 162—First information—Statements made during Police investigation—Admissibility of.

Per *Dawson, Miller, C. J.* The information referred to in S. 154 Cr. P. Code is something in the nature of a complaint or accusation, or at least information of a crime given with the object of putting the police in motion in order to investigate as distinguished from information obtained by the police when actively investigating a case. The information referred to in S. 154 may come from more than one source and more than one such information may be recorded at or about the same time, but once the police have taken active steps to investigate, any written statements taken by them cannot be admissible in evidence as they would come within the scope of S. 162, Cr. P. Code.

Per *Mullick, J.* If the allegations made are in the nature of a complaint, the Police officer must record them as information under S. 154, Cr. P. Code and the writing will attract the provisions of S. 35 of the Evidence Act. In every case it is for the Court to decide whether the communication is an information in this technical sense and whether and when the Police investigation had in fact begun.

A choudkdar informed a Police officer that the accused had dealt him a severe blow on the head and thereupon the police proceeded to the village and took statements from the relations of the accused who however never made any voluntary statement accusing the alleged culprit. Held that the statement by the choudkdar constituted first information but the subsequent statements taken by the Police were inadmissible under S. 162 Cr. P. C. (*Miller, C. J. and Mullick, J.*) GANSA ORAON v. EMPEROR,  
2 Pat. 517 : 4 Pat. L. T. 462 :  
1 Pat. L. E. 178 (Cr.) : 73 I. C. 561.  
24 Cr. L. J. 641 : 1923 P. 550.

———Ss. 154, 342, 540 and 556—Scene of offence—Inspection by Magistrate with a view to understand the evidence—Recalling of prosecution witnesses after local inspection—

## CRIM. PRO. CODE (1898), S. 162

Opportunity to accused to cross-examine the witnesses—Procedure if irregular—Examination of accused thereafter—Necessity for.

Where the accused was examined under S. 342, Cr. P. Code, the Magistrate asked that a plan should be prepared of the scene of the offence. This was not done, but the Magistrate personally visited the scene of offence with the prosecution witnesses and the Vakil for the accused, and observed for himself the relative positions of the huts and the plans from which witnesses claimed to have seen the acts deposited to by them. After this acting under the powers vested in him by S. 540, Cr. P. C., the Magistrate recalled some of the prosecution witnesses, and examined them in such a way as to put on record the most important point which he had observed at his personal inspection. The witnesses were then cross-examined by the defence.

Held that it was open to the Magistrate to use the evidence of his own eyes to test the truth of what the witness had deposed to, that the Magistrate made no improper use of his local inspection; and that, as he had really embodied the results of his inspection in the examination of the prosecution witnesses on recall, and the accused had a full opportunity of cross examining them with reference to the facts elicited, he did not use his local inspection illegally or in such a way as to prejudice the accused.

Held further, that; under S. 342, Cr. P. C., it was not legally incumbent on the Magistrate to further question the accused with reference to the evidence elicited from the prosecution witnesses after the framing of the charges when they were recalled by the Magistrate under S. 540, Cr. P. C.; though it might be highly desirable that he should so question the accused if the evidence contains a new matter of importance.

A Deputy Superintendent of Police is an officer legally competent to investigate the facts of a murder and dacoity within the meaning of S. 157 of the Evidence Act—*Vide* S. 151, Cr. P. Code and statement made and constituting the first information given to the Police of the commission of the crime, is not admissible in evidence because it was not recorded as required by S. 154, Cr. P. Code. (*Ayling and Odgers, JJ.*) THACHROTH HYDROSS IN RE,  
45 M. L. J. 279 : 18 L. W. 113 :  
1923 M. W. N. 860 : 75 I. C. 695 : 1923 Mad. 694.

———S. 162—General and Special diaries of Police—Use of.

The use of the general and special diaries of the police for the purpose of either supporting the evidence of a prosecution witness or rebutting the argument of the defence is contrary to S. 162 Cr. P. Code. Even consent of the accused cannot legitimise such a procedure (*Wazir Hasan, A.J.C.*) MANNA LAL v. EMPEROR.  
90 & A. L. R. 947.

———S. 162—Statement to police—If evidence—Value of.

A statement made to the Police by a person who afterwards gives evidence in the case, is not admissible in evidence against the accused. It can be used as provided in the Evidence Act to

## CRIM. PRO. CODE (1898), S. 164.

contradict and sometimes to corroborate the witness but a conviction cannot be based on it. (*Ryves, J.*) SHIAM SUNDER v. EMPEROR

1923 All. 469.

## —S. 164—Absence of certificate vitates—Confession.

The absence of the certificate might be cured by the evidence of the Magistrate but the failure to make any enquiry as to the state of mind of the confessor at the time of the confession is recorded is fatal. (*Le Rossignol, and Zafar Ali, JJ.*) JEHANA v. EMPEROR.

73 I. C. 506 : 24 Cr. L. J. 618 : 1923 Lah. 345.

## —S. 164—Confession.

There is nothing in S. 164 or any other provision of the Cr. P. Code which forbids a magistrate from recording a statement if the accused chooses to make one before he is placed on his trial. Such a statement if proved to be voluntary is not only admissible but is of the greatest value as a fact relevant to the probability or improbability of his guilt. (*Mullick and Thornhill, JJ.*) MADAN GURU v. EMPEROR.

4 Pat. L. T. 381  
73 I. C. 963 : 24 Cr. L. J. 723.

## —S. 164—Confession not properly recorded—Effect—Admissibility.

A confession not properly recorded in accordance with the provisions of S. 164 Cr. P. Code is not admissible. 39 I. C. 991 : 40 I. C. 721 Rel. (*Wazir Hasan, A. J. C.*) GAJADAR v. EMPEROR.

1923 Oudh 39.

## —Ss. 164 and 533—Confession—Record by magistrate—Narrative form—Irregularity—Cure of defect.

Where a magistrate who recorded a confession was called and he swore that he had all the police removed from the court room and also had the handcuffs removed from the accused before recording the confession and the magistrate also asked the accused whether he was tutored by any body and after being satisfied that the accused was not tutored by any body recorded his confession, *Held*, that any irregularity in the recording of the confession was cured under S. 533 of the Cr. Pro. Code and that the record of the confession in English and in a narrative form did not render it inadmissible. (*Stuart and Ryves, JJ.*) DEO DATT v. EMPEROR.

45 A. 166 : 71 I. C. 54 : 24 Cr. L. J. 6 : 1923 A. 90.

## —Ss. 164, 286 342,—Confession—Sessions Court—Procedure See (1922) DIG. COL. 449.

MT. SUKHIA v. EMPEROR

73 I. C. 497 : 24 Cr. L. J. 609.

## —S. 164—Confession not voluntary.

Where the evidence showed that the accused was beaten by the police before he made his confession and also that he was returned to their custody after the event and the same was retracted at the very earliest opportunity, it must be deemed not voluntary and of no value. (*Shadi Lal, C. J. and Campbell, J.*) HARPHUL v. CROWN.

1923 Lah. 429.

## —S. 164—Failure to question—Confession to the husband of kidnapped girl in the presence of police.

Y D—32

## CRIM. PRO. CODE (1898), S. 174.

Before recording the confession the Magistrate failed to question the accused as to whether he was making the confession voluntarily. *Held* this defect is a fatal one and renders the confession inadmissible in evidence. Nor an oral confession said to have been made on that very day by accused to the husband of the kidnapped girl in the presence of the police can be taken into consideration against him. (*Shadi Lal, C. J.*) LACHHI RAM v. EMPEROR.

73 I. C. 260 : 24 Cr. L. J. 564 : 1923 Lah. 330.

## —S. 164 (3)—Questions by Magistrate recording confession—Form of.

All that section 164 (3) requires is that the Magistrate on questioning the person making the confession shall have reason to believe that it was made voluntarily. No express form of question is prescribed and the extent to which a Magistrate should question the person making the confession must largely depend on the particular facts of each case. There are cases which on the face of them attract the suspicion of a Magistrate and there are others which do not attract suspicion at all and it is impossible to lay down any hard and fast rule on the subject. The Court must in each case satisfy itself that the Magistrate honestly believed and took steps to ascertain that the confession was a voluntary one. No particular form of questioning is necessary. 4 Pat. L. T. 168 foll. Even where confessions are properly recorded the Court must further consider whether they should be accepted as statement of the truth having regard to all the circumstances and the other evidence in the case. (*Miller, C. J. and Mullick, J.*) THIBU BHOGTA v. EMPEROR.

4 Pat. L. T. 279 : 73 I. C. 569 :

24 Cr. L. J. 619 : 1923 P. 356.

## —S. 164 (3)—No question as to detention—Duty of magistrate.

Where an accused person was actually produced before the Magistrate as soon as he was arrested and was produced before him the next day for recording the confession *Held* that the confession should not be ignored on the ground that the Magistrate did not ask him how long he was in Police custody. It is highly irregular for the Magistrate to peruse the alleged statements of the accused made to and recorded by the Police Officer before proceeding to question the prisoner. A Magistrate should generally "question the accused closely as to his motives in making a confession." It is desirable that a Magistrate in recording the confession should put various questions to an accused to enable him to decide whether the confession is a voluntary one or not ; but, there is nothing in law which lays down that a Magistrate cannot satisfy himself as to the voluntariness of the confession by putting a single question to the accused person. (*Das and Adami, JJ.*) EMPEROR v. DEWANKAHAR

72 I. C. 961 :

24 Cr. L. J. 497 : 4 Pat. L. T. 186 : 1923 P. 13.

## —Ss. 174, 175—Proceedings—Nature of—Perjury.

Statements made during an inquest can be made the subject of an offence under S. 193 I. P. C. as the witnesses are bound to speak the truth. If a number of mis-statements are made therein,

## CRIM. PRO. CODE (1898), S. 179.

they all constitute only one offence and not as many separate offences. (*Plumer and Subbanna, JJ.*) JAVARAYA GOWDA v. GOVERNMENT OF MYSORE. 1 Mys. L. J. 144

———Ss. 179 and 181—*Applicability of Cheating and Criminal breach of trust—Jurisdiction of Court.*

S. 179 of the Code of Criminal Procedure is controlled in respect of certain offences by S. 181 of the Code of Criminal Procedure: and as pointed out in 44 C. 595 no question of convenience or expediency can be considered under S. 185 of the Code of Criminal Procedure. That section deals only with questions of competency when they are involved in doubt.

So far as the charge of a criminal breach of trust goes it can only be enquired into and tried by the Court within the local limits of whose jurisdiction the offence was committed or any part of the property which is the subject of the offence was received or retained by the accused. (*Kanhaya Lal, J.*) GIRDHAR DAS v. EMPEROR. 21 A. L. J. 621: L. R. 4 A. 142 (Cr.): 75 I. C. 353 (1): 24 Cr. L. J. 929 (1).

———S. 179—*Cheating—Offence where triable*

In cases of cheating, there must be an intention to cause wrongful loss or wrongful gain but it is not essential that loss should be caused. It is the court within whose jurisdiction the cheating was committed and not where loss ensued that should determine the forum of trial. Case of Criminal misappropriation distinguished. (*Campbell, J.*) RAGHIB SARAN v. KURUKSHETAR MOTOR SERVICE COY. 1923 Lah. 90.

———Ss. 179 and 181—*Criminal breach of trust—Cheating—Place of trial.*

Where the accused, a merchant carrying on business at Calcutta ordered goods from the complainant at Delhi on condition that the goods were to be delivered in Calcutta and payment was to be made in Delhi and the accused disposed of the goods in Calcutta without paying for them.

Held, that the offence of cheating or criminal breach of trust, whichever was committed in Calcutta and the Delhi Court had no jurisdiction to entertain a complaint in respect of those offences against the accused. (*Shadi Lal, C. J.*) ABDUL HAQ v. EMPEROR. 69 I. C. 631 (2): 23 Cr. L. J. 743 (2).

———Ss. 179, 181 and 183—*Criminal breach of trust—Criminal misappropriation—Jurisdiction.*

The complainant from Burma sent a sum of money to the accused, his agent in Japan through a Rangoon Bank. The accused misappropriated the money whereupon the complainant took criminal proceedings in Rangoon. Held that the offence of criminal misappropriation was complete when the conversion was done with the intention of causing wrongful gain to the offender, and did not depend on the consequence of wrongful loss which had ensued. The conversion having taken place in Japan the Rangoon Court had no

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jurisdiction to entertain the complaint 34 A. 487: 38 M. 639 41 C. 205: 35 A. 29 referred to. (*May Bung, J.*) AHMED EBRAHIM v. HAJJE A. A. GANNY. 1 R. 56: 2 Bur. L. J. 40:

74 I. C. 74: 24 Cr. L. J. 746: 1923 Rang. 209.

———Ss 179 and 172—*Jurisdiction—Offence of defamation—Letter posted in Madras addressed to Tinnevely*

Where an alleged defamatory letter is written and posted in Madras with a view to its being read at Tinnevely the offence of defamation is triable either in Madras or in Tinnevely under Ss. 179 and 182 of the Crl. Procedure Code, seeing that the accused has done all in his power towards publication and has lost control of the letter when he has committed it to the post (*Spence, J.*) KRISHNAMURTHI AIYAR v. PARASURAMA IYER. 32 M. L. T. 164 (H. C.): 72 I. C. 69 (1): 24 Cr. L. J. 309 (1): 1923 Mad. 666: 44 M. L. J. 648.

———S. 179—*Local jurisdiction—Enforcement—Verification signed at one place but present in another—Complaint.*

A petition under S. 21 of the Income Tax Act 1918 was verified at a place in the Tanjore District but presented in Ramnad District. On a complaint of an offence under S. 177 I. P. C. read with S. 40 Income Tax Act being filed in Ramnad held that the alleged offence was completed in the Tanjore District and that the Ramnad Magistrate had no jurisdiction to entertain the complaint. (*Olfield and Ramesam, JJ.*) MOHIDEEN PAKKIRI MARAKKAYAR *In re.* 1923 Mad. 50 (2).

———S. 179—*Scope of "Consequence"—Meaning of*

'Consequence' means a consequence which forms part and parcel of the offence and does not mean a consequence which is not such a direct result of the act of the offender as to form any part of that offence. 38 Mad. 639 26 M. L. J. 178 and 7 P. R. 1910 Fol. (*Motisar, J.*) NADAR v. EMPEROR. 73 I. C. 323: 24 Cr. L. J. 579: 1923 Lah. 487.

———S. 181 Sub S. 2—*Criminal breach of trust—Moneys received at one place—Accountability in another—Jurisdiction. See (1922) Dig. Col. 452*

ABDUL LATIF v. ABU MAHOMED KASSIM. 71 I. C. 241: 24 Cr. L. J. 113.

———Ss. 181 (4) and 531—*Scope of—No failure of justice by trial at wrong place—Effect.*

It is doubtful if the words "offence of kidnapping or abduction" in S. 181 (4) include an offence of wrongfully contending or keeping in confinement a kidnapped person. When a person is tried in a wrong court contrary to the provisions of S. 181 (4), but there is no failure of justice, S. 531 cures the defect and the conviction can be sustained. (*Stuart, J.*) BADLU SHAH v. EMPEROR. 21 A. L. J. 912.

———S. 183—*Scope of—Whether offence committed in British India or outside doubtful—Benefit of doubt.*

S. 183, Cr. P. Code, applies only when offence is committed in British India; where it was doubtful as to whether the offence was committed in

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British India or outside the benefit of doubt must be given to the accused. (*Motisagar, J.*) *NADAR v. CROWN*. 73 I. C. 323. 24 Cr. L. J. 579. 1923 Lah. 487.

—S. 183—*Theft from running train—Place of trial.*

In the case of a theft from a running train during the course of the journey the offence can be enquired into and tried by any Court having jurisdiction over any part of the country through which the train passed during the course of its journey. (*Abdul Kadar, J.*) *LAZARUS MEGHA NATH v. EMPEROR*. 71 I. C. 797. 24 Cr. L. J. 233.

—S. 186—*Duty—Magistrate Case of when to be sent.*

The wording of S 186 shows that as it relates to offences which the Magistrate knows at the outset to have been committed if at all, outside the limits of his jurisdiction. The marginal notes makes the meaning clearer and still more the references to the section in sch III and S. 529 of the Code. (*Walmsley and Suhrawardy, JJ.*) *AMULYA CHARAN DUTTA In re*. 1923 Cal. 401.

—Ss. 190 and 351—*Addition of new accused after initiation of proceedings.*

Though a Magistrate has taken cognizance of an offence under S 190 Cr. P. Code he can proceed under S. 351 against any other persons who may appear from the evidence to be concerned in that offence. S. 351 Cr. P. Code is independent of S. 190 and is not limited by the latter section. But the magistrate initiating proceedings in regard to additional accused must be held to have acted under the same clause of S. 190 as that under which the original proceedings were initiated. 1 C. W. N. 105 not foll. 26 C. 785; 3 C. W. N. 367; 41 C. 1013 approved. (*Robinson, C. J. Maung Kin and Macgregor, J.*) *NGA CHAN THA v. EMPEROR*. 73 I. C. 55. 24 Cr. L. J. 519; 1923 Bang. 31.

—S. 190—*Police report—What is—Notice of act.*

"Police report" in S. 190 Cr. P. C. means a report within the meaning of S. 170. When a magistrate takes cognizance of an offence under S. 190, he performs a judicial act. (*Mookerjee and Chatterjee, JJ.*) *NAGENDRA NATH CHAKRABARTY v. EMPEROR*. 38 C. L. J. 388.

—Ss. 190 (a) and 192 (3)—*Powers of District Magistrate—Cognizance of case—Transfer.*

Where a trial magistrate sends up a report to the District Magistrate that an accused before him had committed perjury and altered a document filed in Court, he can take cognizance of the offence under S. 190 (a) and transfer it for trial under S 192 (1) to another Magistrate. (*Sulaiman, J.*) *SURAJ PRASAD v. EMPEROR*. 21 A. L. J. 825; 9 O. & A. L. R. 1049; L. R. 4 A. 248 (Cr.)

—S. 190 (c)—*Cognizance of offence—Jurisdiction of Magistrate—Revival of proceedings.*

On receipt of the final report of the police on a complaint the Magistrate passed the following order "Enter false; mistake of law 379-109 and 447-109 I. P. C." The complainant then applied to the Magistrate for revival of the case and the

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Magistrate decided to enquire into the matter, *Held*, that there was no complaint before the Magistrate and that he had no jurisdiction to revive the proceedings after having finally disposed of the case. The effect of the prior order of the Magistrate had the effect not only of staying the proceedings but of terminating them. 20 C. 857 foll. (*Kulwant Sahay, J.*) *AJO CHAUDHRY v. DEBI CHAUDHRY*. 1 Pat. L. R. 97 (Cr.); 72 I. C. 945; 24 Cr. L. J. 481; 1923 P. 532.

—Ss. 190 (1) (c) and 476—*Document—Presentation to Sub-Registrar—Appeal to District Registrar also a District Magistrate—Penal Code, S. 471.*

The Sub-Registrar, after a protracted inquiry, passed an order on the 5th April, 1921, refusing to register a document.

An appeal was made to the District Registrar under the provisions of the Indian Registration Act, but the appeal was dismissed on the 28th July, 1921, and on the 2nd August, 1921, the District Registrar directed the prosecution of the accused for an offence under S. 471, Penal Code, and referred the case under the provisions of S. 476, Criminal Procedure Code, to another District Magistrate.

After the usual inquiry the accused was committed to the Court of the Sessions Judge, who agreeing with both assessors, has found the accused guilty of the offence charged.

A preliminary point was taken that the Magistrate, who made the commitment enquiry, had no jurisdiction to take cognizance inasmuch as the District Registrar not being a Civil, Criminal or Revenue Court within the meaning of S. 476, had no jurisdiction to proceed under that section. *Held*, that this contention could be accepted but the District Registrar was also the District Magistrate and as such District Magistrate he was competent to take cognizance under S. 190, clause (1), sub-section (c), of the Criminal Procedure Code, and to transfer the case to a Subordinate Magistrate in order that a commitment inquiry might be held; That officer had committed the case to the Sessions Court in accordance with law and the commitment was valid. There was therefore, no defect in the jurisdiction of the Sessions Judge to try the accused. (*Mulick and Bucknill, JJ.*) *CHETA MAHTO v. EMPEROR*. 2 Pat. 459; 4 Pat. L. T. 727; 74 I. C. 536; 24 Cr. L. J. 792.

—S. 191—*Irregularity.*

Where the accused have every reason to apprehend that there will be at any rate irregularities in the further proceedings of the Magistrate's court, it is necessary to transfer it to the Court of any other Magistrate. (*Harrison, J.*) *KADDA SINGH v. MOTI SINGH*. 5 Lah. L. J. 370; 1923 Lah. 410.

—S. 191—*Omission to inform accused of his right to be tried by another Court—Effect.*

The omission by a magistrate to inform the accused that he had a right to be tried by another Court is fatal to the legality of the trial by the magistrate. Waiver cannot be implied unless the

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accused is distinctly told in accordance with the terms of S. 191, Cr. P. Code, (Walsh, JJ.)  
CHANDER SEN v. EMPEROR. 21 A. L. J. 89  
73 I. C. 576 : 24 Cr. L. J. 656 : 1923 A. 383

—S. 191—Transfer after commencement—*De novo trial.*

A general allegation as to *de novo* trial without any date or without any specific allegation as to date when and the person to whom the application was made or what the order was in respect of it carries little weight. The magistrate viewed the locus *in que* at the request of both parties in presence of pleaders who were representing the respective parties. The Magistrate made and used inspection solely for the purpose of enabling him to understand the evidence which had already been given and which was legitimate for him to do. And there was no ground for suspicion that the judgment was influenced by the local inspection. (Sanderson, C. J. and Panton, J.) ALIZ MANDAL v. GIRISH CHANDRA CHOUDHURY.

1923 Cal. 320.

—S. 192 (1)—Powers of District Magistrate—Taking cognizance of case—Power to transfer  
See CR. P. C., SS. 190 (a) AND 192.

21 A. L. J. 825.

—S. 193 (2)—Reference to sessions judge under S. 123—If can be transferred to Additional Sessions judge.

When under S. 123, Cr. P. C. a magistrate referred to the Sessions Judge a case where the accused failed to give security for good behaviour, the latter can transfer the case to the Additional Sessions judge for disposal (Walmsley and Chotzner, JJ.) BENODE BEHARI NATH v. EMPEROR.

27 C. W. N. 996.

—S. 195—Appcal—Sub-magistrate granting sanction.

When a sub magistrate grants sanction to prosecute under S. 193, I. P. C. for giving false evidence before him, he does so as a court. An appeal lies to the District Magistrate, and an application in revision should be made first to the Sessions Judge and not to the High Court (Krishnan and Wallace, JJ.) PALLIKUDATHAN v. BUDDU GOUNDAN. 45 M. L. J. 553 : (1923) M. W. N. 745.

—S. 195—Application for sanction—Death of applicant—Legal representative—Right to continue application.

Where an applicant dies during the pendency of the application for sanction, his legal representatives cannot continue the application. They may file a fresh petition if necessary (Oldfield and Devadoss, JJ.) GHULAM MOHIDEEN QURAISHI SAHIB v. AHAMADULLA BEGAM SAHIBA

44 M. L. J. 66 : 46 Mad. 88 :  
32 M. L. T. (H. C.) 102 : 71 I. C. 49 (2) :  
24 Cr. L. J. 2 : 1923 Mad. 206.

—S. 195—Applicability—Affidavit sworn before District Judge as District Registrar—Perjury—Sanction for—Power to grant. See PENAL CODE, S. 199.

21 A. L. J. 88.

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—Ss. 195 and 196—A—Conspiracy—Non-cognizable offence—Particulars specified in application for sanction—Omission to specify particulars in the order granting sanction—Effect of.

An application for sanction under S. 195 Cr. P. Code should be read with the order granting sanction and where the particulars required by S. 195 Cl. 4 are contained in the petition for sanction the order granting sanction need not set them out 40 C 423 foll. Under S. 196 A of the Cr. P. Code consent in writing of the authorities therein specified is not necessary to a prosecution for a conspiracy to commit a non-cognizable offence when S. 194 Cl. 3 of the Cr. P. Code is applicable to the case. (Newbould and Suhrawardy, JJ.) KALI SINGH v. EMPEROR.

50 Cal. 461 : 75 I. C. 533 : 24 Cr. L. J. 949.

—S. 195—Costs

No costs can be awarded in proceedings under S. 195, Cr. P. Code. (Duckworth, J.) KARUPIAH NAIDU v. R. M. S. MUTHUSWAMI

1 Bur. L. J. 155 : 72 I. C. 975 : 24 Cr. L. J. 511 :  
1923 Rang. 12.

—S. 195—Court of appeal.

An order of the Township Court in Burma granting sanction can be considered by the District Court but when once the latter court has passed an order under S. 195 (5) the remedy of the aggrieved party lies by moving the High Court and not the Divisional Court. If the original proceedings are held in the sub-divisional or District Court then the Divisional Court may have jurisdiction. (Duckworth, J.) KARUPIAH NAIDU v. R. M. S. MUTHUSWAMI.

1 Bur. L. J. 155 : 72 I. C. 975 :  
24 Cr. L. J. 511 : (1923) Rang. 12.

—S. 195—Grant of sanction—Discretion of court—Duty of trying Magistrate.

The fact that a court sanctions a prosecution is no intimation to the Magistrate that the court thinks that there is a case to go to a jury or that he thereby is in any way relieved from his duty of considering whether the accused ought to be committed for trial or not. This view is not inconsistent with the duty of the court to refuse sanction, if it is clearly of opinion, on the evidence before it, that no reasonable jury should convict.

Per Oldfield, J. :—A Court granting sanction must put on record sufficient materials to demonstrate that its exercise of discretion has been judicial.

Per Coutts Trotter, J. :—A Court granting sanction does no more than say that on the materials before it, it is not apparent that a prosecution would be against public interests or a mere indulgence of private spite. Where the court is of opinion that the public interest would not be served by such a prosecution it is not debarred from refusing sanction even if there is a *prima facie* case (Schwabe, C. J., Oldfield and Coutts Trotter, JJ.) MUNISAMI MUDALIAR v. RAJARATNAM PILLAI.

44 M. L. J. 774 : 72 I. C. 340 :  
24 Cr. L. J. 340 : 1923 Mad. 196.

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—S. 195—False charge to Police—Sanction—Subsequent complaint—Effect.

Where a false charge is made to the Police and not to the court, no sanction is required for prosecuting him. The fact that he subsequently made a complaint in court is no bar to the court's proceeding under S. 182, I. P. C. (*Daniels, J.*) *BAKSHI v. EMPEROR* L. R. 4 A. 207 (Cr.). 21 A. L. J. 805.

—S. 195—Judicial proceedings—Bihar and Orissa Public Demands Recovery Act S. 32—Application to certificate officer for payment of surplus sale proceeds—Forgery—Sanction.

A mahal belonging to several co-sharers was sold under the Bihar and Orissa Public Demands Recovery Act, 1914. The proceeds of the sale after paying out the claim of the certificate holder remained in the hands of the certificate Officer. A Muktyar filed an application purporting to be signed by all the co-sharers and drew out the money from Court. Some of the co-sharers applied for sanction to prosecute the muktyar for forgery held that the surplus sale proceeds were not entrusted to the certificate officer in his capacity as a Court and the sanction for the prosecution of the muktyar was not necessary. (*Mullick and Bucknill, JJ.*) *JHARU LAL v. MAHANTH MADAN DAS* 2 Pat. 257 : 74 I. C. 713. 24 Cr. L. J. 809 : 1923 P. 410.

—S. 195—Munsif to whom subordinate.

For the purposes of S. 195, Cr. P. Code a Munsif is subordinate to the Senior Subordinate Judge and not to the District Judge. The latter is not competent to grant sanction for an offence committed before the Munsif. (*Martineau, J.*) *KANHAYA LAL v. ROSHAN MAL*. 69 I. C. 448 : 23 Cr. L. J. 720.

—Ss. 195 and 439—Order granting or revoking sanction—Revision. See (1922) DIG. COL. 454 *BRUJ KUMAR v. MANNALAL MISRA*

9 O. L. J. 662 : 71 I. C. 681 : 24 Cr. L. J. 217

—Ss. 195 and 537—Penal Code, S. 182—Prosecution for offence—Sanction—Absence of—Irregularity.

Where there has been a magisterial trial consequent on a police report the sanction of the magistrate who inquired or the District Magistrate is necessary for a prosecution under S. 182 I. P. C. The absence of sanction is a mere irregularity and does not vitiate the trial (*Heald, J.*) *NAGAPAN MUDALIAR v. EMPEROR*.

1 Bur. L. J. 258 : 74 I. C. 259 : 24 Cr. L. J. 755 : 1923 Rang. 135 (2).

—S. 195—Police not subordinate to District Magistrate.

Where the District Magistrate granted sanction under section 182 for false report to police and the Sessions Judge refused to deal with it on the ground that District Magistrate passed the order as head of the Police, the High Court revoked the sanction holding that the Sessions Judge had the power to revoke it. It was further held by the High Court that the police are not subordinate to the District Magistrate within the section. Although police officers in districts are generally subordinate to the District Magis-

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trate, the subordination contemplated by section 195 of the Cr. P. C. is not such subordination. That subordination contemplated some superior officer of police (*Abdul Raoof, J.*) *KHAZA SINGH v. KIRPA SINGH*. 4 Lah. 130 : 5 Lah. L. J. 372 : 73 I. C. 779 : 24 Cr. L. J. 683. 1923 Lah. 341.

—S. 195—Revenue Court—Deputy Tahsildar holding enquiry into patta transfer—Production of document—Sanction—Penal Code, S. 471.

Where the applicants for a transfer of patta produce as genuine a forged will before the Deputy Tahsildar in the course of the enquiry held by him, they can be prosecuted under S. 471, I. P. C. only with the sanction of the Deputy Tahsildar. 12 Bom. L. R. 383 Rel. (*Sir Walter Schwabe, C. J. and Krishnan, J.*) *MATTAM CHINNA VIRAYYA In re*.

71 I. C. 63 : 24 Cr. L. J. 15 : 1923 Mad. 87 (1).

—S. 195—Sanction given but no prosecution launched before September 1923—Effect.

Where sanction to prosecute was given before September 1923 but no prosecution was launched by that time, further proceedings cannot be taken under the sanction order, under the amended section. It can be done only on a complaint by the court concerned. (*Carr, J.*) *ANI v. AH YONE*. 2 Bur. L. J. 289.

—S. 195—Sanction—High Court—Interference.

Where the question of grant of sanction has been considered by two courts below, the High Court will interfere in revision only in order to prevent a gross and palpable failure of justice. (*Daniels J.*) *JOTI PRASAD v. DURGA PRASAD*.

L. R. 4 All. 213 (Cr.).

—S. 195—Sanction—Penal Code, S. 193—Offence in relation to proceedings—False evidence—Alleged abetment by pleader.

Where the petitioner, the pleader of certain accused persons charged with dacoity, was prosecuted for an offence under S. 193, I. P. C. in that he suborned three of the prosecution witnesses in the dacoity case and the prosecution was launched without the sanction of the criminal court and before the trial of the dacoity case was over, Held, that the want of sanction was fatal to the prosecution of the petitioner and that the starting of the prosecution against the petitioner even before the dacoity case was heard was inadvisable.

*Per Crump, J.* : The words "in relation to" in S. 195 (b) Cr. P. Code are very general and are wide enough to cover a proceeding in contemplation before a criminal Court, though it may not have begun when the offence was committed. (*Shah, A. J. C. and Crump, J.*) *VASUDEO RAM CHANDRA JOSHI In re*.

71 I. C. 523 : 24 Cr. L. J. 171 : 1923 Bom. 105.

—Ss. 195 and 476—Sanction to prosecute—Court's duty.

The Magistrate shall himself make a proper enquiry into the offences against public Justice of the commission of which there are at least strong indications and shall thereafter either refuse sanction or grant it, if it should seem proper to take action, himself under S. 476 of the Cr.



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P. C., The proper attitude of the court and the principle that should guide it in the case of offences against public justice are exactly the same as those of the police officer who actually sees the commission of what appears to be cognizable offences. He must make full inquiry. He fails in his duty if he takes no action at all, but merely waits for the aggrieved party to complain and also if when such a complaint has been made, he does no more than scrutinise the evidence put before him by that party or that of the facts he happens to have seen himself (*Hallifax, A. J. C.*)  
TULSIRAM v. TILOKCHAND. 1923 Nag 258.

—S. 195—Sanction to prosecute—Judicial proceedings—Proceedings without jurisdiction—Effect of—Perjury.

Plaintiff filed a suit to enforce compulsory registration of a deed, the defendant challenged it as a forgery. The suit was dismissed for non-compliance with the provisions of Ss. 71 and 76 of the Registration Act. The defendant applied for sanction to prosecute the plaintiff for forgery and sanction was granted by the first Court and revoked by the appellate Court on the ground that the proceedings were without jurisdiction and a nullity. *Held*, that the Court had jurisdiction to grant sanction even though the proceedings in the course of which the evidence was taken proved abortive. (*Heald, J.*)  
ABDUL AZIZ v. MAUNG LIN. 2 Bur. L. J. 48 : 75 I. C. 74 : 24 Cr. L. J. 874.

—Ss. 195 and 197—Sanction to prosecute—Notice to accused—Necessity for.

Before granting sanction to prosecute under S. 195 Cr. P. Code, the court is not bound to issue notice to the accused. (*Walsh, J.*)  
ANGNOO SINGH v. EMPEROR. 45 A. 109 : 71 I. C. 865 : 24 Cr. L. J. 257 : 1923 A. 35.

—S. 195—Sanction under—Absence of—Effect on complaint which does not require sanction.

Where a complaint consists of an offence for which sanction is required and another offence the trial of which does not require such sanction, the failure to produce the sanction does not absolve the court from investigating that part of the complaint for which no sanction is required. (*Stuart, J.*)  
TANSU BEG v. MUHAMMAD YAKHAN. 21 A. L. J. 915.

—S. 195 (1)—Perjury—Sanction for—Different views of evidence by final court and appellate court.

Sanction for prosecution for perjury in respect of a piece of evidence should not generally be granted where the trial court and the appellate court have taken different views as to its credibility. (*Das, J.*)  
HIRALAL MAHTON v. LILA MAHTON. 1923 F. 102 (2).

—S. 195 (1) (a)—Superintendent of police—If subordinate to District Magistrate.

A District Superintendent of police is subordinate to the District Magistrate within S. 195 (1) a Cr. P. C. Where a District Magistrate granted sanction to prosecute the accused for contempt of the lawful authority of a police officer the order is not of a court of justice and cannot be set aside

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in revision. (*Mears, C. J. and Piggott, J.*)  
CHHOTAY LAL v. CHHEDI LAL.

73 I. C. 341 : 24 Cr. L. J. 597 : 45 A. 135 : 1923 A. 149.

—S. 195 (1) (a) and (7)—Order under S. 145 Cr. P. Code—Disobedience to—Sanction to prosecute—Order passed by first class Magistrate—Subsequently transferred—Power of Dt. Magistrate. See (1922) DIG. COL. 456  
BUDIYUDDIN SARFUDDIN *In re*. 47 Bom. 102.

—S. 195 (1) (b)—Perjury—Sanction for prosecution when to be given—Conflicting statements.

A witness is entitled to *locus penitentiae* and an opportunity to correct himself and if, when he gets that opportunity, he recalls to his mind any fact about which he had made a statement which was not quite accurate, a prosecution for perjury will hardly be desirable. No statement made by a witness in a deposition can be regarded as a completed statement until the deposition is finished and corrected, if necessary, for till then it is open to the witness to qualify any statement or correct it himself. Where the statements relied on were, moreover, statements hardly material to the issue before the Court, sanction to prosecute for perjury should not be given. (*Kanhariya Lal, J.*)  
MAHARAJ PRASAD v. EMPEROR.

21 A. L. J. 673 : 9 O. & A. L. B. 694 : 74 I. C. 443 : 24 Cr. L. J. 779.

—S. 195 (1) (B)—Sanction to prosecute—Remand by District Judge—Legality of.

Where a District Judge remanded an application for sanction to prosecute for re consideration by the District Munsiff *held* that a Judge acting under S. 195 has no jurisdiction to remand a case to the Subordinate Court for further enquiry. He must himself decide whether the sanction which was refused by the Munsiff should be granted and he has power for this purpose to take evidence himself, but he has no power to remand the case for further enquiry by the Munsiff. 44 C 816 followed. (*Newbould and Suhiawardy, JJ*)  
MATHURA NATH v. RAJENDRA KUMAR

72 I. C. 79 (1) : 24 Cr. L. J. 319 (1).

—S. 195 (1) (c) and (7)—Sanction to prosecute—Meaning of the words "or of some other court to which such court is subordinate." See (1922) DIG. COL. 457.  
FAZAL ILAHI v. MOHAN LAL. 72 I. C. 383 : 24 Cr. L. J. 383.

—S. 195 (6)—Appellate Court—Power to take evidence. See (1922) DIG. COL. 458  
RAMDHARI AHIR v. EMPEROR. 4 Pat. L. T. 370 : 71 I. C. 997 : 24 Cr. L. J. 277.

—S. 195 (6) and (7)—High Court—Original Side—Order of Single Judge for prosecution—Appeal—Costs.

An order of a single Judge of the High Court on the original side granting sanction to prosecute is open to appeal to a Bench of the High Court. *Quære*: Whether the Court has power to order costs to be paid in a proceeding under S. 195, Cr.

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P. Code. (Sir Walter Schwabe, C. J., *Oldfield and Coutts Trotter, JJ.*) MUNISWAMI MUDALIAR v. RAJARATNAM PILLAI. 1923 Mad. 136 :

72 I. C. 340 : 24 Cr. L. J. 340 :  
44 M. L. J. 774 (F. B.)

———S. 195 (6)—*Omission to give notice—Effect*

Where no notice was given to the petitioner before the sanction was given which was given on vague grounds by a Magistrate who had no jurisdiction but to whom the case was transferred by the District Magistrate the order giving sanction to prosecute was set aside. Such notice may not be legally necessary but it has been held repeatedly to be highly desirable that it should be given and the omission to give notice taken into consideration with other circumstances may be the ground for setting aside on revision such orders as the present. (*Campbell, J.*) CHARAN DAS v. KODU. 72 I. C. 970 : 24 Cr. L. J. 506 :

1923 Lah. 36 (2).

———S. 195 (6)—*Order granting sanction—Appeal—Sanction when to be granted.* See (1922) DIG. COL. 458. NAZIR HASAN KHAN v. MAHOMED YAMIN. 26 O. C. 104

———Ss. 195 (6) and (7)—*Order by a Sub-Divisional Magistrate, prohibiting interference with a religious ceremony—Disobedience of the order—Sanction to prosecute, given by Sub-Divisional Magistrate—Interference by Sessions Judge, whether legal—Nature of an order by a Magistrate under S. 144, whether passed as a "public servant" or "Court"—District Magistrate the proper authority to revoke.*

A Magistrate passing an order under S. 144 of the Criminal Procedure Code does so only as a "public servant" and not as a "Court" and sub S. (7) of S. 195 is inapplicable to such a case.

Where a Sub-Divisional Magistrate passed an order under S. 144 of the Criminal Procedure Code prohibiting certain persons from interfering with the performance of a certain religious ceremony and the Sub-Divisional Magistrate subsequently sanctioned their prosecution for an offence under S. 188 of the Indian Penal Code and the order was revoked by the Sessions Judge for having disobeyed the order held, that the sanction for prosecution could not be revoked by the Sessions Judge acting under sub S. (6) of S. 195.

The proper authority to revoke the sanction, in such a case, is the District Magistrate. 6 Mad. 203 ; 14 W. R. (Cr.) 46 and 2 Weir 155 Referred to. 35 M. L. J. 454 diss. (*Ayling and Ramesam, JJ.*) NATARAJA PILLAI v. RANGASWAMI PILLAI. 44 M. L. J. 328 :

17 L. W. 409 : (1923) M. W. N. 240 :

32 M. L. T. (H. C.) 214 : 72 I. C. 536 :

24 Cr. L. J. 424 : 1923 Mad. 473.

———S. 195 (6)—*Revision lies.*

A revision lies against an order under S. 195(6) Cr. P. Code. under section 439, 49 I. C. 153. Diss. 5 P. R. 1908. Fol. (*Abdul Raouf, J.*) KHAZAN SINGH v. KIRPA SINGH. 4 Lah. 130 :

5 Lah. L. J. 372 : 73 I. C. 779 : 24 Cr. L. J. 683 :

1923 Lah. 341.

## CRIM. PRO. CODE (1898), S. 195.

———S. 195 (6) and (7)—*Sanction to prosecute—Grant of sanction by single Judge—Appeal to High Court.* See (1922) DIG. COL. 459. ABDUL LATIF USMAN v. HAJI TAR MAHOMED 47 B. 270.

———S. 195 (6) and (7)—*Sanction to prosecute—Grant of, by single Judge of the High Court—Powers of revocation of division bench hearing appeals from the Original Side—Letters Patent—Cl. 15—Judgment.* See (1922) DIG. COL. 459. MUNISWAMI MUDALIAR v. RAJARATNAM PILLAI. 71 I. C. 126 : 24 Cr. L. J. 78.

———S. 195 (6)—*Sanction to prosecute—Limitation—Extension of time.*

The High Court has jurisdiction to extend the time of six months allowed by S. 195 (6) of the Crl. Procedure Code even though the application for extension of time is made after the expiry of six months and after sanction has ceased to be in force. The High Court however will not extend the time unless good cause is shown. An application for revocation of sanction does not bar the institution by the complaint of proceedings in pursuance of the sanction. (*Sanderson, C. J. and Panton, J.*) RAM SARAN SINGH v. CHANDRA MOHAN SAHA. 71 I. C. 222 : 24 Cr. L. J. 94.

———S. 195 (6) — *Sanction to prosecute—Sanction granted by District Munsif but revoked by the District Court—Powers of High Court.*

Where sanction to prosecute was granted by a District Munsif but was revoked by the District Judge on appeal, the High Court can only interfere with the order of the District Judge under S. 115 C. P. C. or S. 107 of the Government of India Act. 36 C. L. J. 265 followed. (*Newshoul and Sukrawardy, JJ.*) JAINUDDIN v. KERAMATULLA. 71 I. C. 595 : 24 Cr. L. J. 179.

———S. 195 (6)—*Sanction—Refusal by first court and appellate court—Revision—Power of High Court—C. P. Code, S. 115—Government of India Act.*

Where the first court and the appellate court have both refused sanction, there is no provision for any further appeal or application to the High Court. Even if the High Court has power under S. 115, C. P. Code or S. 107 of the Government of India Act to interfere, it will not do so, where the courts below have refused sanction on a consideration of the entire evidence, 11 C. W. N. 195 ; 5 C. L. J. 222 Ref. 10 C. W. N. 1026 appr. (*Ghose and Cuming, JJ.*) SARAT CHANDRA MANDAL v. RAMSASHI ROY. 1923 Cal. 45.

———S. 195 (7)—*Appeal against sanction order—Second class magistrate—To whom lies.*

The fact that a first class magistrate has been specially empowered to hear appeals from second class magistrates, does not make him the authority to which appeals ordinarily lie for the purpose of S. 195 (7) Cr. P. C. A sanction order by a second class magistrate is still appealable to the District Magistrate. (*Kanhaya Lal, J. C.*) AHMAD HUSAIN v. RAHIMIN. 26 O. C. 358 : 9 O. & A. L. R. 511.

———S. 195 (7) (a)—*Court to which appeals Ordinarily lie—Sanction to prosecute—Grant by Sub Judge—Revocation by District Judge—Jurisdiction—Sub Judge acting in exercise of Appellate jurisdiction in granting sanction—Effect.*

## CRIM. PRO. CODE (1898), S. 196.

Appeals from a Sub-Court must be regarded as ordinarily lying to the District Court and not to the High Court within the meaning of S. 195 (7) (a), Cr. P. Code.

The District Court has jurisdiction to revoke a sanction granted by the Subordinate Judge, even though the Subordinate Judge's sanction was itself given in the exercise of his appellate jurisdiction.

The nature of the sanction proceedings is not material with reference to the terms of S. 195 (7) (a), the only question under that provision being of the Court to which appeals generally lie. (*Oldfield and Ramesam, JJ.*) A. R. R. M. N. NARAYANAN CHETTIAR v. KADIRAYA GOUNDAN

17 L. W. 311 : (1923) M. W. N. 223 :  
72 I. C. 337 : 24 Cr. L. J. 337 : 1923 Mad. 504 :  
44 M. L. J. 320.

———S. 196—Nature of sanction—Penal Code S. 124 A.

S. 196 Cr. P. Code does not lay down any particular form in which the sanction should be accorded, and must be deemed sufficient if it names the persons to be prosecuted and specifies the sections under which they are alleged to have committed the offence as also the period of their activity. The mere fact that the sanction does not specify the utterances made by the accused or the songs which they have alleged to have recited does not in any way affect its validity. (*Moti Sagar, J.*) KISHEN SINGH v. EMPEROR.

1923 Lah. 333.

———Ss. 196 and 537—Sanction to prosecute—Order not given to determinate person, but communicated to competent officer—Effect.

An order of the Local Government under S. 196 of the Criminal Procedure Code sanctioning the prosecution of certain persons for offences punishable under S. 121, I. P. C., was communicated to the District Magistrate, Malabar, the Public Prosecutor, Malabar and the senior special Judge, Malabar. In pursuance of the order a complaint was presented and a prosecution carried on against the persons named in the order by a gentleman, who signed and described himself as additional Public Prosecutor, South Malabar. In an appeal from their conviction, objection was taken that the order of authorisation was not to any determinate person as required by S. 196 Cr. P.C., and that a condition precedent to the validity of the proceedings was therefore wanting. No such objection was however, taken at the trial.

*Held*, the order of authorisation was sufficient in itself and was sufficient to justify the initiation and carrying on of the proceedings by the additional public prosecutor referred to above.

*Held further* that the alleged defect would in any view, be only an irregularity covered by S. 537, Cr. P. C. or S. 16 of the Ordinance I of 1922 and not an illegality vitiating the proceedings.

The order was communicated to the District Magistrate, the officer entrusted with the duty of initiating prosecutions for offences punishable under the Penal Code, and the Additional Public Prosecutor, who presented the complaint, must, under S. 114 of the Evidence Act, be presumed to have been empowered to initiate and carry on the proceedings, especially as no objection was

## CRIM. PRO. CODE (1898), S. 199.

taken at the trial to that presumption. (*Oldfield and Ramesam, JJ.*) MANDAYAPURATH ERESA KUTTY MOOPAN *In re*.

44 M. L. J. 166 : 17 L. W. 100 :  
73 I. C. 155 : 24 Cr. L. J. 539 : 1923 Mad. 328.

———S. 196—Sanction by Government—Signature by Chief Secretary to Government—Proof of—Judicial notice—Evidence Act, S. 57.

Where under S. 196, Cr. P. Code an order sanctioning a prosecution and signed by the Chief Secretary to the Government is filed in Court, the Court can take judicial notice of that Officer's signature just as of his succession to office, name, title and functions. The genuineness of his signature is not a matter which, unless the Court deems it necessary, need be proved and the exhibition of a copy of the Fort St. George Gazette containing a notification of that Officer's appointment as Chief Secretary is not essential. 42 M. 885 referred to.

*Obiter*. If necessary, the High Court might admit in evidence a copy of the notification under S. 428, Cr. P. Code. (*Ayling and Ramesam, JJ.*) CHOLANCHERI AYAMMAID *In re*.

44 M. L. J. 557 :  
17 L. W. 615 : (1923) M. W. N. 290 :  
32 M. L. T. (H. C.) 300 : 24 Cr. L. J. 403 :  
72 I. C. 515 : 1923 Mad. 600.

———S. 196—Sanction of Local Government—Signature—Proof of. See (1922) DIG. COL. 460.  
50 Cal 135.

———S. 197—Municipal Secretary—Prosecution for offence—Sanction if necessary.

A complaint against the Secretary of a Municipality for an offence does not require sanction under this section. (*Abdul Kadir, J.*) KISHEN SINGH v. GIRDHARI LAL.

69 I. C. 638 : 23 Cr. L. J. 750.

———S. 197—Nature of order of sanction—Reasons if to be stated.

Action taken under S. 197 is more of the nature of an executive than judicial action. The fact that reasons are not stated does not constitute an irregularity. (*Wallace, J.*) KAKARLA CHINA CHENDRAYYA v. MADDUKURI SUBBARAYUDU.

71 I. C. 244 : 24 Cr. L. J. 116 :  
17 L. W. 226 : 1923 Mad. 338.

———S. 197—Sanction under—Additional District Magistrate—Powers of.

An Additional Dt. Magistrate on whom the powers of a Dt. Magistrate have been conferred can pass orders of sanction under S. 197 (*Wallace, J.*) CHINNACHANDRAYA v. SUBBARAYUDU.

71 I. C. 244 : 24 Cr. L. J. 116 : 17 L. W. 226 :  
1923 M. 338.

———S. 198—Complaint by official superior of person aggrieved:

A complaint of an offence under S. 500, I. P. C., should be made by the person aggrieved but not by his official superior. 26 M. 43 Ref. (*Simpson, A. J. C.*) GAYA BARHAI v. KING EMPEROR.

26 O. C. 44 : 1923 Oudh 4.

———Ss. 199 and 345—Institution of complaint by agent—Offence under S. 498 I, P. C.—Compounding of offence.

## CRIM. PRO. CODE (1898), S. 199.

Where a person acting as the agent of another under S. 199 Cr. P. Code started proceedings for the prosecution of an alleged offender for an offence under S. 498, I. P. C. committed in respect of the wife or that other person the former (agent) is not competent to compound the case under S. 345 on behalf of the husband. An order of acquittal based upon such composition is invalid and does not bar the institution of a fresh complaint by the husband. (*Pipon, J. C.*) *HARNAM DASS v. SAIN DASS*, 71 I. C. 248 (2). 24 Cr. L. J. 120 (2).

## —S. 199—Complaint—Meaning—Complaint to police not enough

The complaint referred in S. 199 Cr. P. C. must be to a Magistrate. A complaint to the Police is not sufficient under that section. (*Krishnan, J.*) *ARMUGA MUDALIAR In re*, 1923 Mad. 59.

## —Ss. 200, 202—Cognizable offence—Complaint to Magistrate—Order for Police enquiry—Arrest by Police—Legality of.

The Criminal Procedure Code draws a clear distinction between jurisdiction to try and jurisdiction to investigate and it is possible to conceive of cases where, although the Magistrate may distrust a complainant or delay in passing orders the police would be failing in their duty, if they did not arrest an offender against whom a cognizable offence has been made out. Much more so would this be the case where the Magistrate, after recording the complaint, finds that a regular police investigation would be more suitable and intentionally keeps the complaint pending in order that the police may exercise their powers of investigation and arrest independently of the Magistrate. The order of a Magistrate under S. 202 of the Criminal Procedure Code directing the Police to enquire into a cognizable case does not debar the police from exercising their powers of arrest and investigation in regard to the same matter as forms the subject of the complaint. Where a Magistrate to whom a complaint had been made passed an order directing the police to take cognizance under S. 379 I. P. C., make a quick enquiry and report, it cannot be held to be an order under S. 202 Criminal Procedure Code but it is merely an order directing the police to exercise the independent powers conferred on them by the law. Consequently an arrest made by the Police in the course of their investigation is not illegal. Even if the order was made under S. 202 the Police would have power to arrest and send up a charge sheet against the accused. A complaint recorded by a Magistrate under S. 200, Criminal Procedure Code constitutes "credible information" upon which the Police can effect an arrest under S. 54, Cr. P. C. even in the absence of a process issued by the Magistrate. (*Mullick and Bucknill, J.J.*) *EMPEROR v. BHOLA BHAGAT*, 2 Pat. 379 : 4 Pat. L. T. 521 : 1 Pat. L. R. 248 (Cr) : 24 Cr. L. J. 375 : 72 I. C. 375 : 1923 P. 547.

## —S. 200—Failure to examine complainant—vitiate trial—Prejudice.

The failure to examine the complainant is not an illegality vitiating the trial. Where the accused has not been prejudiced, the omission is only an

## CRIM. PRO. CODE (1898), S. 203.

irregularity and is covered by S. 537. (*Lumsden, J.*) *MEHR CHIRAGH DIN v. EMPEROR*, 4 Lah. 359.

—Ss. 202, 200 and 537—Complaint—Omission of Magistrate to examine complainant irregularity. See (1922) DIG. COL. 462 *RAMA SWAMI AIVANGAR In re*, 69 I. C. 371 : 23 Cr. L. J. 691.

—Ss. 202 and 203—Complaint—Refusal to issue process—Illegality. See (1922) DIG. COL. 463. *CHANDI CHARAN MITRA v. MANINDRA CHANDRA ROY*, 27 C. W. N. 196 : 72 I. C. 173 : 24 Cr. L. J. 333 : 1923 Cal. 198.

—Ss. 202 203 and 204—Counter Complaint—Enquiry and report—Order postponing other case—Legality of. See (1922) DIG. COL. 463 *LALJI SINGH v. NAURANGILAL*, 71 I. C. 248 (1) : 24 Cr. L. J. 120 (1).

## —S. 202 (2)—Evidence under—If basis of prosecution.

A prosecution can be ordered on the basis of evidence recorded under S. 202 (2) Cr. P. C. (*Macpherson, J.*) *BANSHIDAR MARWARI v. EMPEROR*, 74 I. C. 1054 (2) : 24 Cr. L. J. 862 (2).

## —S. 203—Dismissal of complaint—Complainant not examined on oath.

Where a person having made a charge against another finds that the police report designates his charge as false, he is entitled to file a petition before a Magistrate impugning the correctness of the police report. The Magistrate must regard this petition as a complaint and the complainant is entitled to have the persons complained against tried on the charge, or else his statement (that is the complainant's statement) must be recorded on oath and his complaint dismissed. (*Bucknill, J.*) *NAND KISHORE MISSIR v. KALIKA MISSIR*, 74 I. C. 917 : 24 Cr. L. J. 845 : 1923 P. 539.

## —Ss. 203 and 437—Dismissal of complaint—Further enquiry—Opportunity to show cause.

After giving the accused an opportunity of being heard, a Magistrate dismissed a complaint under S. 203 Cr. P. Code. The Sessions Judge without giving an opportunity to the accused to be heard set aside the order of dismissal and directed a further enquiry. Held, that under the circumstances the accused should have been given an opportunity of being heard at the hearing of the application under S. 437, Cr. P. Code. (*Ghose and Chotzner, J.J.*) *JOGESH CHANDRA SEN v. NIKUNJA BEHARY CHOWDHURY*, 27 C. W. N. 552 : 1923 Cal. 651.

## —Ss. 203 and 437—Order of discharge—Further enquiry—When to be ordered.

Where the applicant had been prosecuted before a competent Magistrate and has been, after a trial before that officer, found not guilty and discharged, the Magistrate expressly finding there was no case for the Crown it is not open to the District Magistrate to order further enquiry in the absence of any allegation of improper conduct on the part of the trying officer. (*Bucknill, J.*) *RAKTU SINGH v. EMPEROR*, 1 Pat. L. R. (Cr) 28 : 72 I. C. 950 : 24 Cr. L. J. 446.

## CRIM. PRO. CODE (1898), §. 203.

—§. 203—*Order of discharge—Second case not barred.*

A Court which passed an order of discharge cannot reopen the same case but there is no bar to a second case being instituted and the order of discharge does not stand in the way of such proceedings being taken (*Linisav, J.*) *JASWA v EMPEROR*. L R 4 A 67 (Cr.) : 71 I C 696 : 24 Cr L J 232 21 A L J 215: 1923 A 332 (2).

—§. 203—*Police officer—Opportunity to complainant*

When a complaint is made against a police officer, it should be enquired into with care and every opportunity must be given to the complainant to prove his case. Dismissing it, without even making a memo of the complainant's statement is bad (*Dalal J C.*) *BALDA PASI v NASIR ALI KHAN*, 9 O, & A. L. R. 458 : 74 I. C 718 24 Cr. L J. 814.

—§. 203—*Reasons for dismissal.*

A magistrate dismissing a complaint is bound to give reasons for dismissal. (*Foster, J.*) *CHAUDHURY MANDAR v EMPEROR*. 74 I. C 855. 24 Cr. L J. 822.

—§. 203—*Setting aside dismissal—Procedure—Notice.*

Where a complaint has been dismissed, if the appellate Judge wants it to be set aside, he must do it himself. Where the dismissal was before giving notice to the accused, the order of dismissal can also be set aside without notice to the accused (*Daniels, J.*) *MATA PALAT v. EMPEROR*. 74 I. C. 715 (2) 24 Cr L J 811 (2). 1923 All. 479 (2).

—§. 204—*Order under—Subsequent passing of another order under S. 202.*

A complaint was made before a magistrate on the 22 d December and he passed an order directing that two accused persons be summoned. Subsequently on that date one of the persons against whom summons had been ordered to be issued appeared and laid a cross complaint. The Magistrate then rescinded the order passed by him and sent both the cases to a Subordinate Magistrate for local enquiry and report.

*Held*, that there is nothing in the Code which forbids the Magistrate to reconsider an order of this kind on sufficient grounds, and that the order passed by him was a right and proper order (*Newbould and Suhrawardy, JJ.*) *LALIT MOHAN BHATTACHARJEE v NONI LAL SARKAR* 1923 Cal 662

—§. 205 — *Warrant case — Absence of accused—Trial in his absence—Magistrate appointing mukhtear to represent him—Legality of.*

Sec 205, Cr. P. C., applies only to cases in which the Magistrate has issued summons in the first instance. It does not apply to a case where the accused has been arrested without or after the issue of a warrant.

A Magistrate has no jurisdiction to hear the case in the absence of the accused and jurisdiction could not be confirmed by any consent on the part of a Mukhtear appointed by the Magistrate for the accused *suo motu*.

## CRIM. PRO. CODE (1898), §. 205.

If the defect could be cured by Sec. 537, Cr. P. Code, his acquiescence would have been an important factor, but where there was a complete absence of jurisdiction to hold the trial in his absence the question of the application of Sec. 537 does not arise (*Mullick and Bucknill JJ.*) *ABDUL HAMID v. EMPEROR* (1923) Pat. 239: 4 Pat. L T. 644 : 2 Pat. 793 : 2 Pat. L R 1 (Cr.): 75 I. C 72 : 24 Cr. L J. 872 : 1924 P. 46.

—§. 205 (2)—*Prosecution under the Income Tax Act—Appearance by pleader*

The petitioner was served with a notice on the 12 December 1922, by a Sub-Divisional Officer in his capacity as an Income Tax Officer, requiring the petitioner to submit a return of his income within seven days. The petitioner thereupon raised a question as to whether separate income should or should not be included in the income of the family of which he was a member. On the 11th February 1923, the Sub-Divisional Officer applied to the District Magistrate in the latter's capacity as an Assistant Commissioner of Income tax for sanction to prosecute the petitioner under S 51 (c) of the Income Tax Act, for having failed without reasonable cause or excuse to furnish in due time a return which had been called for from him under S 22 of the Act.

The District Magistrate granted sanction for prosecution on the 15th February, 1923. On the 14th February 1923 the Sub-Divisional Officer in his capacity as an Income Tax Officer reported to make a report to himself as the Sub-Divisional Magistrate, with a request for issue of a process against the petitioner and on the same date the Sub-Divisional Officer took cognizance of the case and summoned the petitioner to appear before him on the 26th February, 1923. On the 27th February 1923 the petitioner appeared before the Sub-Divisional Officer through a Pleader and prayed for exemption from personal attendance and for permission to appear through a Pleader. This prayer was granted by the Sub-Divisional Officer, and on the case being put up before him on the 28th February 1923, the Sub-Divisional Officer took the statement of the Pleader, wherein it was stated that the petitioner was not legally bound to submit a return and that the learned Sub-Divisional Officer had no jurisdiction to try the petitioner. Thereupon the Sub-Divisional Officer recorded the following order in the Order Sheet:—"He (the petitioner) further objects to trial by me. I have no objection to give the accused option to have the case tried elsewhere but, I am afraid, his attitude shows that he is bent on delaying the ends of justice anyhow. I cannot quash the proceedings at this stage on the objection taken by the accused without entering into the merits of the case. Before, however, writing to the District Magistrate for transfer of the case from my file, I must enforce the attendance of the accused, so I revoke the concession granted under S 205 (2) of the Code of Criminal Procedure and order the issue of warrant against him with bail of Rs. 200; fixed 6th March, 1923." *Held*, that having regard to the circumstances of the case the Sub-Divisional Officer should not have revoked the concession which he had previously extended to the petitioner of allowing him to appear by

## CRIM. PRO. CODE (1398), S. 208.

pleader. (*Ghose and Cumming, JJ.*) DWIGENDRA NARAIN BAGCHI v. EMPEROR. 38 C. L. J. 9 75 I. C. 150: 24 Cr. L. J. 902

## —S. 208—Failure to take defence evidence—Effect.

Before committing an accused to the Sessions, it is obligatory to record such evidence as the accused wants to produce. Where after the prosecution evidence was recorded and the statements of the accused taken down, a charge was framed without asking the accused if they had any evidence to produce, the whole procedure is illegal. (*Kanhaya Lal, J.*) KUAR JASWANT SINGH v. EMPEROR. 21 A. L. J. 911.

## —S. 209—Case triable by Sessions Court—Preliminary enquiry—Grounds for committing accused.

When there is no credible evidence on which a Court could convict, it is the duty of the Magistrate to discharge the accused and he should not commit to the Court of Session. But a Magistrate holding a preliminary enquiry ought to commit the accused to the Court of Session when the evidence is enough to put the party on his trial and such a case obviously rises when credible witnesses make statements which it believed would sustain a conviction. It is the duty of the Magistrate to commit when the evidence for the prosecution is sufficient to make out a *prima facie* case against the accused. (*Scott Smith, J.*) MAULU v. EMPEROR, 4 Lah. 69 5 Lah. L. J. 276: 1923 Lah. 337.

## —S. 209—Sessions case—Inquiry by Magistrate—Powers of Discharge.

In a case triable by a Sessions Judge, where the magistrate making the inquiry comes to the conclusion that the prosecution evidence is not worthy of credit, he has power to discharge the accused. (*Martineau, J.*) AHMAD v. EMPEROR. 1923 Lah. 279.

## —S. 213—Charges exclusively triable by Sessions Court—Duty of Magistrate.

Where charges exclusively triable by a Court of Session are brought before a Magistrate and some evidence is offered in support thereof, it is not his duty in all cases to commit the accused to the Session. The Magistrate should exercise his discretion and after weighing the evidence decide whether or not he should try the case himself. (*Malmsley and Suhrawardy, JJ.*) EMPEROR v. HARI DAS MITRA. 37 C. L. J. 34: 73 I. C. 770: 24 Cr. L. J. 674. 1923 Cal. 103.

## —S. 215—Power to quash commitment—Credibility of evidence—If a question of law.

A High Court can quash an order of commitment only if there is an error of law in the order. The question of credibility of evidence is not such a point, if the court thinks that there is some evidence which might properly be placed before the jury. (*Leitnagie, J.*) MAHOMED MOIDIN v. KING EMPEROR. 1 Rang 526

## —S. 228—Charge under Railways Act—Conviction under Railways Act read with S. 149 I. P. C.—Legality.

## CRIM. PRO. CODE (1898), S. 231.

Where the charge mentions only an offence under S. 120 Railways Act, a conviction under that section read along with S. 149 I. P. C. is bad, as the accused cannot be expected to meet that case in the absence of notice of it. (*Kamesam and Wallace, JJ.*) THAKKOTTATHIL KUNHAN, *In re.* 18 L. W. 946.

## —S. 226—Sessions Trial—Power of Court to frame fresh charges.

A Sessions Judge can proceed under S. 226 only on the facts appearing from the Magisterial enquiry.

Where the facts disclosed by the magisterial enquiry warrant the framing of a charge not framed by the Committing Magistrate, it is open to the Sessions Judge to frame an additional charge. 32 C. 22. Not followed. 25 M. 61; 41 I. C. 193 distinguished. (*Broadway, J.*) MULA SINGH v. EMPEROR. 71 I. C. 593: 24 Cr. L. J. 177.

## —Ss. 233 and 235—Distinct Offences—Separate charge—Several offences comprised in one charge. See (1922) DIG. COL. 455 RADHA NATH KARMAKAR v. EMPEROR.

50 Cal. 94: 71 I. C. 120: 24 Cr. L. J. 72.

—Ss. 233 and 434—Misjoinder of Charges—Several acts of declaration—False entries. See (1922) DIG. COL. 462 CHAKRAKODI SHAMA SASTRI *In re.*

44 M. L. J. 67: 72 I. C. 622: 24 Cr. L. J. 462.

## —Ss. 233 and 234—Murder—Causing evidence of offence to disappear—Charge.

At the same trial the accused can be charged with murder, and in the alternative with the offence of causing evidence to disappear with the intention of screening the offender. (*Macleod, C.J. and Crump, J.*) EMPEROR v. HANMAPPA RUDAPPA 26 Bom. L. B. 231: 1923 Bom. 262.

## —S. 233—Perjury—Joint trial of several accused—Legality.

The joint trial of several accused persons for perjury is illegal. The accused are in such a case prejudiced as each is deprived of the advantage of calling the others to give evidence. (*Abdul Raouf, J.*) LACHHMAN SINGH v. EMPEROR. 1923 Lah. 89 (2).

## —S. 234—Cumulative charges under Ss. 411 and 414, I. P. C.—Proceeding changed at the end of trial and striking out res.—Procedure—Legality. See (1922) DIG. COL. 466 CHETTO KALWAR v. EMPEROR.

71 I. C. 214: 24 Cr. L. J. 86.

## —Ss. 234, 239—Joint trial—Offences on different dates.

A joint trial of the accused for offences under Ss. 147 and 125, I. P. C. committed on one day and under Ss. 147, 323 and 342, I. P. C. committed on the next day is illegal. (*Daniels, J.*) PUTTOO LAL v. EMPEROR.

I. R. 4 A. 203 (Cr): 21 A. L. J. 820: 9 O. & A. L. B. 1047.

## —Ss. 234 and 239—Joint trial—Penal Code, S. 379 and 411.

## CRIM. PRO. CODE (1898), S. 234.1

Joint trial for the offences under sections. 379 and 411 Indian Penal Code was illegal with reference to the provisions of sections 233 and 239 of the Cr. P. C. (*Abdul Raoof, J.*) *SOHAN SINGH v. EMPEROR*, 1923 Lah. 394 (1).

## —S. 234—Misappropriation—Twenty six items—Joint trial—Legality.

Where 26 different sums were misappropriated during a period of 6 months and the accused was tried at one trial regarding all the items, the trial is illegal. 25 Mad. 61 (P. C.) folld. (*Stuart, J.*) *GANGA PRASAD v. EMPEROR*, 1923 All. 483 (2).

## —Ss. 234 and 239—Misjoinder of charges—Passing counterfeit coins—Joint trial

Where two persons were jointly tried and convicted of passing counterfeit coins on three different occasions to three different persons on the same day the trial was not bad for misjoinder of charges (*Wallace, J.*) *KOVAGANTI In re* 44 M. L. J. 130 : 69 I. C. 447 : 23 Cr. L. J. 719 : 1923 Mad. 181.

## —S. 234—Scope of—Different complainants.

S. 234 of Cr. P. C. is not limited to cases where the offence has been committed against the same person but it applies also to cases where the complainants are different persons. 43 C. 13 followed. (*Duckworth, J.*) *NGA PO KYIN v. EMPEROR*, 11 L. B. R. 45 : 69 I. C. 628.

## —Ss. 235, 239—Abduction and concealment on different dates—Same transaction—Joint trial.

If a series of acts are so connected together by proximity of time, community of criminal intention and continuity of action and purpose or relation of cause and effect as to constitute one transaction, a joint trial is valid, and is required in the interests of public time and convenience.

Where a girl is abducted on a certain night and thereafter various people conceal her, the first offence being a continuing offence, all can be tried together. (*C. C. Ghose, and Cuming, JJ.*) *KUSHAI MALLIK v. EMPEROR*, 50 Cal. 1004.

## —S. 235—Charges under Ss. 218 and 477 (a) I. P. C.—Framing incorrect records—Falsification of accounts.

A police officer who took charge of the properties of the deceased lady misappropriated some of her ornaments and altered the entries he had made in the police diary regarding the said property and substituted some fresh pages to show that the said ornaments were never taken to the police station. He was tried for offences under Ss. 218, 409, and 477 (a) I. P. C. and convicted under Ss. 218 and 477 (a). On appeal it was argued that the trial was bad for misjoinder of charges. Held that all the charges were framed in relation to acts which were so connected together as to form one transaction and they could be legally joined and tried at one trial. (*Newbould and Suhrwardy JJ.*) *BILAS CHANDRA BANERJEA v. EMPEROR*, 27 C. W. N. 626 : 1923 Cal. 647.

## —Ss. 235 and 239—Conspiracy—Offences committed in the course of the same transaction

## CRIM. PRO. CODE (1898), S. 235.

## —Joint trial—Joinder of charges—Legality—Transaction—What is.

The determining factor as to the legality of a joint trial is not its result.

The word transaction in Section 235, Criminal Procedure Code, has a very wide connotation and covers a series of acts connected together.

Where a proposal for a boycott is made by the President of an Association and shortly afterwards the secretary and a member take joint action to boycott the person against whom the resolution is directed, the inference is that they are acting in furtherance of a common purpose or, in other words, that they are taking part in a conspiracy. Acts done in pursuance of such a conspiracy must be deemed to be part of the same transaction. (*Pratt, J.*) *EMPEROR v. MAUNG AUNG GYAW*, 1 Rang. 604, 2 Bur. L. J. 224.

## —Ss. 235, and 239—Dacoity—Several offences by same gang—Joint trial.

Where a gang of dacoits assembled on a highway for robbing passers by and in the course of the dacoity several offences were committed by them, Held that all these offences were committed in the course of the same transaction and it was not material whether all the members of the gang took an active part in each dacoity. (*Stuart and Ryves, JJ.*) *KAM PRASAD v. EMPEROR*

L. R. 4 A. 4 (Cr.) : 71 I. C. 505 : 24 Cr. L. J. 153 : 1923 A. 137 (1).

## —S. 235—Joinder of charges—Escaping from lawful custody, rioting, hurt and abetment—Joint trial.

Where a number of accused were charged with escaping from lawful custody, rioting, hurt and assisting in the said acts there is nothing wrong in having one trial, as everything happened in the course of the same transaction. (*Krishnan, J.*) *ARUMUGA GOUNDAN In re*, 18 L. W. 818.

## —S. 235—Joint trial—Different offences and acts—Legality.

Where two acts were committed on different dates and there was no connection between the two so as to make them the same transaction, a joint trial is illegal. (*Sulaiman, J.*) *SHAHI v. EMPEROR*, 21 A. L. J. 859.

## —Ss. 235 and 239—Joint trial—Numerous accused—Same transaction.

Where a large number of persons amounting to more than 300 persons were charged with and tried for the offence of wilful murder committed by the members of an unlawful assembly at a time when each of the persons was alleged to be a member of that assembly, the joint trial of the accused must be held to be legal under S. 239 of the Criminal Procedure Code. (*Mears, C. J. and Piggott, J.*) *ABDULLAH v. EMPEROR*, L. R. 4 A. 145 (Cr.)

## CRIM. PRO. CODE (1898), S. 235.

—S. 235—Offences under Ss. 500 and 501, I. P. C.—Joint trial of two persons.

On a complaint, two accused were put on their trial on charges under Ss. 500 and 501 I. P. C. and convicted under S. 805. *Held*, the joint trial was illegal. (*Ghose and Cumming, JJ.*)  
ASHUTOSH DAS GUPTA v. PURNA CHANDRA GHOSH.  
50 Cal. 159 : 71 I. C. 670 :  
24 Cr. L. J. 204 : 1923 Cal. 11.

—Ss. 235 and 236—Joint trial—Different offences in respect of different persons—Penal Code, Ss. 109 and 477. See (1922) DIG. COL. 476  
GIRJA DAYAL v. EMPEROR.

69 I. C. 271 : 23 Cr. L. J. 687.

—Ss. 235 and 239—Receiving stolen property—Different owners—Properties not received at different times—Offence—Conviction.

Even though a person is in possession of stolen property identified to belong to different individuals he cannot be convicted of several offences of theft in respect of property identified by each owner unless it is proved that they were received by him at different times. 15 A. 317 foll. (*Ryves and Daniels, JJ.*) SHEO CHARAN v. EMPEROR.  
45 A. 485 : 21 A. L. J. 389 : L. R. 4 A. 104 (Cr.)  
73 I. C. 520 : 24 Cr. L. J. 632 : 1923 A. 547.

—S. 236—Alternative charges.

Alternative charges may be properly run against an accused person of the same set of facts, but alternative charges which include offences which do not arise out of the same set of facts as those with which they are linked, even though tried in the same proceedings, ought to be made clear to the accused before the trial and clearly dealt with in the Judge's final decision, (*Walsh, J.*) JODHA SINGH v. EMPEROR.  
L. R. 4 A. 93 Cr. : 1923 All. 285.

—Ss. 236 to 238—Conviction for murder—Appellate Court if can convict for offence against property.

In an appeal against a conviction for murder, the court has power to convert the sentence into one of an offence against property under the Penal Code (*Shadi Lal, C. J. and Campbell, J.*)  
WALLU v. THE CROWN. 4 Lah. 373.

—S. 236—Joinder of charges—Offence under S. 379 I. P. C. and S. 54 A. of the Calcutta Municipal Act.

A charge under S. 54-A of the Calcutta Police Act might have been joined with a charge of theft under the provisions of S. 236, Criminal Procedure Code. *Held*, that as the accused could have been tried under the provisions of S. 236, on charges of offence punishable under S. 380, Indian Penal Code, and S. 54A of the Calcutta Police Act, therefore, under S. 237 Cr. P. Code she could be convicted of the offences punishable under the latter section though she was not charged with it. (*Newbould and Suhrawardy, JJ.*) TULSI TOLINI v. EMPEROR.  
50 Cal. 564 :  
72 I. C. 372 : 24 Cr. L. J. 372 :  
1923 Cal. 596.

## CRIM. PRO. CODE (1898), S. 239.

—S. 237—Charge for one offence—Conviction for another—Legality—Test of.

The petitioner, was convicted of an offence punishable under section 54 A of Act VI of 1866 Calcutta Police Act.

At the trial the only charge framed against her was that she committed theft in respect of gold and silver ornaments, cloths and cash Rs. 13,410 in G. C. notes, sovereigns and coins valued in all about Rs. 18,000 from the room of one Khelwan Ahir and thereby committed an offence punishable under S. 380, Indian Penal Code. *Held*, that the conviction was valid under the provisions of S. 237, Cr. P. Code.

The legality of a conviction for an offence not charged depends on whether reliance is placed on S. 237, or whether the different offences of which the accused has been convicted is one for which she might have been charged under the provisions of S. 236, Cr. P. Code. (*Newbould and Suhrawardy, JJ.*) TULSI TOLINI v. EMPEROR.  
50 Cal. 564 : 72 I. C. 372 : 24 Cr. L. J. 372 :  
1923 Cal. 596.

—S. 238 (2)—Witnesses—Order of.

Witnesses for the prosecution, ought, as far as possible, to be called in the order of events which they are called to prove and in chronological order. The Judge without dictating to the prosecution should suggest alterations on proper occasions. (*Sunderson, C. J. and Ghose, J.*) EMPEROR v. AHIRANNESSA BIBI.  
1923 Cal. 579.

—S. 239—Joint trial—Discretion.

Where a number of persons are tried for offences committed in the same transaction it is a question for the Court in the exercise of its judicial discretion to say whether the accused should be tried together or separately (*Maclean, C. J. Prinsep, Hill, Herraington and Brett, JJ.*) EMPEROR v. CHARU CHUNDER MUKERJEE.  
38 C. L. J. 309 (F. B.)

—S. 239—Misjoinder of charges—Numerous accused—Murder—Unlawful assembly.

In determining whether S. 239 of the Criminal Procedure Code does or does not authorize a Sessions Judge not only to try a large number of the accused at one and the same trial but to try them on each and all of the charges set forth against them, under the orders of the committing Magistrate the Sessions Judge has to look to the case for the prosecution as set forth in the charges themselves. If according to that case the offences were such as could be regarded parts of the same transaction he would be justified in entering upon the trial of all the accused on the charges framed. It would not be necessary for him to consider what the position would be if he finally comes to the conclusion that no offence had been committed or that the offence committed was one which was excluded from his cognizance by S. 196A of the Cr. P. Code (*Mars, C. J. and Piggot, J.*) ABDULLAH v. EMPEROR.  
L. R. 4 A. 145 (Cr.).

—S. 239—Misjoinder—Inconsistent allegations against the accused—Joint trial bad.

Where the allegations against the two accused are mutually exclusive, that is to say, where the



## CRIM. PRO. CODE (1898), S. 239.

case is that either the one or the other of the accused committed the offence, they cannot be tried together. (*Tharrawaddy, S. M.*) KYAW DWE v EMPEROR. 74 I. C. 78

24 Cr. L. J. 750 : 1923 Rang. 67

## — S. 239—Same transaction—Joint trial for offences—Dacoity—Receipt of stolen property

Where in the course of the same transaction the offence of dacoity and two other offences of receiving property known to have been stolen in the commission of a dacoity are alleged to have been committed *Held*, that a joint trial was permissible under S. 239 Cr. P. Code. 6 Bom. L. R. 511 Ret. (*Stuart, J.*) DURGA PRASAD v EMPEROR. 45 A. 223 : 71 I. C. 501 :

24 Cr. L. J. 149 : 1923 A. 126.

## — S. 239—Same transaction—Keeping a gaming house—Using it—Joint trial.

The trial of the owner or keeper of a common gaming house under S. 3 of Act III of 1867 together with the trial of persons found gaming or present for the purpose of gaming in such house under S. 4 in one trial is not illegal. It is always necessary to justify a joint trial and to point out the provisions under which it can be held. The separate trial is the rule, the joint trial is the exception, and this trial can only be justified if the provisions of S. 239 Cr. P. Code have application. (*Stuart, J.*) GANESHI LAL v. EMPEROR,

71 I. C. 507 : 24 Cr. L. J. 155 : 1923 A. 18 (1).

## — S. 239—Same transaction—Question of fact.

The question whether certain offences specified in different charges were or were not so connected together, that it might fairly be said that they had been committed in the same transaction, is substantially one of fact, and admissions on a question of fact made by accused persons can undoubtedly be received and acted upon by a trial court. (*Piggot, and Walsh, JJ.*) EMPEROR v. GAYAN SINGH. 1923 All. 277.

— S. 239—Same transaction—Test of—General defamatory statements—Single trial *See* (1922) DIG. COL. 470 BANGA CHANDRA DE v. AN NODE CHARAN CHOWDHURY

69 I. C. 269 : 23 Cr. L. J. 685.

## — S. 247—Absence of complainant—Acquittal of accused—Effect—Bar of fresh trial.

An order of acquittal under S. 247 Cr. P. C. on account of the absence of the complainant is a final order which operates as a bar under S. 403 Cr. P. C. The presence or absence of the accused has no bearing on the question. (*Foster, J.*) KIRAN SARKAR v. EMPEROR. 4 Pat. L. T. 15 :

74 I. C. 719 : 24 Cr. L. J. 815

## — Ss. 247 and 403—Acquittal—Different charge on same facts—Trial bad.

The accused was originally summoned on a charge under S. 426 I. P. C. but was acquitted under S. 247, Cr. Procedure Code on account of the absence of the complainant. The complainant applied to the District Magistrate who directed that the complaint should be revived and that the prosecution should proceed under S. 379, I. P. C. instead of under S. 426 I. P. C. The

## CRIM. PRO. CODE (1898), S. 247.

accused was tried and convicted of an offence under S. 379 I. P. C. *Held* that the acquittal by the Magistrate on the charge under S. 426, I. P. C. was a bar to the petitioner being put on his trial again on the same facts which were relied on to support the charge under S. 379, I. P. C. and that the conviction and trial under this latter Section were without jurisdiction. (*Newbould and Suhrawardy, JJ.*) FAZAR PRAMANIK v. EMPEROR. 37 C. L. J. 253 : 1923 Cal. 407.

## — S. 247—Acquittal under—Revision—Improper clutching at jurisdiction.

The High Court will not ordinarily interfere in revision against an order of acquittal, but this rule does not apply to an acquittal under S. 247, Cr. P. C. especially where the acquittal is the result of an improper clutching at jurisdiction. (*Ashworth, A. J. C.*) RAM NIDH V. RAM SARAN. 26 C. C. 283.

## — S. 247—Applicability of—Offence under S. 352, I. P. C.—Conclusion of hearing—Non-appearance of complainant—Acquittal of accused.

A Magistrate took cognizance on complaint of an offence under S. 352, I. P. C., examined the witnesses and closed the case and adjourned it for judgment. There was no express direction to the complainant that he should attend to hear delivery of judgment. On the day fixed for delivery of judgment the Magistrate acquitted the accused on the ground that the complainant had absented him-self. *Held* that the acquittal was improper and that the case did not fall within S. 247 of the Criminal Procedure Code. (*Batten, J. C.*) EMPEROR v. JANGU SINGH.

6 N. L. J. 68 : 19 N. L. R. 48 : 71 I. C. 669 :

24 Cr. L. J. 205 : 1923 Nag. 158 (1).

## — Ss. 247 and 403—Autrefois acquit—Acquittal under S. 247—Effect of.

An acquittal under S. 247, Cr. P. Code acts as a bar to further proceedings equally with an acquittal after trial on the merits by virtue of S. 403, Cr. P. Code. 4 C. W. N. 346; 34 M. 253 Ret. (*Ryves, J.*) EMPEROR v. DULLA 45 A. 58.

74 I. C. 1054 (1) : 24 Cr. L. J. 862.

## — S. 247—Complainant absent—Accused not acquitted automatically.

S. 247 gives the Magistrate a discretion and the absence of a complainant in a summons case cannot result in the acquittal of the accused without the Magistrate passing any order in exercise of that discretion. (*Newbould and Suhrawardy, JJ.*) SHERMULL v. THE CORPORATION OF CALCUTTA.

1923 Cal. 725.

## — S. 247—Order of acquittal—Enquiry under Workman's Breach of Contract Act—Proceedings if criminal.

The Magistrate's proceedings under the Workman's Breach of Contract Act up to the stage of the passing of an order by the Magistrate for repayment or performance are not criminal at all. 43 M. 443; 33 B. 22 Ref. If the proceedings are not criminal proceedings, the procedure cannot be regulated by Chapter XX of the Cr. P. Code and an order for acquittal cannot be held to be one under

## CRIM. PRO. CODE (1898), S. 247.

Ch. XX of the Cr. P. Code but merely a dismissal of the complaint. Viewed in this light, there is nothing to prevent the Magistrate from receiving that order if he sees cause to do so (*Ayling and Odgers, JJ.*) *RAMANNA v. GURUNATHAM*.

45 M. L. J. 36 : 46 Mad 723 : 18 L. W. 111 :  
32 M. L. T. 347 (H. C.) 72 I. C. 881 :  
24 Cr. L. J. 465 : 1923 Mad. 719.

## S. 247—Order of acquittal—Who can set aside—Revival of.

Where an order is passed by a magistrate acquitting the accused, that order can only be set aside by the High Court. The Magistrate or his successor has no power to revise proceedings by setting aside the order. (*C. C. Ghose and Cuming, JJ.*) *NITYANANDA KOER v. RAKHAHARI MISRA*.

38 C. L. J. 196 : 73 I. C. 940 :  
24 Cr. L. J. 716 : 1924 Cal. 96.

## S. 247—Summons case—Trial—Warrant case procedure—Absence of—Complainant at adjourned hearing—Acquittal—Legality.

The accused was charged under S. 430, I. P. C. a warrant case. The Magistrate tried the accused under the procedure prescribed for the trial of warrant cases but eventually framed a charge under S. 426, I. P. C. a summons case offence. The Magistrate however proceeded with the trial under the warrant case procedure recalling the prosecution witnesses for examination and for further cross-examination and then eventually acquitted the accused under S. 247 Cr. P. C. on the ground that the complainant did not appear on the adjourned date of hearing. *Held*, that the acquittal was legal and proper. S. 247 Cr. P. Code lays down a general principle that a person charged with a summons case offence is entitled to an acquittal if the complainant is absent and there is no reason why this right should be denied to him simply because the Magistrate has adopted a particular procedure in the trial of the case. (*Wallace, J.*) *VENKATARAMA IYER v. SUNDARAM PILLAI*.

44 M. L. J. 119 : 17 L. W. 229 :  
72 I. C. 885 : 24 Cr. L. J. 469 : 1923 Mad. 439

## Ss. 248, 333 and 439—Charge—Acquittal without framing charge—When justified.

It is clear that there are only three contingencies under which a person can be acquitted without a charge having been framed against him (1) in summons cases by the operation of S. 248, Cr. P. Code (2) under S. 345 Cr. P. Code, when there has been a valid composition and (3) under S. 333 Cr. P. Code when the Advocate-General withdraws from a case and where the Court considers it proper, even though a charge has not been framed, to acquit the accused. (*Pipon, J. C.*) *HARNAM DAS v. SAIN DASS*, 71 I. C. 248 (2) : 24 Cr. L. J. 120 (2).

## S. 250—Award of compensation by Magistrate—Case triable by Sessions.

Where a case is ordinarily triable by a Court of Sessions but is actually tried by Magistrate, it is not competent to him to award compensation under S. 250 of the Cr. P. Code. (*Pratt, J.*) *MA E. DOK v. MAUNG PO THAN*.

1923 Rang. 15 (1).

## CRIM. PRO. CODE (1898), S. 250.

## S. 250—Compensation—Acquittal in appeal—Powers of Court.

Where a court of criminal appeal acquits the accused, it has no power to direct the complainants to give compensation under S. 250, Cr. P. C. (*Sulaiman, J.*) *CHEDI v. RAM LAL*.

21 A. L. J. 834 : L. R. 4 A. 233 (Cr.) :  
9 O. & A. L. R. 1056.

## S. 250—Order for compensation—Information given to village magistrate—Liability of informant for false information.

A man who complains to a village munsif of a bailable offence knowing that the latter must in the ordinary course of his duty report the substance of the complaint to the Police gives information to the police just as effectively as if he went in person to the Police station. Consequently the informant is liable to pay compensation under S. 250 of the Cr. P. Code. 39 M. 1008 : 5 L. W. 290 : 4 L. W. 73 : 25 M. 667 : 32 M. L. J. 138 Ref. (*Venkatasubba Rao, J.*) *KALIYAPERUMAL NAIDU v. BAVAJI SAHIB* 45 M. L. J. 255 : 18 L. W. 32 : (1923) M. W. N. 421 : 73 I. C. 941 : 24 Cr. L. J. 717.

## S. 250—Order for compensation—Non-examination of complainant's witnesses—Propriety of order.

Though compensation can be awarded in exceptional cases before all the evidence for the complainant has been recorded, when as in the present case there are witnesses present whom the complainant wished to produce the magistrate should have examined them before passing his order awarding compensation. (*Harrison, J.*) *DEWA SINGH v. EMPEROR*, 71 I. C. 795 (1) : 24 Cr. L. J. 251 (1) : (1923) Lah. 194 (2).

## S. 250—Order for compensation—Security proceedings.

S. 250 of the Crl. Procedure Code, by its terms applies only to a case where a person is accused before a magistrate of an offence and not to proceedings the object of which is to require him to give security to keep the peace. (*Danids, J.*) *RAM BADAN SINGH v. JANKI*.

45 A. 363 : 21 A. L. J. 207 : L. R. 4 A. 91 (Cr.) :  
71 I. C. 692 : 24 Cr. L. J. 228 : 1923 A. 332 (1).

## S. 250—Order for compensation—Vexatious accusation.

S. 250 Cr. P. Code does not require that the Magistrate should call upon the complainant to show cause before directing him to pay compensation for having preferred a vexatious accusation. 9 A. L. J. 170 Diss. (*Walsh, J.*) *PANCHAM v. EMPEROR*, 45 A. 474 : 24 Cr. L. J. 719 :

21 A. L. J. 369 :  
L. R. 4 A. 197 (Cr.) : 73 I. C. 943 : 1923 A. 548.

## S. 250—Order pay compensation without opportunity to show reasons.

A Magistrate ordered the complainant to pay compensation to the persons who had been discharged without giving the complainant an opportunity to show cause why such an order may not be made against him. *Held* the proviso (a) attached to S. 250 of the Criminal Procedure Code lays down that before making any direction as to the

## CRIM. PRO. CODE (1898), S. 250.

payment of compensation, the Magistrate shall consider any objections which the complainant on information may urge against the making of the direction. (*Abdul Raouf, J.*) *MUGHLA v. MAHOMED.* 1923 Lah. 458 (1)

## —S. 250—Person includes a corporation.

The expression "person" includes not only a natural person but also a juristic person. 3 (39) of the General Clauses Act makes it perfectly clear that the word "person" includes "any company or association or body of individuals whether incorporated or not". (*Shadi Lal, C. J.*) *THE MUNICIPAL COMMITTEE OF LAHORE v. RATTAN CHAND.* 72 I. C. 623 : 24 Cr. L. J. 463 : 1923 Lah. 31 (1).

## —S. 253—Discharge complainant absent but pleader present.

Where after framing a charge and the recording of some evidence, the complainant was absent on the date of hearing and though he was represented by his pleader an application for adjournment made on his behalf was refused and the accused was thereupon discharged by the Magistrate under section 253 Cr. P. C. on the same date *Held* that the order passed cannot be regarded as an order of acquittal (*Ghose and Cuming, JJ.*) *IRISHIKESH SEN v. PARESH NATH MUKERJEE.* 1923 Cal. 403 (2)

## —Ss. 253 and 437—Discharge—Setting aside—Notice if necessary—Prejudice.

As a general rule before an order of discharge is set aside, notice should go to the accused. In a case where the order was set aside solely on a question of law and the accused was fully heard on what he had to say in his revision petition in the High Court, *held* mere want of notice was not a ground to set aside the order (*Krishnan, J.*) *PARAVADA CHINA VENKU NAIDU, In re* 17 L. W. 247 : 72 I. C. 525 : 24 Cr. L. J. 413 : 1923 Mad. 327.

## —S. 254—Commitment to Sessions—Ground for—Petty case—Commitment to Sessions.

A petty case of robbery ought not to be committed to the Sessions simply because the Magistrate was a witness to the identification proceedings. The proper course is for the District Magistrate to send the case to another magistrate for trial (*Ryves, J.*) *EMPEROR v. RAM JATAN* 21 A. L. J. 420 : L. R. 4 A. 215 (Cr.).

## —S. 256—Omission to ask accused if he desired to recall prosecution witnesses for cross-examination after framing of charge.

The omission to follow section 256 usually involves remand and re trial of the case from the point of drawing up of the charge.

The provisions of S. 256, Criminal Procedure Code, are imperative, and the accused have a right to be given an opportunity of further cross-examining the prosecution witnesses, if they so desire, after the framing of a charge. (*Abdul Qadir, J.*) *MAHAN SINGH v. EMPEROR* 72 I. C. 371 : 24 Cr. L. J. 371.

## CRIM. PRO. CODE (1898), S. 257.

—Ss. 256, 342 and 537—Warrant case—Recalling prosecution witnesses for cross-examination—Omission to examine accused—Effect of, *See* (1922) DIG. COL. 472. *MARUDA MUTHU VANNIAN In re.* 71 I. C. 252 : 24 Cr. L. J. 124.

## —S. 257—Failure to summon defence witnesses—Effect

Where in a case of murder, some defence witnesses were not summoned for the mere reason they were living at a great distance, there is such a grave irregularity that failure of justice must be deemed to have resulted. (*Ayling and Odgers, JJ.*) *AYAVALI POKKER, In re.* 45 M. L. J. 305 : (1923) M. W. N. 758 : 18 L. W. 899 : 74 I. C. 952 : 24 Cr. L. J. 840.

## —S. 257—Refusal to summon defence witnesses—Warrant case—Effect

As a general rule Courts should always issue process on the defence witness, except when the court considers the application for process vexatious, which ground must be recorded in writing by the magistrate. Inability or even refusal to pay costs is not an adequate ground for refusal in a warrant case. (*Marphersan, J.*) *DEBI SINGH v. EMPEROR.* 74 I. C. 863 : 24 Cr. L. J. 831.

## —S. 257 (2)—Scope of.

Section 257 (2) of the Cr. P. Code fully empowers a Magistrate trying a case to order that reasonable expenses of a witness shall be deposited by the applicant in Court before he is summoned. If the rule laid down in 7 P. R. 1898 was to be literally followed, section 257 (2) of the Cr. P. C. would become an entirely dead letter. One can hardly conceive of a case where an accused person would willingly deposit the expenses of his witnesses if he knew that he had only to express his unwillingness to entitle him to get his witnesses summoned at the expense of the Government. But the Magistrate should summon only so many witnesses for one hearing as he thinks he will be able to examine on that hearing, to save expenses of parties. The language of section 257, Cr. P. C. is imperative and the Magistrate has no discretion to refuse to issue process to compel the attendance of any witness merely because he thinks that no useful purpose will be served by summoning him as a witness to attend the Court. The only grounds upon which an application can be refused are those enumerated in clause (1) of section 257 of the Criminal P. C., and the Magistrate is not entitled to refuse the application of any other grounds. It is not for the District Magistrate to say which witnesses shall and which shall not be of any use to the accused, where the petitioner wanted to prove his presence in various courts on the dates when he was alleged to have made certain objectionable speeches and that the fact of his presence in these courts was recorded in the records. *Held* that the records should have been allowed to be produced without the petitioners having been made to undergo the necessary expense of obtaining certified copies. (*Moti Sagar, J.*) *GANPAT RAI v. THE CROWN.* 73 I. C. 782 : 24 Cr. L. J. 686 : 1923 Lah. 420.

## CRIM. PRO. CODE (1898), S. 260.

—S. 260—Criminal trial—Summary inquiry in the middle of a trial—Irregularity Offences under Ss. 186 and 206 I. P. C. See (1922) DIG. COL. 473 GOSTO BEHARY BASU v. BAISTAM DAS DEVRA. 37 C. L. J. 105 : 71 I. C. 509 : 24 Cr. L. J. 157 : 1923 Cal. 105.

—Ss 260 and 355—Separate Offences of theft—Stolen property not exceeding 10 Rs. Procedure.

Where the accused was charged with two separate offences of theft, the subject-matter of theft in each case being a goat of Rs. 10 or less in value, the procedure at the trial of the accused was regulated by S. 355 Cr. P. Code. (*Lindsay, J.*) EMPEROR v. BULAKI. 21 A. L. J. 276 : L. R. 4 A. 87 (Cr.) : 1923 A. 432

—S. 260—Summary trials—Judgment

In summary trials it is very important that there should be clear findings on questions of fact because it is only through such findings that the Court of Revision can form its own judgment with regard to the legality or otherwise of the proceedings of the trial Court. (*Wazir Hasan, A. J. C.*) JAGMOHAN DAS v. EMPEROR. 9 O. & A. L. R. 1001.

—Ss. 262 and 263—Warrant case—Trial as summons case—Effect of—Plea of accused.

S. 263 applies to cases in which no appeal lies and exempts the Magistrate from framing a formal charge in such cases. But there is no such exemption in a case tried summarily in which, as in the present case, the sentence passed is appealable. Further under S. 262, Cr. P. Code, it is necessary that in a summary trial the procedure prescribed for warrant cases shall be followed in warrant cases with certain exceptions. One of the distinguishing points between a summons and warrant case is that in a warrant case sufficient evidence to support the charge must be recorded before a charge can be framed and the accused called on to plead. Where this was not done in the present case, *Held*, that the conviction was illegal. (*Newbould and Ghose, JJ.*) NATABAR KHAN v. EMPEROR. 27 C. W. N. 923 : 1924 Cal. 63

—S. 262 (2)—Summary trial—Maximum Sentence.

Under S. 262 Cr. P. Code no sentence of imprisonment for a term exceeding three months can be passed in the case of any conviction under Chapter 22 of the Code, Sub section 2 of S. 262 of the Code provides that no sentence of imprisonment for a term exceeding three months shall be passed in the case of any conviction at a summary trial. (*May Aung, J.*) NGA SAN BA v. EMPEROR. 2 Bur. L. J. 100.

—S. 263—Conviction—Reasons for decision. See (1922) DIG. COL. 474. DAMODAR DAS v. EMPEROR. 1923 P. 56

—Ss. 263 (h), 370 and 441—Judgment of Presidency Magistrate—Contents of—Sentence of imprisonment—Omission to state reasons for conviction—Irregularity—Interference by High Court.

## CRIM. PRO. CODE (1898), S. 288.

S. 441 of the Cr. P. Code does not abrogate the terms of S. 263 or S. 370 and a Bench of Presidency Magistrates imposing a sentence of imprisonment for an offence must record their reasons for the conviction. The omission to do so in a case where no record of the evidence was taken is a grave irregularity. 18 Bom 97, 6 C. 579, foll.

*Held*, on the facts that having regard to the reasons for the conviction submitted by the presidency Magistrates under S. 441, Cr. P. Code there was no case for interference by the High Court in revision. (*Wallace, J.*) DERRISH HUSSAIN *In re*

44 M. L. J. 84 : 46 Mad. 253 : 32 M. L. T. (H. C.) 100 : 17 L. W. 18 : 71 I. C. 212 : 24 Cr. L. J. 84 : 1923 Mad. 185.

—S. 264—Summary trial—Judgment, contents of.

The accused were tried summarily and convicted. In the judgment all the Magistrate said about evidence was that the witnesses, for the prosecution support the statements of the complainant and that the statements of the defence witnesses were conflicting and he did not believe them, without giving any indication of what they said. *Held*, that this is not sufficient compliance with S. 264. The record should at least have shown how the witnesses came to be on the spot and how much affair they saw. (*Daniels, J. C.*) SALIM v. EMPEROR. 9 O. & A. L. E. 165 : 72 I. C. 948 : 24 Cr. L. J. 484.

—Ss 262 and 263—Jury—Power of judge to discharge, misconduct.

Where the question of misconduct on the part of the jury or of other similar sufficient cause arises the Sessions Judge has inherent power to discharge the jury and empanel another. It is true that the Code does not provide for such circumstances, but on the other hand, the presumption that jurors will discharge their duties without impropriety may explain the omission. The power to discharge a jury on such grounds is not to be exercised lightly nor until the Judge has satisfied himself by such form of enquiry as in the circumstances he can adopt reasonable grounds for exercising such a right exist. (*Buckland and Cuming, JJ.*) RAHIM SHEIKH v. EMPEROR. 50 Cal. 872 : 37 C. L. J. 595 : 73 I. C. 773 (2) : 24 Cr. L. J. 677 (2) : 1923 Cal. 724.

—S. 288—Evidence before committing Magistrate—Sessions Trial—Admissibility.

S. 288 of the Cr. P. Code clearly intends that the evidence taken before the committing Magistrate where the witnesses produced are examined at the subsequent trial may be treated as substantive evidence in the case. The court is not restricted to admitting the evidence of a witness duly taken before the committing Magistrate merely for the purpose of contradicting that witness when giving evidence in the Sessions Court but can read the previous evidence as substantive evidence at the trial. Where, for the purposes of justice, the adoption of such a course is found necessary by the judge. 21 A. 111 : 28 A. 613 : 24 M. 414 Ref. No doubt it is a matter for a discretion of the judge whether he thinks that such evidence should be used in the interests of

## CRIM. PRO. CODE (1898), S. 288.

justice There may be many cases in which it would be extremely dangerous to rely upon such evidence where witnesses have proved themselves before the sessions judge altogether unworthy of credit. (*Miller C. J. and Mullick, J.*) GANSA ORAON V. EMPEROR. 2 Pat 517 : 4 Pat L. T. 462 : 1 Pat L. R. 178 (Cr.) : 73 I. C. 561 : 24 Cr. L. J. 641 : 1923 P. 550.

—S. 288—*Statements made before Committing Magistrate—Retraction of part at the Sessions—Conviction based on—Legality.*

Where in a case of a faction fight involving a case and a counter case, before the committing magistrate names of assailants were given on both sides, but at the sessions this portion was withdrawn, obviously to protect each other, but the main details of the fight were given, it is open to the Judge to rely upon the Statement before the Committing magistrate as evidence under S. 288, Cr. P. C.

Circumstances under which a conviction can be based on such evidence dealt with. (*Odgers and Wallace, JJ.*) BACHALA PEDA SOMADU V. NETHI PUDI APPIGADU. 18 L. W. 705 : 33 M. L. T. 159 : 45 M. L. J. 602 (H. C.)

—Ss. 288, 291—*Witness—Court witness on a previous trial—Duty of prosecution to call.* See (1922) DIG. COL. 475 EMPEROR V. REED. 69 I. C. 630 : 23 Cr. L. J. 742.

—S. 291—*Scope of—Sessions trial—Whether accused can be allowed to examine defence witness once discharged.*

Section 291 of the Cr. P. Code does not in express terms refer to a witness who has been discharged but if the accused insists on the examination of a witness in attendance who had been discharged before, the Court may, in the interests of justice, allow the accused an opportunity for his production. (*Kanhaiyalal, J. C.*) NAGESHWAR V. EMPEROR. 90 & A. L. R. 46 : 73 I. C. 54 : 24 Cr. L. J. 518 : 1923 Oudh 142.

—S. 297—*Charge to jury—Evidence incomplete—Fresh charge after verdict—Legality.*

It is only after the whole prosecution and defence case is concluded that the Court should proceed to charge the jury. Where under the impression that the jury wanted to acquit, the judge closed the case and after addressing the jury their verdict was taken, but on its turning out adverse to the accused, further evidence was let in and a fresh verdict obtained the procedure is absolutely irregular and a fresh trial must be had. (*Fforde, J.*) LYME V. THE CROWN. 4 Lah. 382 : 1924 Lah. 17.

—S. 297—*Charge to the Jury—Misdirection—Private defence—Offence under S. 326—Statement of accused—Admissibility of.*

Where the only issue in the case of a trial for causing grievous hurt is whether the right of private defence exists or not, it is a misdirection for the Judge to refer to S. 300 Exception 2 I. P. C. and to ask the Jury to consider whether such right was extended. Where a Judge in explaining S. 100 of the Penal Code to the Jury omits mention of the apprehension of grievous hurt there is misdirection even though the whole

## CRIM. PRO. CODE (1898), S. 303.

Section is read out to the Jury. On a charge under S. 326 I. P. C. the omission to refer to the provisions of S. 101 I. P. C. is a misdirection. Similarly where the statement of the accused before the Magistrate is put in at the trial, his deposition in a cross case should also be put in if he considers it as part of his defence. It is the duty of the Judge to warn the jury that the statement of an accused, not amounting to a confession cannot be considered against the co-accused (*Newbould and Suhrawardy, JJ.*) MAHOMED YUNUS V. EMPEROR. 50 Cal. 318 : 1923 Cal. 517.

—S. 297—*Trial by jury—Different trials—Reference to former trial—Sentence.*

Where there are two trials, one original and the other supplementary it is proper for the Judge to warn the jury in the supplementary trial that they should not be influenced by the fact that the first batch have been convicted. The second trial must be decided on the evidence on its own merits. As a general rule there ought to be uniformity in the convictions and punishments but it is impossible to apply this principle in all cases where there are two trials one original and the other supplementary. One batch of prisoners being tried by one Judge and one Jury and the other batch by a different Judge and different jury (*Walmesley and Suhrawardy, JJ.*) MOFEJUDDI V. EMPEROR. 72 I. C. 65 : 24 Cr. L. J. 305.

—Ss. 298 and 299—*Charge to jury—Record of identification.* See (1922) DIG. COL. 475 ABDUL GAFUR KHAN V. EMPEROR. 71 I. C. 56 : 24 Cr. L. J. 8

—S. 298—*Misdirection—Reference to materials not in evidence in the case.* See (1922) DIG. COL. 475 and 507 DASRATH SINGH V. EMPEROR. (1923) Pat. 158 : 1 Pat. L. R. 192 (Cr.).

—Ss. 302 and 304—*Murder—Death caused by one blow—Offence.*

The accused struck one blow on the head of the deceased with a lathi. As a result there was a fracture of the skull and the victim subsequently died. On a question arising as to the offence for which the accused should be convicted held that he was guilty under S. 302 and not under S. 304 Cr. P. Code. (*Mears, C. J. and Banerji, J.*) EMPEROR V. UMRAO. 21 A. L. J. 316 : 74 I. C. 257 : 24 Cr. L. J. 753 : 1923 A. 355 (2).

—S. 303—*Verdict incomplete—Questions.*

In a case of incomplete verdict, the Judge is competent to put questions to ascertain precisely what they meant. A verdict obtained by means of such questions is legal. (*Sanderson, C. J. and Panton, J.*) ERAN KHAN V. EMPEROR. 50 Cal. 658 : 74 I. C. 950 : 24 Cr. L. J. 838 : 1924 Cal. 47

—S. 303—*Verdict of Jury—Duty of Judge to ascertain verdict on each charge.*

The accused was tried for criminal misappropriation, for criminal breach of trust under S. 409 I. P. C., for framing incorrect records under S. 218, I. P. C. and for falsification of accounts under S. 477 (a) I. P. C. The Jury who tried the

## CRIM. PRO. CODE (1898), S. 307.

cases returned a verdict of "not guilty" under Ss. 409 and 403 I. P. C but "guilty" under Ss. 218 and 477 (a). *Held* that the verdict was sufficiently clear and meant that the jury acquitted the accused on all charges under S. 409 and the charge under S. 403 I. P. C. Consequently there was no reason or necessity to ascertain from the jury what their verdict was. (*Newbould and Suhrawardy, JJ.*) **BILAS CHANDRA BANERJEA v. EMPEROR, 27 C. W. N. 626 · 1923 Cal. 647.**

———S. 307—*Aspersions on jurors—Opinion of Judge—Propriety of such reflections.*

If a judge does not agree with the opinion of the jury it is his plain duty to disagree with it; but to make imputation to the jurors in the order of reference to the High Court is unfair to everyone concerned. Such aspersions if not based on any material on record, should not have any bearing at all. Duty of court in case of proved misconduct on the part of the jury pointed out. (*Mookerjee and Chatterjee, JJ.*) **MAMFRU CHOWDHURY v. EMPEROR, 38 C. L. J. 397**

———S. 307—*Discretion to refer.*

Even in cases where the Judge disagrees with the verdict of the jury, if he does not think the ends of justice require a reference to the High Court he need not do so. Failure to refer is not a ground to interfere with the sentence. (*Sanderson, C. J. and Panton, J.*) **ERAN KHAN v. EMPEROR, 50 Cal. 658 · 74 I. C. 950 · 24 Cr. L. J. 838 : 1924 Cal. 47,**

———S. 307—*Duty of High Court.*

Where on a disagreement of judge and jury the case is referred to the High Court, the whole case must be examined with such assistance as is denied from the opinions of the judge and the jury. The opinion of the judge is expressed in the reference or at the hearing, while the verdict contains the opinion of the jury. The High Court is not in any way bound by them. (*Schwabe, C. J. and Wallace, J.*) **NANNI KUDUMBAN In re, 45 M. L. J. 406 :**

**18 L. W. 482 : (1923) M. W. N. 695.**

———S. 307—*Reference—Duty of Court.*

In acting under S. 307 Cr. P. Code the High Court must act with great caution, as it has not the advantage which the judge and jury had *i. e.* to see the witnesses giving evidence. Where acting on the evidence of the same witnesses the judge agrees with the jury in acquitting some of the accused, while as regards the others the judge disagrees with the jury and wants to convict the accused, the verdict of the jury should be up-held. (*Mookerjee and Chotzner, JJ.*) **EMPEROR v. AKBAR MOLLA, 38 C. L. J. 379**

———S. 307—*Reference to High Court—Duty of the High Court.*

The High Court's duties under S. 307 Cr. P. Code do not end by merely finding that the defence story is one which cannot be accepted. The High Court has to find out for itself whether on the evidence such as appears on the record it was possible for the jury to take the view which they had taken in the case with reference to the accused persons whose case had been referred to the High Court. (*Ghose and Chotzner, JJ.*)

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**EMPEROR v. NRITYA GOPAL ROY, 38 C. L. J. 1 : 75 I. C. 145 · 24 Cr. L. J. 897.**

———S. 307—*Reference to High Court—Judge accepting findings of the Jury on graver charge—Reference on minor charges.*

It is not always correct to say that a Judge accepting the Jury's findings on graver charges cannot make a reference with the object of having some of the accused convicted on minor charges. (*Walmsley and Suhrawardy, JJ.*) **EMPEROR v. HARI DAS MITRA, 73 I. C. 770 : 24 Cr. L. J. 674 : 37 C. L. J. 34 : 1923 Cal. 108**

———S. 307—*Reference to High Court—Re-opening of verdict—Extent of.*

The accused was tried on charges under Ss. 302 and 302 read with S. 34 I. P. C. The jury found that it was doubtful whether the accused committed the offence by his own hand and the Judge agreed with the jury on that finding but referred the case under S. 307 of the Criminal Procedure Code on the ground that he disagreed with the verdict as to whether the accused acted together in furtherance of a common intention. *Held* that the High Court should not even if it had the power to do so, deal with the question whether the accused committed the offence personally. (*Sanderson, C. J. and Panton, J.*) **EMPEROR v. PROFULLA KUMAR MAJUMDAR, 50 Cal. 41 : 74 I. C. 267 : 24 Cr. L. J. 763 1923 Cal. 453.**

———Ss. 307 and 537—*Reference—Scope of the enquiry—Objection on the ground of want of sanction. See (1922) DIG. COL. 47b.* **EMPEROR v. SHANKAR BALAKRISHNA DESHPANDE, 47 Bom. 31.**

———S. 307—*Reference—When verdict to be interfered with.*

In a case of murder, where the jury unanimously acquit the accused, it will not be interfered with on a reference under S. 307 unless it is quite perverse and unreasonable. (*Sanderson, C. J. and Ghose, J.*) **EMPEROR v. AHIRANNESA BIBI, 1923 Cal. 579.**

———S. 307—*Trial by jury—Inadmissible confession—Evidence given—Omission of Judge to direct jury.*

In a case tried by jury the Sessions Judge allowed a police witness to give in evidence a confession made by the accused to him. The judge made a note in the record that the confession was inadmissible but omitted to mention it in his charge to the jury. *Held*, that the conviction was bad inasmuch as the mind of the jury might have been influenced by the inadmissible confession having been deposed to and recorded in their presence and the omission of the judge to mention it in the summing up constituted a misdirection. (*Jwala Prasad and Ross, JJ.*) **SUMESHWAR JHA v. EMPEROR, 1923 P. 103.**

———S. 307—*Trial by jury—Verdict of jury—Interference by High Court—Reasons for verdict.*

If the verdict of the jury had merely turned upon the appreciation of oral evidence capable of being viewed either way, but as to which the court is inclined to take a different view from that of the

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jury the High Court will not interfere. But where the evidence is so coercive that it is impossible to draw any conclusion except one adverse to the accused, the duty of the High Court is to interfere with the verdict. It is not competent to the Sessions Judge after a clear verdict is returned by the jury to ask them for their reasons 58 I. C. 89 foll 3, Pat L. T. 655 dis (Mullick and Buckmil, JJ.) EMPEROR v. ALI HYDER, 4 Pat L. T. 425. 1923 P. 474.

## —S. 307—Unanimous verdict—Reference—Duty of Court—Imputation to jurors.

The trend of judicial opinion is in favour of accepting the unanimous decision of the jury and the High Court should not interfere with an unanimous verdict unless it is clearly wrong. The duty of the Court under S. 307 is to consider the entire evidence and the opinions of the judge and jury. But it is unfair for a sessions Judge to make imputations to jurors, and act on evidence not on record. (Mookerjee and Chatterjee, JJ.) EMPEROR v. DHANANJAY RAY. 38 C. L. J. 384

## —S. 307—Verdict of jury—Reference to High Court—Interference when justified

To justify a conviction for murder by poison must be proved that the accused knowingly administered poison to the deceased with at least the intention of causing him death or hurt. The most natural way in which it could be done is to trace possession of the poison to the accused. Where there is a substantial gap in the chain of evidence which one generally expects to see completed in a case of murder by poisoning and though the jury had not mentioned this point in the reasons which they had given for their verdict whatever may be the proper practice as regards asking the jury for their reasons in such a case as the present the High Court could not leave out of sight the fact that they had reasons for their verdict which they had not mentioned in answer to the Judge's question. Held having regard to the gap in the evidence which might be expected in the case the rest of the case was not so strong that the High Court ought to set aside the unanimous verdict of the jury. (Stephen and Chatterjee, JJ.) EMPEROR v. SUKHU BEWA. 38 C. L. J. 155.

## —S. 307, Cl 3—Sessions Judge—Reference to High Court—Coming up—Inconsistencies.

Where the opinion of the Judge expressed in his letter of reference to the High Court was inconsistent with that expressed in his summing up to the jury and the majority of the jury acting on his summing up had acquitted the accused, held that having regard to the fact that the jury were the judges of fact and that they had discredited a material portion of the evidence, the High Court would not interfere with the verdict of the majority (Sawderson, C. J. and Chotzner, J.) EMPEROR v. SRISTIDHAR MAZUMDAR 37 C. L. J. 30 : 1923 Cal. 97.

## —S. 309 Opinion of assessors not taken on offence for which accused are convicted—Effect.

In a Criminal trial, the assessors found the accused not guilty of abetment of murder. The judge accepted the opinion, but convicted them of causing disappearance of the evidence of murder,

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without putting the same to the assessors. Held, under S. 309 Cr. P. C. it is imperative to take the opinion of the assessors on the charge it is proposed to convict the accused (Murlen, and Covajee, JJ.) EMPEROR v. APPAYA BASLINGAPPA HONNAPUR. 25 Bom L. R. 1318.

## —S. 310—Applicability of—Trials before Magistrates.

S. 310 of the Criminal Procedure Code lays down a special form of trial of the issue of liability to enhanced punishment in consequence of previous conviction. But this section is expressly made applicable to trials before the Court of Sessions only, and does not apply to trials before a Magistrate. Admission of evidence of a previous conviction and the framing of a charge under S. 75 I. P. C. before the accused is called on for his defence is not illegal. (Newbould and Suhrwardy, JJ.) DEHRI SONAR v. EMPEROR. 50 Cal. 367. 1923 Cal. 707.

## —S. 337—Applicability—Position of approvers.

No formal order of discharge was passed in respect of the approvers but their names did not appear among those of the accused actually challenged. On the contrary it was expressly stated in the challan that no proceedings were being taken against them, Held, in these circumstances they clearly do not come within the definition of accused persons 16 Bom. 661, 23 Cal. 493 and 21 P. R. 1904 Foll (Lindsay, J.) EMPEROR v. DARYA SINGH. 1923 Lah. 666.

## —S. 337—Approver—Case under investigation—Tender of pardon—Legality of.

Where a Magistrate of the 1st class under the authority of the District Magistrate tendered pardon to an approver at a time when the offence was under investigation by the Police and the approver subsequently gave evidence, it was objected that the pardon not having been tendered while the offence was under enquiry by the Magistrate, held that the pardon was validly tendered and that the evidence was admissible. 3 P. R. 1897 followed (Broadway and Martineau, JJ.) SHER MAHOMED v. EMPEROR. 3 Lah. 431 75 I. C. 365 : 24 Cr. L. J. 941. 1923 Lah. 270.

## —S. 337—Evidence of accomplice—Admissibility—Case outside section.

There is no provision of Indian statute law, nor is there any principle of natural justice, which makes an accomplice, as such an incompetent witness at the trial of another person in respect of the offence in the commission of which he was an accomplice. A refusal to admit his evidence merely because the case is one outside the purview of S. 337, would be a clear error of law. (Mears, C. J. and Piggott, J.) EMPEROR v. HAR PRASAD BHARGAVA. 45 A. 226 : 21 A. L. J. 42 : L. R. 4 A. 19 (Cr.) : 1923 A. 91.

## —S. 337—Scope of.

S. 337 is an empowering section that is addressed to certain courts of justice and has nothing to do with the powers of discretion of an executive authority, such as a Local Government, in the matter of instituting or refraining from instituting any prosecution. (Mears, C. J. and Piggott, J.)

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EMPEROR v HAR PRASAD BARGAVA

45 A. 226 : 21 A. L. J. 42 : L. R. 4 A. 19 (Cr.) :  
1923 A. 91— Ss 337 and 338—*Tender of pardon.*

Under Ss 337 and 338 Cr. P. Code, it is not necessary that the person to whom a pardon is tendered should himself be charged with an offence triable exclusively by the court of Session all that is requisite is that the person to whom pardon is tendered should be supposed to have been directly or indirectly concerned in or privy to, an offence triable exclusively by the Court of Session, with which another person is charged. (*Batten J. C. and Hallifax A. J. C.*) KASHIRAM v. EMPEROR.

6 N. L. J. 144 : 73 I. C. 262:

24 Cr. L. J. 566 : 1923 Nag. 248.

— Ss. 337, 339—*Tender of pardon—Reasons for—Failure to give—Effect.*

The omission to record reasons for tendering a pardon is neither an illegality nor an irregularity which vitiates the proceedings. (*Zafar Ali, J.*) EMPEROR v. WARYAM SINGH. 5 Lah. L. J. 407.

— S. 339—*Tender of pardon—Accused rejecting—If can be tried along with others.*

It is open to an accused who has accepted pardon to resile from it and claim to be tried. If he does it before he is treated as an approver and put into the box, there is no illegality in his being tried along with the other accused. The acceptance of pardon must continue in force till he actually gives evidence and then only will the applicability of S. 339 arise. (*Krishnan and Wallace JJ.*) BASIREDDY NARAPPA v. EMPEROR.

(1923) M. W. N. 697 : 18 L. W. 607 :

33 M. L. T. (H. C.) 77 : 33 M. L. T. (H. C.) 156 :

45 M. L. J. 613

— S. 341—*Deaf and dumb accused—Attempt to commit suicide—Punishment.*

Where a deaf and dumb accused was found guilty of attempt to commit suicide and at the trial he made certain signs indicating his guilt, the High Court affirmed the conviction and sentenced the accused to a day's simple imprisonment. (*Marten and Fawcett, JJ.*) EMPEROR v. KHASHABA TATYA.

25 Bom. L. R. 43 :

1923 Bom. 194 (1).

— S. 342—*Applicability—Security proceedings—Failure to put questions—Effect.*

S. 342, Cr. P. Code does not apply to proceedings under Chapter VIII. The person called upon to give security is not an accused person, nor is there any trial or offence committed. Failure to question him is not an illegality but only an irregularity and when there is no prejudice, the proceedings are not vitiated. (*C. C. Ghose and Cuning, JJ.*) BINODE BEHARI NATH v. EMPEROR.

50 Cal. 985.

— S. 342—*Examination of accused—Before cross examination of prosecution witnesses.*

Where the accused were examined under S. 342 of the Criminal Procedure Code after the examination-in-chief of the prosecution witnesses but before their cross examination, held that examination under S. 342 ought to be after the close of the prosecution case, although it seems

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to be carrying the operation of this section to a very extreme limit. (*Bucknill, J.*) BALDEO DUBEY v. EMPEROR.

1 Pat. L. R. (Cr.) 29 :

72 I. C. 891 : 24 Cr. L. J. 475.

— S. 342—*Examination of accused—Omission to examine accused after the examination of all prosecution witnesses—Filing of written statements—Trial illegal.*

The duty of a Magistrate under S. 342 of the Cr. P. Code is to examine the accused after the witnesses for the prosecution have been examined, cross examined and re-examined. The filing of written statement, at the time of the plea in no way exonerates or exempts the Court from examining the accused as required by S. 342. A discussion with the counsel for the defence as to the number and nature of the witnesses the accused were going to call is not sufficient compliance with the provisions of the Section. Non-compliance with the provisions of S. 342 Cr. P. Code is fatal to the proceedings and the trial must be treated as having become illegal from the moment when without compliance with the section, the Magistrate called up in the accused to enter on their defence. (*Rankin, J.*) PRAMATHA NATH MUKERJEE v. EMPEROR.

50 Cal. 518 :

27 C. W. N. 389 : 71 I. C. 792 (2) :

24 Cr. L. J. 248 (2) : 1923 Cal. 470.

— S. 342—*Examination of accused—Provisions of the Code mandatory—Illegality—Irregularity.*

The object of the examination referred to in S. 342 Cr. P. Code is to enable the accused to explain any circumstances appearing in the evidence against him. The provisions of the section are mandatory and the Court is bound to question the accused generally on the case, after the prosecution case is completed and before the accused person is called on for his defence. Non-compliance with S. 342 renders the trial illegal. (*Sanderson, C. J. and Chotmarr, J.*) MAZAHAR ALI v. EMPEROR.

50 C. 223 : 71 I. C. 662 :

24 Cr. L. J. 198 : 1923 C. 196.

— S. 342—*Examination of accused—Stage at which accused should be examined.*

The accused was tried for an offence under S 500 I. P. C. After the prosecution witnesses had been examined in chief the accused was questioned severally on the case by the Magistrate. Thereafter the cross examination of the prosecution witnesses took place and the accused was not again examined. Held that the provisions of S. 342 Cr. P. Code had not been complied with, the requirements of the section being that after the witnesses for the prosecution have been examined in the sense that the examination, cross-examination and re-examination have concluded, the accused is entitled to the advantage of being called upon to explain any matter against him. (*Rankin, J.* on a difference of opinion between *Buckland and Cuning, JJ.*) DIBA KANTA CHATTERJI v. GOUR GOPAL MUKERJI.

27 C. W. N. 743 :

50 C. 939 : 1923 C. 727.

— S. 342—*Examination of accused—Sufficiency of—Revision.*

It is not open in revision to the High Court to enquire into the sufficiency of the examination



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made under S. 342 Cr. P. Code. Where the accused is defended by a legal practitioner an elaborate examination is unnecessary. Where an accused is undefended, the tribunal may well point out to him the elements of the evidence adduced against him which seems in his own interest to demand his explanation, but where an accused is defended by a legal practitioner, it would not be desirable to contemplate a tribunal entering upon a lengthy examination of an accused person which might easily develop into a recounting of the history of the whole case or into, what would be far worse, some sort of cross examination. (*Bucknill, J.*) *PANCHU CHOUDHURY v. EMPEROR.* 1923 P. 91.

—Ss. 342 and 537—*Examination of accused by Court—Stage at which examination should be held—Irregularity—Effect on trial.*

S. 342 Cr. P. Code requires the Magistrate to question the accused generally on the case after the witnesses for the prosecution have been examined and before the accused is called on for his defence. S. 256 enables the accused to recall the prosecution witnesses for further cross examination after the charge has been framed, but while making it clear that the accused does not enter upon his defence until the termination of such cross examination, that Section says nothing about any second examination of the accused after the further cross examination. It is often desirable that the accused should be asked at this stage whether he wishes the Court to record any additional explanation but S. 342 cannot be interpreted as conveying a peremptory direction to that effect, if the Court has already questioned him before the charge when the case for the prosecution has been closed and the prosecution witnesses have been cross-examined. If there is any such direction, failure to comply with it, would amount to not more than an omission in the proceedings during trial within the meaning of S. 537 of which the accused would obtain advantage if he satisfies the Court that it has occasioned a failure of justice, but which is otherwise no ground for setting aside the finding of the Trial Court. (*Campbell, J.*) *BYRNE v. EMPEROR.* 4 Lah. 61.

—S. 342—*Examination of accused—Warrant case—Stage at which should be examined.*

Where in a warrant case the Magistrate examines the accused after the examination in-chief of the prosecution witnesses and before the close of their cross examination and re-examination and does not examine the accused further, there is not compliance with the provision of S. 342 of the Code and the conviction is illegal. 27 C. W. N. 28; 6 P. L. J. 644 referred to. (*Newbould and Suhrawardy, JJ.*) *JUMMON CHRISTIAN v. EMPEROR.* 50 C. 308 : 1923 Cal. 668.

—S. 342—*Examination of witnesses includes cross-examination as well as re-examination.*

The accused was standing his trial in a warrant case on a charge under S. 500 of the Indian Penal Code. After the prosecution witnesses had been examined in-chief the accused was questioned generally on the case by the Magistrate. Thereafter cross-examination of the prosecution wit-

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nesses took place but the accused was not again examined generally.

Held, that the word "examine" in S. 342 is to be taken in the ordinary English sense in which it covers all kinds of examination including cross examination and re-examination and that the accused should have been examined again. (*Rankin, J. on a difference of opinion between Buckland and Cuming, JJ.*) *DIBAKANTA CHATTERJEE v. GOUR GOPAL MUKHERJEE.*

27 C. W. N. 743 : 50 Cal. 939 : 1923 Cal. 727.

—S. 342—*Failure to comply with—Cases—Effect of examination in.*

A failure to comply with the provisions of S. 342 Cr. P. C. is a serious irregularity which ordinarily necessitates a retrial. But where in a connected cross case which was also tried simultaneously the accused was a prosecution witness and had a full say, a retrial is not necessary. (*Simpson, A. J. C.*) *NAGESHAR PRASAD v. EMPEROR.*

9 O. & A. L. R. 218 : 73 I. C. 693 : 24 Cr. L. J. 661

—S. 342—*Failure to examine accused after prosecution evidence—Effect of.* See (1922) DIG. COL. 479 *MIR TILAWAN v. EMPEROR*

4 Pat. L. T. 60 : 1 Pat. L. R. (Cr.) 35 : 69 I. C. 383 : 23 Cr. L. J. 703.

—S. 342—*Finger impressions of accused—If prohibited*

There is nothing in S. 342 Cr. P. Code to prevent a Magistrate trying an accused directing him to make a finger impression under S. 73, Evidence Act. (*Young, O. C. J., Heald and May Oung, JJ.*) *EMPEROR v. NGA TUN HLAING.*

2 Bur. L. J. 270.

—S. 342—*Non compliance with—Effect.*

The omission to comply with S. 342 Cr. P. Code is an illegality which is not curable by the provisions of S. 537 (*Cuming and B. B. Ghose, JJ.*) *HARO NATH MALO v. ALA BUX.* 28 C. W. N. 119 : 38 C. L. J. 281.

—S. 342—*No Substantial compliance—Effect.*

Where there has been no substantial compliance with the provisions of S. 342 Cr. P. C., a retrial should be ordered. (*C. C. Ghose and Cuming, JJ.*) *SAILENDRA CHANDRA SINGH v. EMPEROR*

38 C. L. J. 175.

—S. 342—*Obligation to question the accused to explain circumstances appearing against him—Whether exists in summons cases.*

The provision of S. 342 of the Code of Criminal Procedure requiring the Court to question the accused generally on the case or to enable him to explain the circumstances appearing against him on the evidence, do not apply to summons cases. The case law on the subject considered. (*Schwabe, C. J., Oldfield Ramjesam, Devadoss and Coleridge, JJ.*) *PONNUSAMI ODAYAR v. RAMASAMI THATHAN.*

45 M. L. J. 224 : 46 Mad. 758 : (1923) M. W. N. 519 : 18 L. W. 478 : 74 I. C. 945 : 24 Cr. L. J. 833 : 1924 Mad. 15. (F. B.).

—S. 342—*Objection of section—General questions not sufficient.*

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The object of S. 342 is to enable the accused to explain each and every circumstance appearing against him. A judge or magistrate should note every point which he thinks is against the accused and then question him on each. A general question as to what he has to say is not sufficient compliance with the section. (*May Oung, J.*) *MA HMAN v. EMPEROR.* 1 B. 689 : 2 Bur. L. J. 238.

—Ss 342 and 537—*Omission to comply with—Trial and conviction—Legality.*

Omission to comply with S. 342, Cr. P. Code does not vitiate a trial and conviction in the absence of prejudice to the accused. (*Stuart, J.*) *BECHHU CHAUBE v. EMPEROR.*

45 A. 124 : 71 I. C. 115 : 24 Cr. L. J. 67 : 1923 A. 81 (2).

—S. 342—*Omission to examine accused—Effect of.*

Where the accused are not examined under S. 342 Cr. P. Code, the whole proceedings are vitiated and the trial and conviction are illegal. (*Ross, J.*) *BAIJNATH SAHAY v. EMPEROR*

1 Pat. L. R. (Cr.) 34 : (1923) Pat. 96 : 4 Pat. L. T. 231 : 72 I. C. 71 (1) : 24 Cr. L. J. 311 (1) : 1923 P. 292.

—S. 342—*Provisions of if mandatory—Omission to question the accused—If vitiates trial.* See (1922) DIG. COL. 449. *NAINAMALAI KONAN In re.* 69 I. C. 377 : 23 Cr. L. J. 697.

—S. 342 and 164—*Scope.*

Where an incomplete *chalan* is put up in a hurry before the committing Magistrate and the Magistrate recorded the appellants' statement in the way he did, i.e. the questions he put were not for the purpose of explaining circumstances appearing in evidence against him but to implicate him and others it is probable that the police knew he would make some statement if examined at once, but thought that he probably would not admit anything if the Magistrate waited until he had recorded the whole of the prosecution evidence. S. 342 of the Cr. P. C. no doubt allows the court at any stage of any enquiry or trial, to put such questions to the accused as the court considers necessary but the object of putting such questions is, as laid down in the section, "for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him". (*Scott Smith and Fford, JJ.*) *BARHATI v. EMPEROR.* 1923 Lah. 539.

—S. 342—*Statement of accused under—Admission of certain facts—Effect.*

No evidence was given by prosecution to prove that the petitioner made or published the imputation complained of, but the Courts below held the publication proved because the petitioner when examined admitted the publication.

*Held*, the prosecution must make out its case by evidence and a gap in the evidence cannot be filled up by any statement made by the accused in his examination under S. 342 of the Criminal Procedure Code. 17 Mad. 238 Foll.

A Magistrate is not entitled under section 342 to put questions to the accused, if the prosecution had not let in evidence implicating him in the offence

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with which he is charged, answers to question put by a committing Magistrate in contravention of that section are not admissible in evidence against the accused at the trial (*Martineau, J.*) *DEVI DIAL v. EMPEROR.*

4 Lah. 55 : 73 I. C. 805 (2) : 24 Cr. L. J. 693 (2) : 1923 Lah. 225.

—Ss. 342—*Statement at an early stage—If dispenses with examination.*

A statement made by the accused at an early stage of the trial does not dispense with a strict observance of the provisions of S. 342 Cr. P. C., i.e. to question the accused at the close of the prosecution evidence. (*Cuning and B. B. Ghose, JJ.*) *HAMID AFI v. SRI KISSAN GOSAIN.*

37 C. L. J. 413 : 28 C. W. N. 118 : 75 I. C. 367 : 24 Cr. L. J. 943.

—S. 342—*Summons case—Examination of accused—Stage at which examination could be held.*

A magistrate is bound to examine the accused under S. 342 Cr. P. Code after all the prosecution witnesses have been examined and cross examined. Where therefore in a summons case the magistrate examined the accused after the examination in chief of some of the prosecution witnesses but did not examine him again after another witness for the prosecution had been examined after the cross-examination of the previous witnesses, *held*, that there was no compliance with the provisions of S. 342 of Criminal Procedure Code and that the conviction was therefore illegal. (*Sanderson C. J. and Panton, J.*) *GULZARI LAL v. EMPEROR.*

49 Cal. 1075 : 71 I. C. 51 : 24 Cr. L. J. 3.

—Ss. 342—*Warrant case—Examination of accused—Stage at which accused should be examined.*

*Per Curiam*—The provisions of S. 342, Cr. P. Code as regards the examination of the accused are mandatory and failure to comply with them is an illegality vitiating the trial.

In a warrant case the prosecution witnesses were examined and the accused did not avail themselves of the opportunity to cross examine the witnesses. The accused were then questioned generally in the case for the purpose of enabling them to explain the circumstances appearing from the evidence against them and they stated they would put in a written statement. The Magistrate then framed a charge against the accused under S. 411 I. P. C. and they pleaded not guilty and the case was adjourned. At a later date the accused cross examined the prosecution witnesses under S. 256, Cr. P. Code and the witnesses were also re-examined. Evidence was then called for the defence and the accused were not further questioned generally on the case after the cross-examination and re-examination of the prosecution witnesses. *Held*, by the majority (*Venkatasubba Rao, J.* dissenting) that there was a sufficient compliance with the requirements of S. 342 Cr. P. Code and that the trial and conviction of the accused were legal. 43 M. L. J. overruled, 6 Pat. L. J. diss. from (*Schwabe, C. J. Phillips.*

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*Devadoss, Venkatasubba Rao and Wallace, JJ*)  
VARISAI ROWTHER *In re*.

44 M. L. J. 567 : 17 L. W. 722 :  
32 M. L. T. (H. C.) 385 : 1923 M. W. N. 477 :  
73 I. C. 163 : 24 Cr. L. J. 547 :  
46 Mad. 449 : 1923 Mad. 609. (F. B.).

— S. 342 (1)—*Chapter XXII—Applicability of the section to the trial of summons cases summarily.*

The provisions of S. 342 (1) of the Code of Criminal Procedure requiring the Court to question the accused are inapplicable to the summary trials of summons cases as well as to summons cases tried in the ordinary manner (*Schwabe, C.J. Oldfield, Ramesam, Devadoss and Coleridge, JJ.*)  
DHARAM SINGH *In re*

45 M. L. J. 230 : 18 L. W. 612 :  
1923 M. W. N. 893 : 74 I. C. 959 : 24 Cr. L. J. 847  
46 Mad. 766 : 1924 Mad. 30 (F. B.).

— Ss. 344 and 439—*Criminal proceedings—Stay of pending Civil suit—Application to High Court.*

Where an application was made to the High Court for stay of a Criminal case pending a civil suit *Held* this was not a case for the exercise of the extraordinary powers of the High Court under S. 107 of the Government of India Act.

The petitioners might apply under S. 344 Criminal Procedure Code to the Sub Magistrate to postpone the trial before him, pending the decision of the Civil Court and if he fails to get a reasonable order, he may then ask the High Court to revise the order so passed (*Spencer J.*)  
YALAVARTHY ANKAMMA v. PILLALAMERI ADRI-  
BHOTLU. 18 L. W. 236 : 73 I. C. 528 :  
24 Cr. L. J. 640.

— S. 345—*Assault—Compromising with one—Effect.* See (1922) DIG. COL. 480. SAROJ KUMAR MUKERJEE v. EMPEROR 4 Pat. L. T. 107, 1923 P. 348 (1).

— S. 345—*Complaint of abduction—Who can compound*

The only person who can compound an offence of abduction is the husband though in certain cases the prosecution for the offence can be set in motion by a person under whose care the woman is in the absence of her husband. (*Broadway, J.*)  
MAHBUB ALI KHAN v. EMPEROR.  
74 I. C. 444 : 24 Cr. L. J. 780.

— S. 345—*Compounding of offences—Offence under Ss. 323 and 342—Hurt—Wrongful Confinement—Compounding with one of the complainants—Effect.*

A complainant can only compound the offence committed against him and not any offence committed against others jointly with him. (*Nowbould and Suhravard, JJ.*)  
SHIB CHANDRA CHAKRAVARTHY v. RABBANI MONDAL.  
27 C. W. N. 168 : 37 C. L. J. 254 : 73 I. C. 322 :  
24 Cr. L. J. 578 : 1923 Cal. 168.

— S. 345—*Composition of offence—Letter of withdrawal of case—Subsequent proceedings—Police prosecution.*

The accused, a railway servant, assaulted a student who was travelling by the railway and the

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latter made a complaint to the police who prosecuted the accused under S. 120 of the Railways Act. In the meantime the accused offered an apology to the student who wrote to the accused thus : " This is to say that Mr. John (the accused) came to me and offered an unconditional apology. I beg to withdraw the case against him". This was produced at the trial *Held* that the document clearly amounted to a composition of the offence in so far as it was compoundable. (*Stuart, J.*)  
EMPEROR v. JOHN. 45 All. 145 :  
74 I. C. 262 : 24 Cr. L. J. 758 : 1923 A. 474.

— S. 345—*Compounding of offence—in Revision.*

It is open to the High Court to allow a case to be compounded in revision. (*Kanhaya Lal, J. C.*)  
CHOTAHI SINGH v. EMPEROR.

90 & A. L. R. 770 : 73 I. C. 334 (2) :  
24 Cr. L. J. 590 (2).

— Ss. 345 and 439—*Revision—Composition of offence—Legality of.*

A Court of revision has no power to sanction the composition of an offence after the conviction of the accused by the court below. 43 Cal. 1143 (ol). 29 M. L. J. 621, 3 All. 1137 ref. (*Bucknill, J.*)  
AUDHI RAI v. EMPEROR. 1923 P. 89.

— S. 345—*Who can compound—S. 498 A. I. P. C.* See (1922) DIG. COL. 481. MIR ALAM v. EMPEROR. 5 Lah. L. J. 183 : 69 I. C. 370 :  
23 Cr. L. J. 690.

— S. 345 (5 A)—*Compounding offence—Revision.*

Under S. 345 (5 A) Cr. P. Code as amended, a High Court in revision may allow any person to compound any offence which he is competent to compound under the section—An offence under S. 420 I. P. C. is compoundable. (*Sulaiman, J.*)  
BRIJ BEHARI LAL v. EMPEROR. 21 A. L. J. 838 :  
90 & A. L. R. 1083.

— S. 346—*Case referred by Sub-Magistrate—Jurisdiction of Sub-Divisional Magistrate—Procedure.*

Where a case is submitted by a Sub-Magistrate to a Sub-Divisional Magistrate under S. 346 Cr. P. Code his jurisdiction determines. The Sub-Divisional Magistrate may thereupon try the case himself or commit the accused for trial or if he thinks fit, refer the case to any Magistrate having jurisdiction to try the offence which in the opinion of the Magistrate making the reference has been committed. The Sub-Divisional Magistrate should not send the case back without taking any action thereon. (*Oldfield and Ramesam, JJ.*)  
THE SESSIONS JUDGE OF BELLARY v. HAMPANNA. 69 I. C. 438 : 23 Cr. L. J. 710 :  
1923 Mad. 51.

— S. 346—*"Trying a case himself", what is—Judgment based on evidence taken by referring magistrate.*

Where a magistrate to whom a case is referred under S. 346, passes orders on the evidence taken by the magistrate who was not competent to try the case, he cannot be considered to be "trying the case himself."

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It may be taken to be a general principle of the Cr. P. Code that evidence taken by one magistrate is not evidence in a trial before another magistrate unless some provision of law expressly makes it so. Mere consent of parties will not do, (*Krishnan, J.*) PARAVADA CHINA VENKU NAIDU *In re*.

17 L. W. 247.  
72 I. C. 525 : 24 Cr. L. J. 413  
1923 Mad. 327

—S. 349—Case referred to joint Magistrate for passing order under S. 106 Cr. P. Code—Conviction by trial Magistrate.

Where a second class magistrate sent a case to the joint Magistrate as he thought an order under S. 106 Cr. P. Code was necessary and the latter passed the order, while he sent the case back to the Magistrate for trial, the order is without jurisdiction, (*Daniels, J.*) DUKHI v. EMPEROR.

74 I. C. 448 : 24 Cr. L. J. 784.

—S. 349—Joint trial—Some accused adolescents—Reference under—Legality of.

A subordinate magistrate tried some adults and adolescents together, found them all guilty and as under a Provincial Circular he could not try the latter, referred the case under S. 349 to the Sub-Divisional Magistrate. Held the procedure was totally irregular. S. 349 will not apply as it is not a case where he could not have inflicted a sufficiently severe sentence. Even if the reference is valid as regards the adolescents, the mere fact that the adults were jointly tried, does not enable the Magistrate to make a reference. (*Kotwal, A. J. C.*) BABA v. EMPEROR.

24 Cr. L. J. 738 : 74 I. C. 66.

—S. 350—Criminal trial—Transfer of magistrate—Judgment written after transfer and delivered by successor

The Code of Criminal Procedure makes no provision for delivery of judgment written by the Magistrate who heard the case after he had ceased to have jurisdiction in the District.

S. 350 would under certain circumstances, give the successor jurisdiction to decide the case on evidence recorded by his predecessor but it could not give him jurisdiction to deliver judgment written by his predecessor. (*Newbould and Suhrwardy, JJ.*) BAISHNAB CHARAN DAS v. AMIN ALI.

50 Cal. 664 ;  
72 I. C. 953 : 24 Cr. L. J. 489  
38 C. L. J. 202 : 1924 Cal. 55.

—S. 350—Judgment by third Magistrate—If valid.

If a Second Magistrate can act on evidence recorded by his predecessor, there is no reason why a third Magistrate should not act on evidence recorded by two of his predecessors and deliver judgment. (*Odgers and Hughes, JJ.*) GOVINDAN NAIR v. KUNHI KRISHNAN NAIR.

45 M. L. J. 808 : 18 L. W. 949 :  
(1923) M. W. N. 815.

—S. 350 (1) (a)—Warrant case—Proceedings before charge—Nature of.

Proceedings in a warrant case before a charge is framed are merely an enquiry and not a trial and at that stage the magistrate is not bound to adopt the procedure laid down in S. 350 (1) (a)

## CRIM. PRO. CODE (1898), S. 367.

Cr. P. Code, (*Oldfield and Ramesam, JJ.*) RAMANATHAN CHETTIAR v. EMPEROR,

46 Mad. 719 : 32 M. L. T. (H. C.) 81 :  
17 L. W. 412 : 32 M. L. T. (H. C.) 217 :  
71 I. C. 608 : 24 Cr. L. J. 192 : 1923 Mad. 660.

—S. 350, Proviso A.—Proceedings under S. 145—De Novo Trial not necessary on transfer of magistrate. See CR. P. CODE, Ss 145 AND 350.  
37 C. L. J. 128.

—S. 353—Cross complaint—Prosecution evidence in each to be defence evidence in the other—Validity.

In the trial of two cross complaints, when the prosecution evidence in each was taken as the defence evidence in the other, it amounts to letting in evidence in the absence of the accused and violates S. 353 Cr. P. Code. (*Broadway and Kforde, JJ.*) ALLU v. THE CROWN.

4 Lah. 376.

—S. 355—Summary trial—Depositions—Reading of.

S. 355 Cr. P. Code does not require that the evidence of witnesses should be read over to them in a case triable summarily. (*Jwala Prasad, J.*) MAHOMED ISHAQ v. EMPEROR

1 Pat. L. R. (Cr.) 159 : 1923 P. 157

—L. 360—Non-compliance with—Effect.

The omission to comply with S. 360 Cr. P. Code is an illegality which is not curable by the provisions of S. 537, (*Cuming and B.B. Ghose, JJ.*) HARO NATH MALO v. ALA BUX

28 C. W. N. 119 : 38 C. L. J. 281.

—S. 367—Appellate Judgment—Contents of See CR. P. CODE, Ss 424 AND 367.

2 Bur. L. J. 101.

—S. 367—Judgment of appellate Court—What it should show. See Cr. P. CODE, Ss. 424 AND 367,  
1923 Rang 188.

—S. 367—Judgment—Contents of—Interference on appeal.

All that Ss 367 of the Cr. P. Code requires is that the point for determination should be stated the decision thereon and the reasons therefor. It cannot be assumed that because the District Magistrate has not referred to the oral evidence, but has drawn inferences from documents and from probabilities, therefore, he has not considered the evidence. Where the Magistrate has given strong and legal reasons for his conclusion his omission to refer to minute details of the case does not vitiate his judgment. (*Ross, J.*) DURGA SINGH v. EMPEROR.

71 I. C. 597 :  
24 Cr. L. J. 181.

—S. 367—Non-compliance vitiates judgment.

Under S. 424 of the Cr. P. Code the rules contained in S. 367 as to the judgment of a criminal Court of original jurisdiction apply to the judgment of any appellate Court other than a High Court. The High Court will not in revision make up for the deficiency of the appellate judgment by having recourse to that of the Court of first instance. 2 Lah. 308 Foll. (*Moti Sagar, J.*) RAHIM ALI v. EMPEROR

1923 Lah. 344.

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—S. 367—Provisions of mandatory—Non-compliance.

The delivery of judgment and passing of sentence is an integral part of a Criminal trial. It is not a mere formality and the deliberate breach of express provisions of the law cannot be treated as a mere irregularity to be cured by S. 537 Cr. P. Code. (*Robinson, C. J. and Macgregor, J.*) *RAMBIT v. EMPEROR*.

73 I. C. 328 (1). 24 Cr. L. J. 584 : 1923 Rang. 44 (2).

—S. 367 (5)—Lesser sentence than capital—Circumstances under which to be passed.

S. 367 (5) Cr. P. C. Contemplates the passing of the extreme sentence as the ordinary rule in cases punishable with death, unless there are extenuating circumstances. The absence of aggravating circumstances will not do. The discretion has to be exercised judicially and the accused is entitled to the benefit of a reasonable doubt in the matter of sentence as in the matter of conviction. (*Young O. C. J. and May Oung, J.*) *MI. SHWE YI v. EMPEROR*.

2 Bur. L. J. 277.

—Ss. 369 and 439—Dismissal of Criminal case for default—Power to re-hear.

Where the High Court has dismissed a criminal case for default and not on the merits, the Court can hear the case. (*Abdul Qadir, J.*) *KISHEN SINGH v. GIRDHARI LAL*.

69 I. C. 638 : 23 Cr. L. J. 750.

—Ss. 370 and 260—Presidency Magistrate—Summary trial and conviction—Judgment—Contents of.

Under S. 370 (1) Cr. P. Code a Presidency Magistrate who tries and convicts an accused in a Summary trial is bound to give reasons for the conviction. (*Ramesam, J.*) *VARADARAJULU PILLAI In re*.

1923 Mad. 144.

—S. 370—Reasons for conviction—Bench court.

Where a substantive sentence of imprisonment is passed, the Honorary Presidency Magistrate must record the reasons for the conviction. (*Wallace, J.*) *DERVISH HUSSAIN In re*.

44 M. L. J. 84 : 32 M. L. T. (H. C.) 100.

17 L. W. 18 : 71 I. C. 212 :

24 Cr. L. J. 84 : 46 Mad. 185 : 1923 Mad. 185.

—S. 400—Trial of offence in Native State—If can be tried again in Br. India for same offence.

Where in respect of the offence under S. 411 I. P. C. an accused is convicted by the courts of a Native State, he cannot on the same facts be again convicted of the same in British India. (*Harrison, J.*) *TEJA SINGH v. EMPEROR*.

73 I. C. 939 : 24 Cr. L. J. 715.

—S. 403—Acquittal on charge of abduction—If bars trial for detention.

The acquittal of a person on a charge of abduction does not bar a trial for detaining the same person (*Broadway, J.*) *MAH ALI KHAN v. EMPEROR*.

74 I. C. 444 : 24 Cr. L. J. 780.

## CRIM. PRO. CODE (1898), S. 403.

—S. 403—Acquittal for forgery—Retrial for offence under Registration Act—If legal.

Where a person is charged with forgery and abetment thereof but acquitted, he cannot afterwards be tried for an offence under S. 82 Registration Act in respect of the same transaction. (*Pratt, J.*) *MAUNG SAING v. EMPEROR*.

1 Rang. 299.

—S. 403—Acquittal—Second Trial for same offence on same facts. I. P. C. S. 247

Under S. 403, Cr. P. Code, an accused once acquitted of an offence under S. 274 I. P. C. cannot again be tried for the same offence in the same facts, (*Ryves, J.*) *DULLA v. EMPEROR*.

1923 A. 360.

—S. 403.—Autrefois acquit—Criminal misappropriation—Prosecution in respect of gross sum misappropriated—Withdrawal—Subsequent prosecution for minor items—Bar.

The accused was tried for criminal breach of trust under S. 409, I. P. C. in respect of a gross sum alleged to have been misappropriated within a specified period. No evidence was offered and the prosecution was withdrawn. The accused was subsequently prosecuted in respect of a particular sum misappropriated on a date within the period covered by the previous charge under S. 409 I. P. C. *Held*, that the previous acquittal was no bar to the subsequent trial (*Greaves, J.*) *NAGENDRA NATH BOSE v. EMPEROR*.

50 Cal. 632 : 27 C. W. N. 578 :

38 C. L. J. 286 : 1923 Cal. 654.

—S. 403—Autrefois acquit—Possession of several articles of stolen property—Acquittal in respect of some—Effect of.

The petitioner was tried and convicted under S. 411 I. P. C. on the charge of having been in dishonest possession of stolen property on 7—11—1921. On that date several articles of property were found in the room occupied by the petitioner. In respect of some of them he had been previously tried and acquitted, *Held*, that the subsequent trial was barred even though the two articles were alleged to have been stolen from different persons, in the absence of evidence they were received from different persons. (*Newbould and Suhrwardy, JJ.*) *GANESH SAHU v. EMPEROR*.

50 Cal. 594 : 37 C. L. J. 326 :

27 C. W. N. 554 : 73 I. C. 931 : 24 Cr. L. J. 707 :

1923 Cal. 557.

—S. 403—Bar of trial—Acquittal under S. 247—Effect

An acquittal under S. 247 Cr. P. C. operates as a bar under S. 403 (*Foster, J.*) *KIRAN SARKAR v. EMPEROR*.

4 Pat. L. T. 15 : 74 I. C. 719 :

24 Cr. L. J. 815.

—S. 403—Cognizance of offence by different Magistrates—Procedure.

There is no provision of the Cr. P. Code which prevents a Magistrate from taking cognizance of an offence because another magistrate had previously taken cognizance. The law prevents a person being tried twice for the same offence. But if cognizance is taken by two different magistrates, there is no provision that the trial can be held before one of them only. But multiplicity of

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trials can be always prevented by the sections providing for the transfer of cases, (*Newbould and Suhrawardy, JJ.*) *HARI SATYA BISHNU v. EMPEROR.* 50 Cal. 482 : 37 C. L. J. 327 : 73 I. C. 934 : 24 Cr. L. J. 710 : 1923 Cal. 652.

—S. 403—*Criminal breach of trust—Trial and acquittal—Subsequent trial for falsification of accounts—Same evidence.*

The accused, the cashier and accountant of the complainant, was alleged to have dishonestly misappropriated three sums of money on three different dates and at the trial he was acquitted. It was part of the prosecution case at the trial that the accused had made three false entries in the accounts to conceal the misappropriation. The accused was subsequently charged under S. 477 (A) I. P. C. Held that the accused could not be tried again on what was virtually the same offence charged in a different form (*Sanderson, C. J.*) *EMPEROR v. JHABBAR MULL.* 49 C 924 : 72 I. C. 973 : 24 Cr. L. J. 609 : 1923 Cal. 179

—S. 406—Orders for security for good behaviour and for keeping the peace—Appeal—If lies. See Cr. P. CODE, Ss. 107, 118 and 406.

19 N. L. B. 160.

—Ss. 407, 429, 439—*Appeal—Notice of, to be given to District Magistrate—Acquittal without notice—Illegality.*

Where a Sub-Divisional Magistrate disposes of an appeal against a conviction without giving notice to the District Magistrate and acquits the accused, the omission to give the notice is an illegality and not a mere irregularity. The High Court interfered in revision and set aside the acquittal. (*Shah C. J. and Crump, J.*) *EMPEROR v. SHIVLINGAPPA BASAPPA.* 73 I. C. 812 : 24 Cr. L. J. 700 : 1923 Bom. 74.

—S. 413—*Non-appealable sentence—Co-accused receiving appealable sentence—Effect.*

If a person who is given a sentence which is ordinarily non-appealable is tried jointly with a person who is given an appealable sentence, he does not get a right of appeal which he would not otherwise have. (*Daniels, J.*) *JHAGRU v. EMPEROR* 73 I. C. 775 : 24 Cr. L. J. 679 : 1923 A. 609 (1).

—S. 417—*Acquittal—Interference.*

A sold a land to B without disclosing a prior incumbrance. The sale deed contained a clause that the property was unencumbered. Subsequently the incumbrancer sued on his mortgages and got a decree under which B had to pay the mortgage money with interest to save the property from sale. B filed a complaint against A under Penal Code S. 417 but A was acquitted. Held that the question is not of any public interest and the parties had a remedy in Civil Courts and therefore no interference with the order of acquittal is necessary. (*Lumsden, J.*) *GANGA SINGH v. RAMZAN.* 1923 Lah. 601 (2).

—S. 417—*Appeal from acquittal—Interference.*

The High Court will not interfere with an acquittal unless the lower court has been perverse in its judgment or taken such unreasonable and distorted conclusions of the facts as to cause a

## CRIM. PRO. CODE (1898), S. 422.

miscarriage of justice. (*Jwala Prasad and Ross, JJ.*) *EMPEROR v. KUNJA DUSADH.* 1923 P. 119.

—S. 417—*Appeal against acquittal—Trial by Jury—Interference by High Court when justified.* See (1922) DIG. COL. 485 *SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS v. SHYAM SARDAR BHUMIJ* 71 I. C. 367 : 24 Cr. L. J. 143

—S. 417—*Scope of.*

So far as the wording of S. 417, Cr. P. C is concerned, there is nothing in it which shows that it is the District Magistrate alone who can move the local Government to file an appeal. It is, in ordinary cases, a matter of practice that the local Government is moved by private applicants or the Police through the District Magistrate, or the latter, as the head of Criminal Administration in his district, himself moves the local Government, but the Government can move otherwise. (*Abdul Qadir J.*) *MUL SINGH v. THE CROWN.* 72 I. C. 593 : 24 Cr. L. J. 433 : 1923 Lah. 163.

—S. 417—*Verdict of jury—When can be set aside.*

In the absence of misdirection to the jury, a conviction based on the verdict of the jury will be upheld in appeal. (*Krishnan and Wallace, JJ.*) *MULIMAYANDI THEVAN In re* 45 M. L. J. 845 : 18 L. W. 886

—S. 420—*Jail appeal—Dismissal on ground of limitation—Subsequent appeal presented by counsel against same convictions and sentence—Maintainability.* See *MAD HIGH COURT RULES (APPELLATE SIDE)*, 44 M. L. J. 450.

—Ss. 420 and 419—*Jail appeal—Dismissal of—Effect of.*

Where a jail appeal is preferred under S. 420 of the Cr. P. Code and is dismissed, no further appeal can be preferred through Counsel under S. 419 of the Cr. P. Code. 3 O. L. J. 326 diss (*Daniels, C. J.*) *GANGA DIN v. EMPEROR,* 1923 Oudh 56 (1).

—S. 421—*Criminal appeal—Summary dismissal after admission—Legality.*

After the admission of a criminal appeal, the court has no jurisdiction to dismiss it summarily. (*Sanderson, C. J. and Panton, J.*) *RAM HARI CHAKRAVARTY v. SANTOSH KUMAR MANNA.* 69 I. C. 461 : 23 Cr. L. J. 733.

—S. 421,—*Form of judgment.* See (1922) DIG. COL. 485 *PADARATH KURMI v. EMPEROR.*

24 Cr. L. J. 477 : 72 I. C. 893.

—S. 421—*Jail appeal—Dismissal of—Subsequent appeal preferred through counsel—Maintainability.* See (1922) DIG COL 486. *EMPEROR v. KHALI.* 44 A. 769.

—S. 421—*Judgment in jail appeal—Contents.*

A Court when rejecting an appeal under S. 421 Cr. P. C. should record shortly its reasons for such rejection, as it may be challenged in revision. (*Dalal, J. C.*) *BRIJ MOHAN LAL v. EMPEROR.*

9 O. & A. L. R. 560.

—Ss. 422 and 537—*Appeal—Disposal of appeal without notice to District Magistrate—Legality of—Complainant—Right to object.*

## CRIM. PRO. CODE (1898), S. 423.

Where the lower Appellate Court disposed of an appeal preferred by the accused and acquitted him without notice to the District Magistrate, the High Court will not interfere in revision at the instance of the complainant where the objection on the ground of absence of notice to the District Magistrate comes not from him but from the complainant (*Macleod, C. J. and Crump, J.* DEVENDRA v. SHETTAPPA. 25 Bom L. R. 251 : 1923 Bom 264 (2))

## —S. 423—Appeal—Non-appearance of appellant—Power to dismiss appeal for default.

On the day fixed for the hearing of a criminal appeal no one appeared in support of the appeal on behalf of the appellant and no application for adjournment was filed. The Magistrate thereupon summarily dismissed the appeal. Held that under the provisions of S. 243, Cr. P. C. it was incumbent upon the Magistrate to go through the record and to dispose of the appeal on the merits. He could not dismiss the appeal merely because there was default in the appearance of the pleader for the appellant. (*Ghose and Cumming, JJ.*) BANSI MIRDHA v. BROJESWAR DUTT 50 Cal. 972 : 27 C. W. N. 947 (2) : 1924 Cal. 95.

## —S. 423—Appellate Judgment—Contents of.

A Criminal appeal having been once admitted it could not be disposed of summarily without considering the whole evidence in the case and writing out a judgment under S. 423 Criminal Procedure Code. If the pleader of the appellants did not appear it was the duty of the Magistrate then to go through the record and write out a proper judgment according to law. (*Kulwant Sahay, J.*) NEWA LAL RAI v. EMPEROR 4 Pat L. T. 552 : 72 I. C. 613 (1) 24 Cr. L. J. 453 (1) : 1923 P. 368.

## —Ss 423 and 439—Criminal case—Remand for fresh trial—When permissible

When the trial before a Magistrate was perfectly regular the mere fact that he had held a preliminary enquiry does not incapacitate him from trying the case. It is not competent for an appellate Court to order a retrial when the trial in the first Court has been regular and the record of that Court is as full as the law requires it to be and there is evidence on record to enable the appellate Court to decide the appeal on its merits. If inadmissible or irrelevant evidence had been admitted it should be left out of consideration. (*Pratt, J.*) MRS. MAY BOUVILLE v. EMPEROR. 74 I. C. 72 : 24 Cr. L. J. 744 : 1923 Rang. 65 (1)

## —S. 423—Different sentences on each of the accused—Appeal by each—Forum

Where some of the accused in a case are convicted for terms of imprisonment for which appeal lies to the High Court and others are given lesser sentences, the latter are not bound to appeal to the High Court but should appeal as if they have been convicted in a separate case of their own. 40 M. 591 foll. (*Oldfield and Ramesam, JJ.*) NITTOOR MOIDEEN HAJEE In re. 71 I. C. 217 : 24 Cr. L. J. 89 : 1923 Mad. 95.

## —S. 423—Powers of Appellate Court—Conviction under different section.

## CRIM. PRO. CODE (1898), S. 435.

The petitioner was convicted by a Magistrate under S. 143, I. P. C. and sentenced to pay a fine of Rs. 100. On appeal the Sessions Judge upheld the conviction and sentence and for her passed an order setting aside the order of acquittal of the offence under S. 379, I. P. C. which had been passed by the trying Magistrate. Held that the Sessions Judge had no jurisdiction to set aside the order of acquittal when he upheld the conviction under S. 143, I. P. C. It was not a case of altering the conviction which was within his powers under S. 423 Cr. P. Code. (*Newbould and Suhrawardy, JJ.*) PROSARNA CHANDRA MAJUMDAR v. UPENDRA NATH SHAW

27 C. W. N. 555 : 37 C. L. J. 409 : 75 I. C. 362 : 24 Cr. L. J. 938.

## —Ss. 424, 367—Appellate judgment—What it should contain.

The provisions of S. 424 Cr. P. C. read with S. 367 are imperative and an appellate judgment should indicate clearly that the evidence has been gone into and tested extrinsically as well as intrinsically and that it has arrived at an independent opinion for itself. It must be not be a supplement to that of the trial Court, but one which would enable the High Court to dispose of the case in revision without the necessity of going through the record. (*May Oung, J.*) BAGH EMPEROR

1 R. 301 : 2 Eur. L. J. 101 : 75 I. C. 296 : 24 Cr. L. J. 920 : 1923 Rang. 188.

## —S. 428—Appeal—Admission of additional evidence—Proof of signature. See CR. P. CODE S. 196.

44 M. L. J. 557.

## —S. 428—Report of Chemical Examiner—Not tendered in Trial Court—No order admitting additional evidence in appeal—Basis of conviction.

In a trial for possession of cocaine, the articles were sent for examination to the Chemical Examiner, but his report was not tendered in evidence in the trial Court. In appeal the Court sent for the report but without recording an order under S. 428, Cr. P. C., refused the report and convicted the accused. Held the procedure was wrong and the conviction based on it illegal. (*Sulaiman, J.*) WALI MUHAMMAD v. EMPEROR. 21 A. L. J. 869 : 9 O. & A. L. R. 994.

## —Ss 435 and 439—Conviction by Sessions Court at Bangalore—Power of revision—European British subject.

Where no question of European British subject is involved, the Madras High Court has no power of revision over a sentence by the Sessions Judge of Bangalore, the proper tribunal being the Resident's Court. The law is the same where an European British subject waives his right to be tried as such in the Sessions Court of Bangalore (*Krishnan, J.*) JEREMIAH v. JOHNSON 45 M. L. J. 800 : 18 L. W. 895.

## —Ss. 435 and 439—Criminal—Revision Petition—Dismissal for non-payment of printing charges—Power to rehear the case

Once a criminal revision case has been dismissed for default of payment of printing charges, it is not competent to the High Court to rehear

## CRIM. PRO. CODE (1898), S. 435.

the case or entertain a fresh application for revision 23 M. L. J. 321 foll. (*Wallace, J.*) NARA APPAYYA v. DARS VENKATAPPAYYA.

44 M. L. J. 27 : 17 L. W. 23 : 69 I. C. 634 : 23 Cr. L. J. 746 : 1923 Mad. 276 (1)

—S 435—*District Magistrate—If inferior to Sessions judge*

As a court of revision the District Magistrate is not inferior to the Sessions Judge. Where he passes an order as a court of original jurisdiction, he is subordinate to the Sessions Judge who can exercise revisional power, (*Dalal, A. J. C.*) EMPEROR v. BALWANT SINGH.

9 O. & A. L. R. 344. 73 I. C. 504, 24 Cr. L. J. 616

—S 435—*High Court—No power to review—Remedy of accused.*

The High Court has no power to review its judgment dismissing a Criminal appeal even though fresh materials throwing doubt on the conviction are placed before it. The proper procedure is to make a reference to the Local Govt. Under Ch. XXIX, Cr. P. CODE. (*Stuart J.*) KALE v. EMPEROR. 45 All 143

74 I. C. 270 : 24 Cr. L. J. 766 : 1923 A. 473 (2)

—Ss. 435 and 439—*Interference by High Court suo Motu—Calling for records—Revision*

A Court should be loath to interfere on behalf of a person convicted in a Criminal case if that person is an adult of ordinary intelligence when that person himself in no way contests the propriety of his conviction. Under the very extensive powers conferred by S. 435, Cr. P. Code, the High Court can call for and examine the proceedings of inferior courts if the necessity for doing so is brought to its notice in any manner. But before it does so it would have to be satisfied that there are *a priori* grounds for apprehending a miscarriage of justice (*Stuart, J.*) NARAIN PRASAD NIGAM v. EMPEROR. 45 All. 128 :

71 I. C. 243 : 24 Cr. L. J. 115 : 1923 A. 85.

—S. 435—*Order of discharge—Compensation—Guarded—Revision—Forum.*

Where a first class Magistrate discharges an accused and directs the complainant to pay compensation, he must apply in revision as regards further enquiry to the District Magistrate or Sessions Judge before approaching the High Court (*Krishnan, J.*) GOPOBONDHU BEHARA v. VENKATESAM PANTULU. 18 L. W. 651 :

(1923) M. W. N. 837.

—S. 435—*Revision—Interference—Order of acquittal.*

Where there has been a regular trial by a Sessions Judge and an acquittal, it is only in the most exceptional circumstances that the High Court will interfere at the instance of the complainant when the government have not chosen to appeal against the order. 9 Bom. L. R. 156 Ref. (*Macleod, C. J. and Crump, J.*) JOITA BECHAR v. PAKSHOTTAM SANKALCHAND. 25 Bom. L. R. 488 : 74 I. C. 974 : 24 Cr. L. J. 734.

—S. 435—*Scope of—Orders under S. 110 Cr. P. C.*

S. 435 Cr. P. C. does enable a Sessions Judge to call for the record of proceedings under S. 110 Cr. P. C. taken before an inferior Criminal Court

## CRIM. PRO. CODE (1898), S. 437.

within his jurisdiction. Private and confidential enquiries should not influence judicial decisions. (*Walsh, J.*) ASHIQ ALI v. EMPEROR.

21 A. L. J. 513 : L. R. 4 A. 126 (Cr.) : 73 I. C. 337 : 24 Cr. L. J. 593 : 1923 A. 596.

—S 435—*Security for good behaviour and keeping peace—Order based on insufficient material—Interference.*

The High Court seldom interferes in the preliminary stage with the discretion of a Magistrate taking action under the preventive sections of the Cr. P. Code but when the materials on which the orders are passed are clearly insufficient to support the orders the High Court will interfere. (*Newbould and C. C. Ghose JJ.*) NAFAR CHANDRA PAL CHOWDHURY v. EMPEROR. 38 C. L. J. 198 : 28 C. W. N. 23.

—S 436 (New Code)—*If applies to proceedings under Ch VIII.*

The present S. 436 (old S. 437) contains the words "any person accused of an offence" instead of "any accused person" and hence does not include persons against whom proceedings were taken under Ch. VIII (*May Oung, J.*) MAUNG THAN v. EMPEROR. 2 Bur. L. J. 285.

—S. 437—*Discharge of accused—Order directing further enquiry—No notice to accused—Validity of order.*

Where a Sessions Judge without giving notice to the accused directs a further inquiry in a case where the accused had been discharged, the order is bad and cannot stand. 20 All. 339, followed. (*Stuart, J.*) SAGAR MAL v. EMPEROR. 1923 A. 122 (1).

—S. 437—*Further enquiry—Grounds for.*

The mere fact that a District Magistrate does not agree with the decision of the trying Court is not a sufficient ground for ordering a further enquiry as mentioned in S. 437 Cr. P. Code. (*Ryves, J.*) UMRAO KHAN v. EMPEROR

L. R. 4 A. 95 (Cr.).

—S. 437—*Further enquiry—Order for—Grounds for.*

The mere fact that the District Magistrate does not agree with the decision of the Trying Magistrate is not sufficient ground for ordering a further enquiry under S. 437 Cr. P. Code. Moreover notice must be given to the accused before action is taken under S. 437 Cr. P. Code. 44 A. 697 followed. (*Ryves, J.*) UMRAO KHAN v. EMPEROR 21 A. L. J. 194 : L. R. 4 A. 89 (Cr.) :

71 I. C. 600 : 24 Cr. L. J. 184 : 1923 A. 484 (2).

—S. 437—*Further enquiry—Order for—Lapse of time—Effect of.*

Mere lapse of time is not a sufficient ground for refusal to order further enquiry if the Court feels that an offence has been committed which should be enquired into. Any other view would offer an inducement to accused persons to delay the proceedings. (*Kotwal, A. J. C.*) BIRJUBHUKAN v. JANRAO. 69 I. C. 633 : 23 Cr. L. J. 745 :

1923 Nag. 100.

—S. 437—*Further enquiry—Order for when to be made.*

Further enquiry cannot be ordered on the bare possibility of an offence being disclosed on further evidence being taken. There must be something on record to indicate that such an offence was



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committed or there must be something to show that further evidence is available, which has not been taken and which would support a charge for that offence. (*Krishnan, J*) ARUMUGA MUDALIR *In re*. 1923 Mad 59.

—S. 437—Further enquiry—Order for—Whether notice to accused necessary.

S. 437 of the Criminal Procedure Code does not specifically mention that notice must be issued to the accused but it has always been held that notice is proper and there must be some special reason for not following the general rule prescribing notice. Where however there has been a second trial and conviction the trial would not be vitiated by the fact that an order for further enquiry was made without giving an opportunity to the accused before ordering a re-trial. The trial can be invalidated only if the accused can be shown to have been prejudiced by the fact of not having been given an opportunity of being heard in the proceedings under S. 437. (*Pipon, J C*) KHWAJA HASSAN *v* EMPEROR. 71 I. C. 360 : 24 Cr. L. J. 136.

—S. 437—Further enquiry—Same materials.

A Court has jurisdiction to direct a further enquiry upon the same materials as were before the trial Magistrate. (*Dalai, J C*) HAIDER KHAN *v* EMPEROR. 9 O. & A. L. R. 868.

—S. 437—Further enquiry—When to be ordered.

A Sessions Judge can under S. 437 direct further enquiry in a case where the accused has been discharged under S. 253, but where no fresh evidence is likely to be produced the Court should hesitate before exercising such powers unless there are many palpable errors in the decision of the first Court. (*Newbould and Suhrawardy, JJ*) ABDUL RASHID SHEIKH *v* MONTAZ SHEIKH. 38 C. L. J. 206.

—S. 437—Order for further enquiry—Validity—Failure to consider prospect of public advantage from re-opening of case—Effect—Setting aside of order in revision—Jurisdiction.

An order directing further enquiry under S. 437 Cr. P. C. without regard to what is really the material consideration in such cases *viz.*, the prospect of any public advantage from the case being re-opened is one passed without jurisdiction and is liable to be set aside by the High Court in revision. (*Oldfield and Ramesam, JJ*) KRISHNA PILLAI *In re*. (1923) M. W. N. 56 : 1923 Mad. 134 (1).

—S. 437—Order of discharge—Setting aside—Notice to accused, if necessary. See Cr. P. CODE, Ss. 253 AND 437. 17 L. W. 247.

—S. 437—Scope.

An order for a further enquiry should not be passed without notice to the person accused and then only if the order of discharge was manifestly perverse or occasioned a grave miscarriage of justice. (*Broadway, J*) BAHADUR ALI *v* THE CROWN. 73 I. C. 510 : 24 Cr. L. J. 622 : 1923 Lah. 158.

—S. 437—Scope of—Further enquiry.

When a Magistrate has passed an order discharging an accused person generally speaking

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further enquiry should not be directed unless the order of discharge is manifestly perverse or foolish or is based upon a record of evidence which is obviously incomplete. (*Scott Smith, J*) KARAM CHAND *v* MATHRA DAS. 72 I. C. 369 : 24 Cr. L. J. 369 : 1923 Lah. 329 (2).

—L. 437—Want of notice vitiates order.

Where accused has a plea to urge, want of notice vitiates the order passed without notice. (*Jafar Ali, J*) MAHENDAR NATH *v* MILKHI RAM. 1923 Lah. 689 (1).

—Ss. 438 and 439—Revision—Application to High Court—No application to Sessions Court.

The appeal in the lower Court was disposed of by a first class Magistrate, who was empowered to dispose of appeals from the decisions of 2nd and 3rd class Magistrates under the provisions of S. 497 Sub-clause (2) of the Criminal procedure Code. A revision application to the High Court, without going to the Sessions Judge and asking him to make a reference to this Court was held to be not in order.

Ordinarily an applicant ought to go to the Sessions Judge and move him for a reference to this Court. But so far as the Rule in question was concerned the Court held that they could not discharge this Rule on that ground. The application having been heard and the Rule having been granted the High Court was bound to dispose of the Rule on the merits. (*Ghose and Chotener, JJ*) ABDUL MATLAB *v* NANDA LAL KHATEL. 50 Cal. 423 : 1923 Cal. 674.

—S. 439—Acquittal—Powers of revision.

In revision, the High Court has power to set aside even an order of acquittal and will do so when the order is based on a misapprehension of law. (*Chevis, J*) FAKIR CHAND *v* FAKIR. 69 I. C. 379 : 23 Cr. L. J. 699.

—S. 439—Acquittal—Revision—Interference by High Court.

Where no appeal has been preferred against an order of acquittal by the Sessions Judge, the High Court does not ordinarily interfere on revision *suo motu* to set aside the order of acquittal. (*Pratt, J*) EMPEROR *v* MAUNG AUNG GYAW. 1 Rang. 601.

—S. 439—Action by Civil Court—Revision Interference.

Where a Civil Court has taken action under S. 476 Criminal Procedure Code, the Revisional Court cannot act under S. 439 Criminal Procedure Code. (*Duckworth, J*) VALAB DAS *v* MAUNG BA THAN. 1 Rang. 372 : 2 Bur. L. J. 154.

—S. 439—Appeal from conviction under S. 304 I. P. C.—Enhancement—Powers of Court.

Where the accused charged under Ss. 302 and 304 I. P. C. is convicted under the latter section and appeals, the High Court acting under Ss. 423 and 439 Cr. P. C. can convert the sentence into one under S. 302 I. P. C. (*May Oung and Duckworth, JJ*) ON SHWE *v* EMPEROR. 1 Rang. 436.

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—Ss. 439 and 423—Appeal disposed of on merits—Pleaders' absence. See (1922) DIG. COL. 108. OLAYAT KHAN v. EMPEROR.

4 Pat. L. T. 98 : 1 Pat. 589 :  
24 Cr. L. J. 118 (2) : 71 I. C. 246 (2).

—S. 439—Application to lower Court—Omission to make—Effect of. See (1922) DIG. COL. 490. SAT NARAYAN SINGH v. EMPEROR.

71 I. C. 995 : 24 Cr. L. J. 275.

—S. 439—Complainant—Right to be heard—Defamation.

On hearing a revision the High Court could hear a private complainant in the case of an offence under Ss. 500 and 501 P. C. 42 C. 612 Ref. (Ghose and Cuming, JJ.) ASHUTOSH DAS GUPTA v. PURNA CHANDRA GHOSH

50 Cal. 159 : 71 I. C. 670 :  
24 Cr. L. J. 206 : 1923 Cal. 11.

—S. 439—Cr. Revision—Findings of fact—Accepted by High Court.

Unless there is something on the face of the record showing that the accused has been prejudiced in any way by the conduct of re-trial in the Court below, the High Court would in revision, accept the findings of fact of the appellate Court. (Prideaux A. J. C.) SURYABHAN v. EMPEROR.

71 I. C. 667 : 24 Cr. L. J. 203 :  
1923 Nag. 155.

—S. 439—Discretion—Exercise of.

Where a discretion has been exercised by a Court of competent jurisdiction which is not on the face of it arbitrary, the High Court in revision will neither inquire into the reasons nor interfere. (Mullick and Macpherson, JJ.) GULLI BHAGAT v. NARAIN SINGH

2 Pat. 708.

—Ss. 439 and 476—Direction to prosecute—Revision by High Court.

The High Court will interfere in revision with a direction to prosecute made under S. 476 Cr. P. Code only when that direction is based on grounds merely fanciful, grounds so empty and so obviously wrong that the Court granting cannot be said to have formed serious judicial opinion. 23 A. 249 followed. (Macleod, C. J. and Crump, J.) PARSHOTAMDAS M. SHAHIN re.

25 Bom. L. R. 282 : 72 I. C. 359 :  
24 Cr. L. J. 359 : 1923 Bom. 201 (1).

—S. 439—Findings of fact—Power of High Court.

The High Court's power of interference in revision with findings of fact is one that should be sparingly used. (Daniels, J. C.) MAHOMED ZAHUR v. EMPEROR

1923 Oudh 8 (2).

—S. 439—Findings of fact—When open to question in revision.

Ordinarily the High Court would not in revision, go behind the concurrent findings of the courts below on a question of fact. (Devadoss J.) MARUTHAYEE v. APPAVU PILLAI.

72 I. C. 892 : 24 Cr. L. J. 476 :  
1923 Mad. 237 (2).

—S. 439—Order of acquittal.

Where the accused has been acquitted by the trying Magistrate and the complainant applies to

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the District Magistrate to move the High Court in revision, to set aside the order of acquittal, the District Magistrate, if he considers the case to be of sufficient importance should, in the first instance, move the Local Government to file an appeal 18 P. W. R. 1915, Dist. (Lumsden, J.) GANGA SINGH v. RAMZAN. 1923 Lah. 601 (2).

—S. 439—Order directing enquiry under S. 202—Stay of such order.

A Magistrate cannot dismiss a complaint off-hand unless he is satisfied that no *prima facie* case of any kind is made out and if he considers that before issuing process against the person complained against he should make further inquiry, interference by the High Court on the petition by either party for stay of the proceeding would obviously be uncalled for. (Lumsden, J.) NARAYAN SINGH v. EMPEROR. 1923 Lah. 663.

—S. 439—Point not taken in courts below—Effect.

The object of requiring application to be made first to the District authorities before moving the High Court is that in dealing with the matter the High Court may have before it the reasoned opinion of two Courts on the point at view and this object will be defeated if parties are allowed to take points which they did not pass in the court below. (Daneils, J.) BHURE MAL v. EMPEROR.

45 A. 526 : 73 I. C. 801 :  
24 Cr. L. J. 689 : 1923 A. 606.

—S. 439—Powers of High Court—Finding of fact.

A revisional court does not decide the balance of credibility between two conflicting sets of witnesses or two conflicting issues of fact but it may be compelled to dissent from a finding of fact which is either perverse or has been arrived at contrary to well established principles of law. (Walsh, J.) UMED SINGH v. EMPEROR

21 A. L. J. 765 : L. R. 4 A. 221 (Cr).

—S. 439—Power of High Court to set aside a charge—Civil case.

The High Court has power to set aside a charge in revision but it should be exercised only in very exceptional cases. 33 P. R. 1910 Cr. Ref. The mere fact that an act gives rise to a civil or criminal liability according to the intention of a person charged is not a ground for interference with a charge (Scott-Smith, J.) BUTA SINGH v. EMPEROR.

5 Lah. L. J. 36 :  
71 I. C. 246 (1) : 24 Cr. L. J. 118 (1) :  
1923 Lah. 278 (1).

—S. 439—Power of High Court—Direction to Subordinate Court not to try a case.

S. 439 of the Cr. P. Code does not authorise the High Court to direct a subordinate Court to refrain from trying an accused against whom process has been issued by such Court. (Mullick and Bucknill, JJ.) JHARU LAL v. MAHANATH MADAN DAS.

2 Pat. 257 :  
74 I. C. 713 : 24 Cr. L. J. 809 : 1923 P. 410.

—S. 439—Power to revise order of District Magistrate refusing transfer—Remedy of party.

The High Court has no power either under S. 439 or the Letters Patent to revise an order of

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the District Magistrate refusing to transfer a case from one Court to another. The remedy of the party is to file an application for transfer under S. 526. (*May Oung, J.*) *ASHU v. MG PO KHAN.*

1 Rang 632 : 2 Bur. L. J. 236.

—S. 439.—*Revision against acquittal—Interference—Invalid composition of offence.*

Where a person is acquitted of an offence as a result of an alleged composition of the offence which turns out to be invalid it is open to the High Court to interfere in revision and set aside the acquittal. (*Pipon, J. C.*) *HARNAM DASS v. SAIN DASS* 71 I. C. 248 (2) : 24 Cr. L. J. 120 (2).

—S. 439.—*Revision against acquittal—When justified—Compromise between parties—Non compoundable offence—Acquittal.*

As a rule an interference is not made in revision with an order of acquittal on the application of a private party except where such interference is imperatively demanded in the interests of public justice or where the procedure adopted is so irregular or illegal as to vitiate the whole trial. Where a magistrate trying a non-compoundable case heard the evidence of the prosecution and framed a charge but thereafter acquitted the accused on the complainant filing a written compromise without considering the merits of the case, held that the procedure of the Magistrate was manifestly illegal and that the High Court should interfere in revision with the order of acquittal. (*Kanharya Lal, J. C.*) *DR. ZAHIRUDDIN v. NASIRUDDIN.*

71 I. C. 602 : 24 Cr. L. J. 186.

—S. 439.—*Revision—Interference in—Practice—Order refusing to allow private vakil to appear for accused—Revision against—Trial ending in conviction of accused before hearing of revision—Remedy of accused.*

In an application by an accused person for revision of an order of a Sub-Magistrate refusing to allow a private vakil to appear on his behalf, it appeared that the trial in which the private Vakil's assistance was required had ended in the conviction of the accused. Held, that the case was not one for interference in revision, because the accused could, in an appeal from the conviction, make it a ground of appeal that he was improperly deprived of legal assistance at the trial (*Oldfield, J.*) *SARAVAYYA In re* 44 M. L. J. 366 : 1923 Mad. 484 (2) : 17 L. W. 357.

—S. 439.—*Revision—Interference with pending case—Charge clearly unsustainable.*

It is unusual to interfere in revision with a pending case but where even on the evidence of the prosecution witnesses the criminal charge is entirely unsustainable the High Court should interfere. 26 C 786 : 38 C 68 followed. (*Batten, J. C.*) *EMPEROR v. KRISHNA RAO.*

6 N. L. J. 119 : 73 I. C. 335 : 24 Cr. L. J. 591

—S. 439.—*Revision—Order of sessions judge—Report by District Magistrate—Interference by High Court*

It is not the practice of the High Courts in India to take action under S. 439 of the Code of Criminal procedure on a report by a District Magistrate which has for its object interference with a decision by a Court of Session

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A District Magistrate if he considers a Sessions Judge's order illegal should move the public Prosecutor to bring it before this Court. (*Campbell, J.*) *EMPEROR v. FAZAL DAD.*

73 I. C. 269 : 24 Cr. L. J. 573.

—Ss. 439 and 195 (6)—*Sanction Order for by Sessions judge—Revision.* See (1922) DIG. COL. 491. *NAZIR HASSAN v. MAHOMED YAMIN,*

26 O. C. 104.

—S. 439.—*Sanction to prosecute—Question, considered by two courts below—High Court when will interfere—Gross and palpable failure of justice.* See CR. P. CODE, S. 195.

L. R. 4 All. 213 (Cr.).

—S. 439.—*Scope of—Power of Court.* See (1922) DIG. COL. 491. *EMPEROR v. SHIBOO.*

45 A. 17.

—S. 439.—*Revision—Interference with finding of fact.*

Where an appellate Court has dealt with the evidence carefully and has not omitted to consider any relevant or important portion of the evidence, the High Court would not interfere in revision with findings of fact of the Appellate Court (*Mullick and Kulwant Sahay, JJ.*) *GAJO SINGH v. EMPEROR* 1 Pat. L. R. (Cr) 25 :

(1923) Pat. 109 : 4 Pat. L. T. 265 : 72 I. C. 959 :

24 Cr. L. J. 495 : 1923 P. 238.

—S. 439 (3)—*Enhancement of sentence—Magistrate not specially empowered—Practice*

Except in very exceptional cases, the sentence passed by the High Court under its powers of enhancement should not, where the sentence has been imposed by a Magistrate, exceed 7 years rigorous imprisonment which a magistrate empowered under S. 34 has power to pass. If the court thinks that even this is not enough to meet the ends of justice, the proper course is to set aside the trial and order the case to be committed to the Sessions (*Scott-Smith and Fford, JJ.*) *SEWA SINGH v. RANJHA.*

75 I. C. 356 :

24 Cr. L. J. 932 : 1923 Lah. 600

—S. 440.—*Release of prisoner on bail—Disappearance—Right of pleader for accused to be heard.*

Where an accused person applied in revision to the High Court and pending the revision, he was let off on bail and thereupon he disappeared held that the High Court would not hear his application for revision. (*Lindsey, J.*) *HAR NARAIN PRASAD v. EMPEROR.*

L. R. 4 A. 72 (Cr) : 71 I. C. 704 :

24 Cr. L. J. 240 : 1923 A. 327 (1).

—Ss. 441, 447.—*Essentials for offence.*

For a conviction under S. 447 I. P. C. it is essential that there must be a finding of the trial court that the trespass was committed with the intention of committing an offence or to intimidate, insult or annoy any person in possession of the property. (*Wazir Hasan A, J. C.*) *JAGMOHAN DAS v. EMPEROR*

9 O. & A. L. R. 1001

—S. 441.—*Scope of—If abrogates Ss. 263 and 370—Reasons for conviction can be stated later by Presidency Magistrate.* See CR. P. CODE, Ss. 263, 370 AND 441,

44 M. L. J. 84.

## CRIM. PRO. CODE (1898), S. 451.

—Ss. 451 (2) and 454—*Scope of—Waiver of right—Trial by Jury—Warrant case.*

An European British subject who has waived his right of trial by jury may in a warrant case reconsider his position before he is called on for defence (*Newbould and Sulrawaray, Jf.*) *MAK BUL AHMAD v ALLEN* 50 Cal. 689.

74 I. C. 1040 : 24 Cr. L. J. 849 : 1923 Cal. 657.

—S. 454—*Any subsequent stage—If includes revision.*

The expression "in any subsequent stage of the same case" in S. 454 Cr. P. Code includes the stage of revision. (*Krishnan, J.*) *JEREMIAH v JOHNSON.* 45 M. L. J. 800 : 18 L. W. 895.

—S. 471—*Crl. lunatic—Power of Court to pass order for detention and safe custody.*

The intention of the Legislature in amending S. 471 of the Criminal Procedure Code was that the Court in a case where it has been found that an offence has been committed by a lunatic, should confine itself to making an order that he should be kept in safe custody in such place and manner as the Court thinks fit. Then it is for the Government under their own powers to decide the future fate of the person concerned. (*MacLeod, C.J. and Crump, J.*) *EMPEROR v. IMAM HASAN.* 25 Bom. L. R. 286 : 1923 Bom. 261.

—S. 476—*Court—Successor or Judge.*

Under S. 475 it is competent to the successor of a Judge before whom the alleged offence was committed or to whose notice the commission of it was brought in the course of judicial proceeding to direct the prosecution of the offender. 37 C. 642 : 34 A. 393 : 29 M. 331 followed, 34 C. 551 35 C. 114 : 6 P. R. 1919 not followed. (*Scott Smith, J.*) *KHAN MUHAMMAD v. EMPEROR.* 4 Lah. 58 : 71 I. C. 596 : 24 Cr. L. J. 180.

—Ss. 476 and 195—*Direction to prosecute—Grant of sanction—Duty of Court.*

It is the duty of every Court to take action of its own motion in every apparent case of forgery or perjury which is committed before it or brought to its notice and to institute proceedings in all such cases if there is a reasonable probability of the prosecution resulting in a conviction. If this is done there would be no room left for application from private persons for sanction to prosecute. The matter of reasonable probability of the prosecution ending in a conviction is practically the only matter which a court has to consider in proceedings under S. 195 or 476 Cr. P. Code (*Hallifax, A. J. C.*) *GANGA PRASAD v. SHIAM LAL* 1923 Nag. 180.

—S. 476—*Enquiry before granting sanction—Nature of.*

Where in proceedings under S. 144 Cr. P. C., a deputy magistrate made some personal enquiry but did not keep any record of the evidence or allow any cross examination, there is no judicial enquiry or proceeding and sanction to prosecute under S. 182 I. P. C. should not be granted. (*Bucknill, J.*) *CHOTE LAL MODI v. EMPEROR.* 1 Pat. L. R. 137 (Cr.) : 74 I. C. 710 : 24 Cr. L. J. 806 : 1923 P. 542.

—S. 476—*Evidence under S. 202 (2)—If a basis for order.*

## CRIM. PRO. CODE (1898), S. 476.

An order under S. 476 Cr. P. C. can be passed on the basis of evidence recorded under S. 202 (2) (*Macpherson, J.*) *BANSHIDAR MARWARI v. EMPEROR.* 74 I. C. 1054 (2) : 24 Cr. L. J. 862 (2).

—S. 476—"In the course of judicial proceedings"—Return of documents after disposal of case—Petition for—Order for prosecution—Legality. See (1922) DIG. COL. 493 *GIRIJANANDA KALI MITTER v. EMPEROR.*

71 I. C. 666 : 24 Cr. L. J. 202.

—Ss. 476 and 4 (M)—*Ex parte decree—Set aside—Trial of suit thereafter—Judicial proceeding.*

The trial of a suit after the *ex parte* decree against the defendant is set aside may be regarded as a continuation of the trial of the same suit which first ended in a decree for the plaintiff. The definition of judicial proceeding in S. 4 (m) Criminal Procedure Code is not opposed to this view. Where at the time of dismissing the suit, the District Magistrate commenced to take action under S. 476 Criminal Procedure Code, by issuing notice to the petitioner to show cause against an order being passed under that Section. Held his proceedings were legal. 32 M. 49 : 42 M. 422 Ret. (*Spencer, J.*) *ARUMUGAM PILLAI In re* 18 L. W. 133.

—S. 476—*Order under—Essentials of.*

In an appeal from a conviction the High Court directed the Sessions Judge to take action under S. 476 Cr. P. C. Held, it was the duty of the Sessions Judge to apply his mind to the matter on the merits and then only decide whether a prosecution was necessary or not (*Stuart and Kankaraya Lal, Jf.*) *GHANSAM RAI v. EMPEROR.* 21 A. L. J. 930.

—S. 476—*Order under—Powers of District Magistrate.*

A District Magistrate has no power to interfere with orders passed under S. 476 Cr. P. C. by subordinate magistrates, but it is otherwise if the order is passed under S. 195. (*Daniels, J.*) *SITA RAM v. EMPEROR.* 73 I. C. 690 :

24 Cr. L. J. 658 : 1923 A. 597.

—S. 476—*Order under—When to be passed.*

It is no use passing an order under S. 476 Cr. P. C. unless there is a reasonable probability of conviction. (*Foster, J.*) *CHAUDHURY MANDAR v. EMPEROR* 74 I. C. 855 : 24 Cr. L. J. 823.

—S. 476—*Sanction based on evidence which is not legal—Validity of.* See EVIDENCE ACT, S. 45. 1923 A. 601.

—S. 476—*Sanction—Court acting on the evidence of witnesses whom applicant had no opportunity to cross examine—Direction for prosecution before termination of Civil proceedings.* See (1922) DIG. COL. 495 *PERUMALLA VENKATASUBBIAH In re.* 44 M. L. J. 74 : 69 I. C. 440 : 23 Cr. L. J. 712 : 1923 Mad. 228.

—S. 476—*Sanction to prosecute—Duty of Court.* See CR. P. CODE, SS. 195 AND 476. 1923 Nag. 258.

## CRIM. PRO. CODE (1898), § 478.

—S. 478—*Faulty procedure.*

An Assistant Collector, after deciding to act under S 478 neglected to follow the directions contained in the second sub section of that section, which requires that if he concludes the enquiry himself, his proceedings shall be conducted as nearly as may be in accordance with chapter 18, Crim. Pro. Code. He framed no charge and although he made some sort of enquiry it was of a perfunctory character and when he came to write his committal order, he incorporated as the main grounds for committing for trial the reasons which he had given in his judgment in a Civil suit, with the result that there was nothing in any way resembling a proper record in the Committing Magistrate's Court. *Held*, that the trial was irregular, there having been no proper proceedings before the Committing Magistrate. 40 All. 32, *Foll.* (Walsh, J.) *EMPEROR v. BASHA NAND* 1923 A. 610.

—S. 481—*Contempt—Prosecution—Procedure.*

No person can be punished for contempt of Court which is a criminal offence unless the specific offence charged against him be distinctly stated and an opportunity given him of answering. The omission to record the statement of a legal practitioner charged for contempt is a fatal defect to the prosecution. (*Newbould and Suhrawardy JJ.*) *KRISHNA CHANDRA BHOWMIK v. EMPEROR.* 37 C. L. J. 535 74 I. C. 542. 24 Cr. L. J. 798 : 1923 Cal. 562

—S. 481—*Statement of prisoner—Absence of—Effect*

The order of the Magistrate falls short of the requirements of S. 481 if it does not contain the statement made by the petitioner. (*Abdul Raoof, J.*) *POHU RAM v. EMPEROR.* 1923 Lah. 88

—S. 488—*Maintenance of child—Boy of the age of 17 or 18.*

A father is bound to maintain a child if he is not able to maintain himself. Where a boy is 17 or 18 and is able to work and earn a living he cannot compel his father to educate him in a college and thus better his prospects. (*Maung Kin, J.*) *ABDUL RAHIM v. MA SHWE MAY.*

73 I. C. 334 (1) : 24 Cr. L. J. 590 (1) : 1923 Rang. 45 (1).

—S. 488—*Mutual agreement—Living apart—Short quarrel between husband and wife.*

Where a husband quarrelled with his wife and exchanged angry words and then the husband kept her away from the house there is no living apart by mutual agreement within S. 488 Cr. P. Code. (*Maung Kin, J.*) *MA PWA KYIN v. MAUNG BA THIN.* 1923 Rang. 100.

—S. 488—*Order for maintenance—Effect of decree of civil court.*

The subsequent decree of civil court supersedes any order for maintenance that may have been previously passed by a Criminal Court under S. 483 Cr. P. Code. Such a decree is no answer to an application for enforcement of an order previously obtained by the wife under S. 488 of the Code for her maintenance, without proof by the husband that the conditions of the decree for

## CRIM. PRO. CODE (1898), § 488.

custody had been duly complied with and that without any sufficient cause she has left his custody (*Das, J.*) *RAMDHEYAN RAM v. MT. RAM DULARIA.* 1 Pat. L. R. (Cr) 158 : 1923 P. 153 (1).

—S. 488—*Order for maintenance—Jurisdiction of Civil Court to entertain a suit for declaration—Effect of decision of Civil Court.*

A Magistrate's order for maintenance under S. 488 Cr. P. Code has not the effect of taking away the jurisdiction of the Civil Court and it can entertain a suit for a declaration that the person who has been required to maintain another as his son not his father. The Civil Court could not grant an injunction restraining the magistrate from enforcing the order for maintenance but the plaintiff could ask the magistrate to abstain from giving further effect to his order in view of the finding of the Civil Court, (*Saunders, A. J. C.*) *NGA PO THEIN v. MA ME SAN* 70 I. C. 897.

—S. 488—*Order for maintenance—Suspension—Temporary stay of wife with husband.*

A mere temporary stay of the wife with her husband after the passing of an order under S. 488 Cr. P. Code does not have the effect of cancelling the order but it may suspend the operation of the order for the time being. Where after an order for maintenance has been passed both the husband and wife while temporarily living together presented a petition by which they agreed that the husband should pay his wife Rs. 10 a month so long as she stayed at the house of her father and the petition asked for a decree on the said terms *held* that the intention of the parties was, when they filed a petition, that the lady should abandon all claim for arrears due till then. (*Sanderson, C. J. and Panton, J.*) *PAKUL BALA v. SATISH.* 37 C. L. J. 180. 75 I. C. 529 : 24 Cr. L. J. 945 : 1923 Cal. 456.

—S. 488—*Order to pay maintenance—Effect of decision of Civil Court as regards paternity of child*

Where an order for maintenance has been made under S. 488 Cr. P. Code by a Magistrate and where the relationship on which the maintenance order is based has been declared by the final decree of a competent Civil Court not to exist, it is open to the person adversely affected thereby to ask the magistrate to abstain from giving any further effect to his order of maintenance. 14 C. 276 ; 33 M. L. J. 449 *Rel.* (*Ayling and Odgers, JJ.*) *MADDU VENKAYYA v. MADDI PAIDAMA.*

46 Mad. 721 : 45 M. L. J. 104 : 18 L. W. 132 : (1923) M. W. N. 401 : 73 I. C. 944 : 24 Cr. L. J. 720 : 32 M. L. T. 345. (H. C.) : 1923 Mad. 707.

—S. 488—*Personal law abrogated—Buddhist monk sued for maintenance of child.*

Even a Buddhist monk is bound to maintain his child. The Cr. P. C. must override his personal law, if it conflicts with it. The presumption is that an able bodied man has sufficient means to support his child as well as himself and that it is for him to prove the contrary. (*Mac Coll, A. J. C.*) *U THIRI v. MA PWA YI.*

72 I. C. 368 : 24 Cr. L. J. 368 : 1923 Rang. 131.

## CRIM. PRO. CODE (1898), S. 488.

———S. 488—Pongvi—If liable to pay maintenance See (1922) DIG COL. 496. MA E SHI v. U. ADITSA. 72 I. C. 974 : 24 Cr. L. J. 510

———S. 488—Prior decree for restitution of conjugal rights—If a bar to application for maintenance—Bona fides.

In an application for maintenance by a wife under S. 488 Cr. P. C. a decree obtained by the husband long prior for restitution of conjugal rights is no bar. If the husband has no bona fide intention of maintaining his wife a Court should award maintenance. (Ramaswamy Iyengar, J.) NARAYANAPPA v. CHIKKA MARIAMMA 1 Mys. L. J. 137

———S. 488 (?)—Wilful default—Insolvency of husband—Effect.

A husband who has been ordered to pay maintenance cannot be guilty of wilful neglect under S. 488 (3) Cr. P. C. after he is adjudged an insolvent and while the order of adjudication remains in force. (C. C. Ghose and Cuming, JJ.) HALFHIDE v. HALFHIDE. 50 Cal. 867.

———S. 488 (6)—Order for maintenance—Application to successor of Magistrate who passed the order for its modification.

S. 488 (6) of the Cr. P. Code gives power to the successor of a magistrate who passed an order for maintenance to reopen the order on application. (May Oung, J.) MAUNG TUN YIN v. MA THEIN SHIN. 2 Bur. L. J. 61 : 75 I. C. 304 : 24 Cr. L. J. 928 : 1923 Rang. 159.

———Ss. 492, 495—Private complaint—Prosecution conducted by party—Power of District Magistrate to direct withdrawal.

A private complainant was allowed to conduct the prosecution. After the charge was framed, on the application of the accused the District Magistrate directed the prosecuting Inspector to withdraw the case. Held, neither S. 492 nor S. 495 applied and the order was illegal (Sulaiman, J.) RAM GOBIND SINGH v. LALLU SINGH. 21 A. L. J. 855 : L. R. 5 A. 1 (Cr.)

———S. 494—Accomplice witness—Corroboration—Dacoity.

An accomplice witness against whom a criminal case has been withdrawn under S. 494, Cr. P. C. is a less reliable witness than one to whom a pardon has been tendered under S. 337. His evidence is tainted and must be corroborated in material particulars before it can be acted upon. This is not so necessary on a charge of dacoity where the only direct evidence that can be given of association is that of accomplices. (Campbell, J.) CHHAPROLIA v. EMPEROR. 73 I. C. 808 : 24 Cr. L. J. 696.

———S. 494—Scope withdrawal—Reasons

Where the Magistrate should have given his reasons for allowing withdrawal and did not act properly in passing the very brief order viz., the case is withdrawn, the accused is hereby discharged, without reference to S. 494 which could have shown him that his consent was necessary and that (under certain authorities) he had to state his reasons for giving that consent ;

## CRIM. PRO. CODE (1898), S. 494.

Held : the absence of any statement of reasons in the particular case did not vitiate that order to such an extent as to make this case a fit case for exceptional treatment and to justify the setting aside of an acquittal on revision in the absence of appeal by local Government under S. 417. Order of discharge in summons cases under this section is an order of acquittal. (Abdul Qadir, J.) MUL SINGH v. EMPEROR. 72 I. C. 593 : 24 Cr. L. J. 433 : 1923 Lah. 163.

———S. 494—Withdrawal allowed—Revision against—Reasons if to be recorded—Private party.

Where a prosecution is withdrawn under S. 494, Cr. P. C., the validity of the order is not open to interference in revision at the instance of a private party. The Court need not record its reasons for permitting the withdrawal (Mullick and Macpherson, JJ.) GULLI BHAGAT v. NARAIN SINGH. 2 Pat. 708.

———S. 494.—Withdrawal of a case—Interference by High Court in revision.

Where reasons have been given by the Court below for allowing the withdrawal of a criminal case the High Court will be slow to interfere in revision against the order allowing the withdrawal. S. 494 controls the other sections of the Code relating to Sessions Trial. (Ghose and Cuming, JJ.) BEPIN BEHARI GHOSE v. HARI PADA GHOSE. 71 I. C. 53 : 24 Cr. L. J. 5.

———S. 494—Withdrawal of prosecution—Effect of—Fresh complaint on the same facts. See (1922) DIG COL. 497. CHANDIRAM VERHOMAL v. EMPEROR. 69 I. C. 625 : 23 Cr. L. J. 737.

———S. 494 (a)—Withdrawal of prosecution—Order for—Reason to be stated. See (1922) DIG. COL. 497 JAGAT CHANDRA ROY v. KALIMUDDI SARDAR. 71 I. C. 693 : 24 Cr. L. J. 229.

———S. 494 (a)—Withdrawal of prosecution—Reasons for order of Court to be recorded.

"In according or withholding consent to an application by the Public Prosecutor for withdrawal under S. 494 (a) the Court acts in a judicial capacity and for its order, as for every order judicially made, the Court must give and record its reasons so that the High Court may be in a position to say whether the discretion vested in the Court has been properly exercised 22 C. W. N. 69 : 41 I. C. 998 Rel. (Pradeaux, A, J. C.) SUGAN CHAND v. CHUNNILAL.

6 N. L. J. 177 : 72 I. C. 361 : 24 Cr. L. J. 361 : 1923 Nag. 260.

———S. 494—Withdrawal by Public Prosecutor—Grounds for—Revision—If proper.

When a public Prosecutor withdraws a case under S. 494 and the Court consents to it, it must record its reason so that the High Court may judge whether the discretion vested in the Court has been properly exercised.

Where against such a order of withdrawal a revision is filed by the complainant, the Court ought not to take action upon it. The proper procedure is to appeal through Government. (May Oung, J.) ABDUL GANI v. ABDUL KADER.

2 Bur. L. J. 287.

## CRIM. PRO. CODE (1898), S. 496.

—S. 496—*Directing bail before the Police investigation—Crim. Pro. Code, S. 202.*

A Magistrate being of opinion that further inquiry was necessary, sent the complaint to the Police and directed further that if the crime be proved, the accused should be challenged in due course, and that if he gave bail of Rs. 2,000 he be released. *Held*: that the powers under S. 496 are very wide and cover a case of this kind (*Lumsden, J.*) NARAYAN SINGH v. EMPEROR.

1923 Lah. 663

—S. 497—*Bail—Grant of—Considerations*

Bail is not to be withheld merely as a punishment. Its object is to secure the attendance of the accused at the trial and the test to be applied is whether it is probable the party will appear to take his trial considering the nature of the accusation, the evidence in support of it and the punishment awardable. The power to admit to trial is not arbitrary but judicial. (*Mookerjee and Chatterjee, JJ.*) NAGENDRANATH CHAKRABARTI v. EMPEROR.

38 C. L. J. 388.

—S. 497—*Scope of.*

Persons accused of non-bailable offences should not be released on bail as a rule, but they may be so released if there are reasons for believing the case against them will not succeed and there are special circumstances justifying bail. The law is not that such persons should be enlarged on bail, unless and until the court is satisfied that there are good grounds for believing them to be guilty. (*Stuart, J.*) EMPEROR v. MT. BASHIRAN

1923 All. 479 (1)

—S. 498—*Bail—Reference to sessions judge—Power to let on bail.*

It stands to reason that if in the case of a person who is convicted and who has preferred an appeal bail is allowable, bail can similarly be allowed in the case of a person against whom an order has been made under S. 118 and which order is liable to be revised by a Sessions Judge under the provisions of S. 123, sub S. (2). At any rate, there is no reason why any restriction should be placed upon the wide provisions of section 498. (*Ghose and Cuming, JJ.*) AHMED ALI SANDAR v. EMPEROR.

50 Cal. 969.

37 C. L. J. 592 : 75 I. C. 537 : 24 Cr. L. J. 953

1923 Cal. 723

—S. 498—*Leave to appeal to the Privy Council—Power of High Court to grant bail*

On the true construction of the provisions of S. 498 Cr. P. Code where the High Court has dealt with the application of the petitioner by way of revision *i. e.*, having granted a Rule and having heard the Rule and discharged the Court is *functus officio* and it has no jurisdiction under the provisions of S. 498 to grant bail, in order that a petition for leave to appeal may be made to His Majesty in Council or until the petition for leave to appeal to His Majesty in Council is disposed of. 24 M 161 Dist. 15 P. R. (1908) F. B. (*Sanderson, C. J. and Richardson, J.*) TULSI TELINI v. EMPEROR.

50 Cal. 585.

72 I. C. 362 : 24 Cr. L. J. 362 : 1924 Cal. 64.

—S. 503—*Commission—Additional District Magistrate—Power to issue.*

## CRIM. PRO. CODE (1898), S. 517.

Additional District Magistrate authorised to exercise all the powers of a District Magistrate as contained in Schedule III part V (18) is empowered to issue a commission under S. 503. This power entitles him to issue a commission for the examination of a witness within his own jurisdiction. (*Broadway, J.*) BAHALUR ALI v. EMPEROR.

73 I. C. 510 : 24 Cr. L. J. 622 :

1923 Lah. 158.

—S. 503—*Commission for examination of witnesses—Refusal—Unreasonable expense.*

The District Magistrate is given under S. 503 a discretion in the matter of issuing a commission and if the attendance of a witness cannot be secured without enormous or unreasonable expense the District Magistrate might direct his examination on commission. 5 A. 92, 6 A. 224 8 C. 896 Rel. (*Martineau, J.*) PARMANAND v. EMPEROR.

1923 Lah. 73.

—S. 514—*Bond for good behaviour—Conviction under S. 323, I. P. C.—Forfeiture—Recovery of amount.*

After a conviction under S. 323 I. P. C., a bond for good behaviour can be forfeited. On forfeiture, the amount can be recovered from the principal or surety but not twice over *i. e.* from both. (*Mou Sagar, J.*) EMPEROR v. ABDUL AZIZ.

4 Lah. 462.

—S. 514—*Forfeiture of bond—Failure to give Notice—Effect—Who can appeal.*

Passing an order of forfeiture regarding a bond under S. 107 Cr. P. C. without notice to the party whose bond is forfeited amounts to a failure of justice. The error is not cured by S. 537, Cr. P. C. (*Daniels A. J. C.*) SARJU v. THAKIRAIN JAI RAJ KUAR.

9 C. & A. L. R. 119.

—S. 517—*Applicability—Proceedings under S. 512.*

A proceeding under S. 512 (1) Cr. P. C. is neither an enquiry nor a trial within the meaning of S. 517 Cr. P. C. It is not the function of a criminal court to decide nice questions involving principles of civil law, if there is a dispute between rival parties claiming return of property. In such cases, the normal procedure is to return it to the person from whom it was seized and leave the dissatisfied party to his remedy in a civil court. (*May Oung, J.*) P. R. V. N. VELLIAPPA CHETTY v. JOSEPH.

2 Bur. L. J. 85 :

1923 Rang. 248.

—Ss. 517 and 520—*Disposal of criminal appeal by Sub-divisional Magistrate—Order for disposal of property passed after the decision of the appeal—Competency of Sub-Divisional Magistrate—Notice to parties.*

Where a Sub-divisional magistrate decides an appeal against a conviction it is competent to him as part of the proceedings on appeal to make an order under S. 520 Cr. P. Code for the disposal of the property concerned in the case. Where there is some interval between the date of the decision of the appeal and the passing of an order under S. 520 Cr. P. Code it is desirable that the parties should be given a reasonable opportunity of being heard before the passing of

## CRIM. PRO. CODE (1898), S. 517.

the order. (*Krishnan, J*) ARUNACHALA THEVAN v. VELLACHAMI THEVAN. 44 M. L. J. 56.

32 M. L. T. (H. C.) 104 : 17 L. W. 462.  
46 Mad. 165 : 71 I. C. 514 : 24 Cr. L. J. 162 :  
1923 Mad. 324.

—S. 517—Disposal of property—Order regarding—When can be made.

An order for the disposal of property regarding which an offence has been committed can only be made upon the conclusion of an inquiry or trial, and not on the application of a person subsequently made after the trial is over. (*Moti Sagar, J*) ABDUL v. GULAM MAHAMMAD.

4 Lah. 460.

—S. 517—Gold entrusted to goldsmith for making jewel—Pawn of jewel when made Restoration of property.

A goldsmith was entrusted with a certain quantity of gold and diamonds for making a comb for the complainant. When the article was nearly completed the goldsmith pledged it for Rs. 800 with a diamond merchant who had no knowledge that the property was the property of the complainant. The Court ordered the jewel to be returned to the complainant. Held that the order was justifiable. (*Macgregor, J*) CHAGANLAL v. MAUNG PO KAU. 2 Bur. L. J. 152.

—Ss. 517 and 520—Order for disposal of property—Power of appellate Court—Application by accused who was acquitted on appeal.

An application by an accused person who was acquitted on appeal of an offence under S. 411 I. P. C., to the Appellate Court for an order directing the return of the money is an independent application to the Appellate Court with a view to its taking action under Ss. 517 and 520, Criminal Procedure Code. No period of limitation is prescribed for such an application and it can be made within a reasonable time from the date on which an accused person is acquitted of the offence charged. The words "and take any further orders that may be just" in S. 520 of the Criminal Procedure Code are intended to cover cases of this nature and to enable superior courts to pass proper orders in cases where property has been erroneously disposed of under S. 517 of the Cr. P. Code. (*Moti Sagar, J*) KANSHI RAM v. EMPEROR. 4 Lah. 49 : 73 I. C. 937 : 24 Cr. L. J. 713.

—S. 517—Pledgee—Goods stolen by pledgor—Restoration of goods—Transfer to third person.

A pledgor dishonestly removes from the possession of the pledgee certain goods and sell them to a third person for good consideration and the pledgor is convicted for theft, it is open to the court to pass an order under S. 517 of the Cr. P. Code directing the stolen articles to be returned to the pledgee who as the person, holding a lien on them, was entitled to their possession. (*Newbould and Suhrawardy, JJ.*) GOUR M. HAN-DALUI v. BANSIDHAR BYAS. 71 I. C. 702 24 Cr. L. J. 238 : 1923 Cal. 598.

—S. 517—Restoration order—Bona fide purchaser—Remedy.

Where property was stolen a long time back and a part of it comes into the hands of a

## CRIM. PRO. CODE (1898), S. 522.

merchant at a great distance, who has honestly aided in the detection of the offence, a criminal court ought to hesitate a long time before making an order of restitution, even if the goods were still *in esse*. When a question of *bona fides* and of title by purchase or otherwise clearly arises, the duty of the Criminal Court is to leave the complainant to his remedy in the Civil Court.

The jurisdiction to pass an order under S. 517 Cr. P. C. is confined to an order at the conclusion of the trial for the disposal of the property which is before it—Such an order can only be made in the presence of the purchaser, who has a right to be heard. (*Walsh, J.*) NAINA MAL v. EMPEROR. 74 I. C. 708 : 24 Cr. L. J. 804.

—S. 517—Scope of—Direction for delivery of property already returned. See (1921) DIG. COL. 466. JHUMAK SINGH v. TOTA MAHTO. 1923 P. 84.

—S. 522—House trespass—Unlawful possession during absence of owner—Owner kept out by force—Order under S. 522, Legality of.

Where a wife who had deserted her husband for several years took advantage of his temporary absence from his house, broke open the lock and entered into the house and subsequently kept out the husband by force, an order under S. 522 Cr. P. Code is legitimate. (*Davaddass, J.*) MARUTHAYEE v. APPAVU PILLAI. 72 I. C. 892 : 24 Cr. L. J. 476 : 1923 Mad. 237 (2).

—S. 520—Appellate court—Power to order restoration.

An appellate court under S. 520 Cr. P. Code has power to modify, alter or annul an order made under S. 517 or make any further orders that may be just. If there are complicated questions of title involved, it is better to leave such questions to the Civil Court. (*Sulaiman, J.*) ONKAR v. EMPEROR. 21 A. I. J. 877.

—Ss. 520, 517 to 519—No appeal from conviction—District Magistrate's power to interfere with an order passed by a Subordinate Court under S. 517.

Where no appeal has been filed from a conviction by a subordinate Court, District Magistrate has got jurisdiction to interfere as a Court of revision under S. 520, with an order passed by the trial Court under S. 517. (*Robinson, C. J. and May Oung, J.*) EMPEROR v. NGO PO CHIT. 1 Rang. 199 : 2 Bur. L. J. 241 74 I. C. 1050. 24 Cr. L. J. 858 : 1923 Rang. 227.

—Ss. 520 and 369—Order for disposal of property regarding which offence has been committed—Order by Appellate Court sometime after—Judgment—Mere irregularity. See (1922) DIG. COL. 498. SUBBA NAIDU *In re* 71 I. C. 511 : 24 Cr. L. J. 159.

—S. 522—Appellate Court—Power to direct restoration of property.

The discretion to pass an order relating to restoration of property is vested in the trial court, and a court of appeal or revision cannot in a case where the former has refused to exercise its



## CRIM. PRO. CODE (1898), S. 522.

discretion, cancel it to do so. (*Daniels, J*) *AZIZ AHMAD v. BUDDHU KHAN.* 45 A. 553 : 21 A. L. J. 459 : L. R. 4 A. 86 (Cr.) : 73 I. C. 773 (1) : 24 Cr. L. J. 677 (1)

—S. 522—Attended by criminal force—Meaning of—Criminal trespass—Resistance.

Where a person owning a field prevented certain trespassers from ploughing up his sugar cane crop and was driven off with sticks and lathis by the trespassers *Held* that the offence committed by the trespassers was one attended with criminal force and an order under S. 522 Cr. P. Code could be passed against them. (*Lindsay, J*) *EMPEROR v. ASHIQ HUSAIN KHAN.* 45 Ail. 25.

—S. 522—Conviction set aside—Effect

Where a conviction is set aside the order under S. 522 resulting therefrom must also be set aside. Once it has been held that no offence has been committed the consequences arising from the commission of the offence must automatically cease to be. The irregularity in first dealing with the order under S. 522, Cr. P. C. before taking up the appeal from conviction under S. 447 Penal Code which ultimately results in acquittal is only a technical irregularity. 5 P. R. 1895 Foll. (*Harrison, J*) *LALCHAND v. DASONDHI.* 72 I. C. 957 : 24 Cr. L. J. 493 1923 Lah. 15

—S. 522—Criminal trespass—Offence under S. 447 I. P. C.—Use of criminal force.

Where certain persons were convicted of an offence under S. 447, I. P. C. by reason of their having continued to cultivate certain fields in spite of their ejectment and there was nothing to indicate that the offence of criminal trespass was attended by the use of criminal force, *held* that S. 522 Cr. P. Code could not, on these facts, apply, and that the order of the magistrate directing the delivery of possession of the fields in question with the crop standing thereon to the complainant could not be sustained. (*Kanhaya Lal, J*) *CHUNNI LAL v. BALDEO.* 21 A. L. J. 593 : L. R. 4 A. 129 (Cr.).

—S. 522—Power of appellate court to order restoration—No order by Trial Court—Powers of High Court.

Where the Trial Court did not make an order for restoration of property under S. 522 Cr. P. Code, the Court of appeal cannot direct restoration. But under the Code as amended, the High Court acting in reference on revision has power to pass the necessary orders. (*Sulaiman, J.*) *LACHMAN v. EMPEROR,* 21 A. L. J. 871.

—S. 522—Refusal to make order for restoration of property—Interference.

Where a criminal Court in the exercise of its discretion refuses to make an order of restoration of property, it is not open to a court of appeal or revision to set it aside. (*Daniels J*) *AZIZ AHMAD v. BUDDHU KHAN.* 45 A. 553 : 21 A. L. J. 459 : L. R. 4 A. 86 (Cr.) : 73 I. C. 773 (1) : 24 Cr. L. J. 677 (1)

—S. 523—Order of Magistrate on Police Report—Revision.

## CRIM. PRO. CODE (1898), S. 526.

It is not incumbent on a Magistrate to hold a judicial enquiry on oath before passing an order under S. 523 Cr. P. Code. Such an order can be passed on Police reports and papers alone without an independent enquiry on oath held by the Magistrate with regard to the question of possession. On a proper case being made out, a High Court has jurisdiction to examine orders passed under S. 523 Cr. P. Code. (*Broadway, J*) *CHUNI LAL v. ISHAR DAS.* 4 Lah. 38 : 73 I. C. 702 : 24 Cr. L. J. 670.

—S. 526—Action after application.

Where the Magistrate sent the record after inexplicable delay and where the Magistrate had charged accused's father with an offence owing to enmity. *Held*, a transfer was desirable. (*Scott-Smith, J.*) *KIRPA RAM v. BUTA SINGH.* 1923 Lah. 282 (1).

—S. 526—Applicability—Proceedings under S. 145, Cr. P. Code See CR. P. CODE, S. 145. 1923 Oudh 161

—S. 526—Compromise attempted by Judge—Failure—if ground for transfer.

Where a Magistrate tried to bring about a compromise between the parties but failed, the complainant if he feels suspicious should be granted a transfer of the case. (*Dalal, A. J. C.*) *GAYA CHARAN MISRA v. KUNWAR BAHADUR.* 9 O. & A. L. R. 368.

—S. 526—Conviction—Retrial ordered by appellate Court—Expression of opinion in counter case—Transfer. See (1922) D. G. COL. 499. *MAHADEB MARWARI v. KISHAN LAL MARWARI.* 72 I. C. 339 : 24 Cr. L. J. 389.

—S. 526—Grounds for—Extra judicial duties of Magistrate—Suspicion

Consequent upon the many extra judicial duties of a magistrate, where a magistrate in the discharge of his executive duties has acted in such a way as to raise in the mind of an accused person the suspicion that he was not likely to get justice when the Magistrate came to inquire into a particular matter judicially, it is advisable to transfer the case to another magistrate, especially where he is easily available. (*Dalal, J. C.*) *MAHOMED YANUS KHAN v. GULAB SINGH.* 9 O. & A. L. R. 448 : 74 I. C. 715 (1) : 24 Cr. L. J. 811 (1) : 1923 Oudh 172

—S. 526—Grounds for transfer—Proceedings under S. 145.

Where in proceedings under S. 145, Cr. P. C. the Magistrate is believed to have made up his mind already on the question of likelihood of breach of the peace, it is no ground for transfer. But if he has also formed an opinion on the question of possession, which would hamper him in dealing with the evidence on that point, it might be a proper case for transfer. (*Simpson, A. J. C.*) *MAHOMED NAQI KHAN v. RANI KAHAMATUN-NISSA* 1923 Oudh 161.

—S. 526—Transfer of case—Enquiry—Proceedings under Workman's Breach of Contract Act.

## CRIM. PRO. CODE (1898), S. 526.

The definition of enquiry given in S. 4 clause (k) Cr. P. Code which includes every enquiry other than a trial conducted under the Code of Criminal Procedure by a Magistrate or a Court, is not exhaustive so as to exclude an enquiry under the Workman's Breach of Contract Act of the nature above referred to. Any enquiry by a Magistrate or a Criminal Court subordinate to the High Court, can, therefore be transferred under S. 526, Criminal Procedure Code to any Criminal Court of equal or superior jurisdiction subordinate to its authority, if the requisite grounds set forth in the section are established. (*Kanhariyal Lal, J.*) *BANSI v. LAKSHMI DAS*  
45 A. 700 : 21 A. L. J. 619 : L. R. 4 A 140 (Cr.) : 1924 A. 76.

———S. 526—Transfer of criminal case—Application to District Magistrate. \*

Ordinarily, the High Court does not transfer a case pending before a Magistrate unless the party applying for transfer has moved the District Magistrate before coming to the High Court. (*Motisaragar, J.*) *GHULAM NABI v. JAMALA*,  
1923 Lah. 685 (1) : 72 I. C. 882 24 Cr. L. J. 466.

———S. 526—Transfer of criminal Case—Case not instituted in proper Court

It is not competent to a superior Court to transfer a case filed in a Court not having jurisdiction to entertain it, to some other Court 9 A. 191 Ref. (*Oldfield and Devadoss, JJ.*) *SIKKA GOUNDAN in re*.  
17 L. W. 69 : 72 I. C. 351 : 24 Cr. L. J. 351 : 1923 Mad. 326.

———S. 526—Transfer of Criminal case—Reasonable apprehension on the part of accused.

It is of paramount importance that persons arraigned before the Courts should have confidence in the impartiality of those Courts and if a person has reasonable cause to apprehend that the Court before whom he is tried is not completely free from bias a transfer should be directed. What is reasonable must of course depend on the degree of intelligence of the accused. (*Broadway, J.*) *SARDARI LAL v. EMPEROR*.

3 Lah. 443 : 71 I. C. 1006 : 24 Cr. L. J. 286 : 1923 Lah. 264.

———S. 526—Transfer of criminal case—Grounds for—Refusal to summon prosecution witness for cross-examination—Error of judgment. See (1921) DIG. COL. 468. *SHIVADHAN SINGH v. EMPEROR*.  
1923 P. 116.

———S. 526—Transfer—Magistrate as Vice President of Municipal Committee starting proceedings. See (1922) DIG. COL. 500. *MUSSAMMAT NUR NISHAN v. THE MUNICIPAL COMMITTEE RAWALPINDI*.  
69 I. C. 384 : 23 Cr. L. J. 704

———S. 526—Trial of other accused of same offence—if Ground for transfer.

The fact that the judge has already tried some other accused of the same offence is no ground for transferring the case to another Court. (*Dalal, J. C.*) *DALSHER v. EMPEROR*.

9 O. & A. L. R. 547 : 74 I. C. 544 : 24 Cr. L. J. 800.

———S. 526—Village Panchayat Court—Power to transfer proceedings.

## CRIM. PRO. CODE (1898), S. 537.

S. 526 applies only to proceedings pending in courts subordinate to the High Court. Panchayat courts established under U. P. Act VI of 1920 are not subordinate to the High Court and the powers under the section cannot be used to transfer proceedings pending in one Court to another. (*Stuart and Kanhaiya Lal, JJ.*) *SAT NARAIN v. SARJU*.  
21 A. L. J. 925.

———S. 526 (1) (a)—Cantonment Magistrate—Secretary or Cantonment Committee—Order for prosecution in one capacity—Trial in another. See (1922) DIG. COL. 501. *HIRA LAL v. EMPEROR*.  
24 Cr. L. J. 128 : 71 I. C. 256.

———S. 528—Transfer of case—Notice to accused—Omission of.

The omission to issue a notice upon the accused before considering the transfer application is an irregularity but it does not follow that the order of transfer is illegal. It is not the object of S. 528 that a case should be transferred merely because it is going against a particular party. Where the trial magistrate has full power to enquire into the case, nothing should be done by appellate Court that may give rise to any impression that an attempt is being made to interfere with the judgment of the trial Court. (*Mullick and Kulwant Sahay, JJ.*) *GOBINDSWAIN v. EMPEROR*. (1923) Pat. 47 : 1 Pat. L. R. (Cr.) 109 : 2 Pat. 333 : 1923 P. 228.

———S. 528 (3)—Transfer—Notice necessary.

The District Magistrate without sending for the record and without giving notice to the accused persons, passed an order as follows:—"The order for bail is cancelled and the case transferred to Mr. Phailbus. The accused who are on bail should be put back into the lock-up". Held, although strictly speaking it is not necessary to issue notice before transferring a case, nevertheless the practice has been to do so. Reasons should be given for transferring a case under S. 528 (3), Cr. P. Code. (*Broadway, J.*) *SARDARA v. EMPEROR*.  
5 Lah. L. J. 230 : 71 I. C. 603 : 24 Cr. L. J. 187 : 1923 Lah. 380.

———S. 531—Accused tried at a place in contravention of S. 181 (4)—No prejudice—Trial if vitiated. See Cr. P. Code Ss. 181 (4) and 531.  
21 A. L. J. 912.

———S. 535—Failure to frame charge—Prejudice.

Where two persons were given notice to show cause why they should not furnish security and execute bonds under S. 107, Cr. P. C., and in addition a charge was framed against one only under S. 506, I. P. C., but both were convicted, the omission to frame charge in the absence of prejudice does not vitiate the trial. (*Stuart, J.*) *GANGA PRASAD v. EMPEROR*.  
1923 All. 476.

———S. 537—Failure to examine complainant—Error—No failure of justice.

The failure to examine the complainant is an error of procedure but where it has caused no injury or failure of justice, it is not an irregularity vitiating proceedings. (*Pratt, J.*) *GOPI CHAND v. EMPEROR*.  
1 Rang. 517.

## CRIM. PRO. CODE (1898), S. 537.

———S. 537—Forfeiture of bond under S. 107—Notice to party—Failure to give—If error curable. *See* Cr. P. Code S. 514.

90. & A. L. R. 119

———S. 537—Irregularity—Convulsion when liable to be set aside.

Under S. 537, the High Court will not respect a conviction on the ground of irregularity unless a failure of justice has resulted. (*Wallace, J.*) *In re Dervish Hussain* 46 Mad. 253.

44 M. L. J. 84 : 32 M. L. T. (H. C.) 100 :

17 L. W. 18 : 71 I. C. 212 :

24 Cr. L. J. 84 : 1923 Mad. 185.

———S. 537—Judgment—Signed by magistrate conducting but read by another—Legality.

Where a Magistrate who tried the case wrote a judgment, signed and dated it but owing to physical disability asked another magistrate to read out the judgment, this procedure is at least a mere irregularity covered by S. 537, Cr. P. Code. (*Ryves, J.*) *Nur Mahomed Khan v. Emperor*

21 A. L. J. 137 : L. R. 4 A. 76 (Cr.) :

71 I. C. 525 : 24 Cr. L. J. 173 : 1923 A. 276.

———Ss. 537 and 342—Non-compliance with provision of the Code—Effect of irregularity.

The test to be applied in considering whether a particular infringement of the provisions of the Cr. P. Code is one which does or does not come within the purview of S. 537, Cr. P. Code appears to be this : "does the error go to the whole root of the trial? Does it in effect vitiate the proceedings? Has the court assumed an authority which it does not possess. Has it broken the vital rules of procedure?" If the error is of such a nature that the proceedings are vitiated in the very inception S. 537, Cr. P. C. has no application. But the mere fact that a certain provision of the Code is imperative does not in itself indicate that a breach of the provision vitiates the whole proceeding. (*Stuart, J.*) *Bechu Chaube v. Emperor*.

45 A. 124 : 71 I. C. 115 :

24 Cr. L. J. 67 : 1923 A. 81 (2)

———S. 537—Order—Sanctioning prosecution not addressed to specific person—Communication to proper officer—Effect—Prejudice. *See* Cr. P. Code, Ss. 196 AND 535.

44 M. L. J. 166.

———S. 537—Scope of—Cross trials—Mixing up evidence.

S. 537, Cr. P. Code applies only to errors, omissions or irregularities of a formal nature and does not cover a substantial departure from the mode of conducting criminal trials—Thus when two cross trials are heard together the prosecution evidence in each being treated as the defence in the other the whole proceedings are vitiated. (*Broadway and Ffordes, J.J.*) *Allu v. The Crown*

4 Lah. 376.

———Ss. 540 and 556—Local inspection of scene of occurrence with a view to understand the evidence—Legality of. *See* Cr. P. Code, Ss. 154, 342 AND 340.

18 L. W. 113

———S. 540—Reception of evidence—Duty of Court.

S. 540 provides that any Court may, at any stage of an inquiry, trial or other proceeding

## CRIM. PRO. CODE (1898), S. 545.

under this Code, summon any person as a witness or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined, and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case.

The first part of this section is an enabling provision whereby a Court, in the exercise of its discretion, is empowered, at any time before it actually pronounces judgment to take further evidence either for prosecution or for the defence, and for that purpose it may adjourn the hearing of a case in order to procure the attendance of the proper persons. In many instances it happens that a new light is thrown on the case by witnesses for the defence and it then becomes desirable, sometimes in the interests of the accused himself, that fresh evidence should be called for. Where this fresh evidence is likely to prove prejudicial to the accused the Court should proceed with the utmost circumspection. It should not exercise its power under the section merely because the prosecution desires it to do so.

The second part of the section, on the other hand, is imperative. If the new evidence appears to the Court essential to the just decision of the case, and this must depend entirely on the particular circumstances of each case, the Court has no option but is bound to take the evidence. (*May Oung, J.*) *Maung Po. Hmyin v. J. B. Bhattacharjee*.

1 Rang 308 :

2 Bur. L. J. 127 : 1923 Rang. 216.

———S. 540—Scope of—Examination of witnesses after reserving judgment.

Although the terms of S. 540 Cr. P. Code are very wide Magistrates should exercise their discretion thereunder very cautiously. Where in a criminal trial arguments were heard and the case was postponed for judgment for a certain day, the examination of prosecution witnesses thereafter cannot be justified. (*Ghose and Chotzner, J.J.*) *Natabar Ghose v. Adyanath Biswas*.

27 C. W. N. 675 : 37 C. L. J. 415 :

75 I. C. 541 : 24 Cr. L. J. 957 : 1923 Cal. 690.

———S. 540—Scope of—Power of Court to examine witnesses.

The provisions of S. 540, Cr. P. Code are very wide. The Court may summon witnesses and if the prosecution declines to examine them, the Court may thereupon acting on its own initiative cause them to be produced. Such witnesses may thereupon be regarded as called under S. 540. (*Walmsley and Pearson, J.J.*) *Emperor v. Satyendra*.

37 C. L. J. 173 : 71 I. C. 657 :

24 Cr. L. J. 193 : 1923 Cal. 463.

———S. 545—Pledge of jewels—Cheating—Compensation out of fine to pledgee.

Where the accused was convicted of cheating the complainant and obtaining jewels and pledging them, it is not competent to the magistrate to pay a portion of the fine as compensation to the pledgee. Such an order is not contemplated by S. 545, Cr. P. Code. (*Macleod, C. J. and Coyajee, J.*) *Emperor v. Ramchandra Bapuji*.

1923 Bom. 22.

## CR. PRO. CODE, S. 556

—S. 556—Magistrate—Criminal trial—Report to Government for sanction See (1922) DIG. COL. 503. MAHOMED OZIULLAH v. BENI MADHAB CHOWDHURY. 71 I.C. 239: 24 Cr. L.J. 111.

—S. 556—Magistrate also President of Town committee—Prosecution by Town committee—If can try.

Where a prosecution is by a Town committee, the mere fact that the Magistrate trying is the President of the Town committee does not give him any personal interest in the proceedings. But where other magistrates are available, it is extremely undesirable that a Judge should try a case in which he has in a different official capacity given formal sanction for a prosecution. (Pratt, J.) GOPI CHAND v. EMPEROR.

1 Rang. 517.

—S. 556—Municipal Commissioner—Case initiated by—Offence against Municipal Bye-law Trial by Bench Magistrate of which Municipal Commissioner was a member.

A Municipal Commissioner, in his capacity as such commissioner had invited the attention of the executive officer of the Municipality to the manner in which the Bye-law on the subject of the keeping of swine within Municipal limits was apparently being disregarded. The Executive Officer called the attention of the Health Officer to the matter and the Health Officer instituted the prosecution after satisfying himself that there were good *prima facie* grounds for believing that the Bye law was being broken and that the interests of the public health, required its enforcement. The case was tried by a Bench of Honorary Magistrates of which the Municipal Commissioner was a member and ended in a conviction. On objection being taken to the validity of the trial on the ground that the Municipal Commissioner sitting on the Bench of Magistrate was a person interested in the success of the prosecution within the meaning of S. 556 Cr. P. Code or was a party to the prosecution in the sense that he had caused it to be instituted *held* that the objection was entirely devoid of merits and that the trial and conviction were valid. (Piggott, J.) NANOO v. EMPEROR.

71 I. C. 359 :

24 Cr. L. J. 135 : 1923 A. 483 (1).

—S. 556—Sessions judge sanctioning prosecution as an Insolvency Judge—If competent to hear appeal.

A sessions Judge is not prohibited in law from hearing an appeal from a conviction by a magistrate, in which as an Insolvency Judge he allowed the prosecution to proceed. (Walsh, J.) SRI KRISHNA SONAR v. EMPEROR 21 A. L. J. 90 : 71 I. C. 368 : 24 Cr. L. J. 144 : 1923 A. 193 (1).

—S. 557—Pleader when can act as a Magistrate.

S. 557, Criminal P. C. does not forbid a pleader to practice in any Court but forbids him to sit as a Magistrate in Certain Courts. If a pleader practices in the Honorary Magistrate's Court or in the Township Magistrate's Court, within whose jurisdiction that Court is, he is debarred from sitting as a Magistrate in the Honorary Magistrate's Court (C. Mac Coll, A. J. C.) EMPEROR v. NGATHA SHWIN.

1923 Rang. 119 (1).

## CRIMINAL TRIAL

—S. 562—Applicability—I. P. C., S. 411.

S. 562 Cr. P. C. does not apply to a case under S. 411 I. P. C. (Ross J.) KABIR SHAH v. EMPEROR. 1 Pat. T. R. 174 (Cr.) : (1923) Pat. 237 : (1923) P. 297 (2).

—S. 562—Mis appropriation—Meaning of—Cheating.

In S. 562 of the Cr. Procedure Code the word "misappropriation" covers Ss 404 and 405 of the Penal Code as well as S. 403 and the word "cheating" covers Ss. 418, 419, and 420 as well as S. 417. Indeed it appears more correct to say that those words were not meant to cover Ss. 403 and 417 at all, and only do so accidentally. 41 M. 533 dissented. 4 N. L. R. 18 ; 12 A. L. J. 465 followed. (Hallifax, A. J. C.) EMPEROR v. JIYALAL BHOI. 71 I. C. 795 (2) : 24 Cr. L. J. 251 (2) : 1923 Nag 158 (2).

—S. 562—Order under, if punishment.

An order under S. 562 Cr. P. C. directing release upon probation of good conduct cannot be said to be punishment. It is one of the various kinds of punishments described in S. 53 I. P. C., what is done is that the sentence of punishment is postponed and something which is not a punishment is substituted therefor. (Kotwal, A. J. C.) BABA v. EMPEROR 74 I. C. 66 : 24 Cr. L. J. 738.

CRIMINAL TRIAL—Accomplice—Evidence of Case outside purview of S. 337 Cr. P. Code—Admissibility. See CR. P. CODE, S. 337.

21 A. L. J. 42.

—Accomplice—Evidence of—Necessity for corroboration—Failure to draw presumption—Effect. See EVIDENCE ACT, S. 133.

4 Pat. L. T. 381.

—Accused in same degree of insanity.

The medical and the local standards of sanity are not identical. From the medical point of view it is probably correct to say that every man at the time when he commits a murder is insane, that is, he is not in a sound, healthy normal condition, but from the legal point of view a man must be held to be sane so long as he is able to distinguish between right and wrong, so long as he knows that the offence he is committing is a wrong thing to do, so long as he has a guilty mind. (Shadi Lal C. J. and Le Rossignol, J.) SHER SINGH v. EMPEROR. 1923 Lah. 508

—Alternative charges.—Offences arising out of different facts.

Alternative charges may properly be run against an accused person on the same set of facts, but alternative charges which include offences which do not arise out of the same set of facts as those with which they are linked, even though tried in the same proceeding, ought to be made clear to the accused before the trial and clearly dealt with in the Judge's final decision. (Walsh, J.) JODHA SINGH v. EMPEROR.

L. R. 4 A. 83 (Cr.) : 1923 A. 285.

—Appeal—Appellant absent.

Where the Judgment of the Appellate Court was to the effect that the appellant was absent and unrepresented, that he had been through the

## CRIMINAL TRIAL.

judgment and the whole record and the petition of appeal and could see no substance in any of the grounds of appeal: *Heud*, there was nothing improper in the same. (*Ross, J.*) *KABIR SHAH v. EMPEROR*.  
1 Pat. L. R. 174 (Cr.).  
(1923) Pat. 237 : 1923 P. 297 (2).

——— *Appeal—Dismissal for default—Legality of.*

Even though no one may appear in a criminal appeal it is the duty of the Court to examine the matter and to come to some sort of decision on the merits. (*Bucknill, J.*) *BALDEO DUBEY v. EMPEROR*.  
1 Pat. L. R. (Cr.) 29 :  
72 I. C. 891 : 24 Cr. L. J. 475.

——— *Appeal—Summary dismissal—Magistrate called on to show cause—Duty.*

Where a Bench of the High Court issues a Rule calling on a District Magistrate to show cause why a Criminal appeal dismissed summarily by him after admission should not be reheard, it is not in consonance with the respect due to the High Court to give no explanation beyond saying that it was a temporary case. (*Sanderson C. J. and Panton, J.*) *KAM HARI CHAKRAVARTY v. SANTOSH KUMAR MANNA*.  
69 I. C. 461 :  
23 Cr. L. J. 733.

——— *Approver—Corroboration—Nature of.*

As an Approver's evidence is tainted, other evidence which is itself tainted cannot be sufficient for purposes of corroboration. This a wife who knew about the conspiracy to murder her husband and even consented to it cannot be considered a corroborating witness for the purposes of securing conviction. (*Shadi Lal, C. J.*) *and Abdul Qadir, J.*) *AHMAD NUR v. EMPEROR*.  
1923 Lah. 76.

——— *Approver—Evidence of—Weight.*

The evidence given by approvers or persons practically in the position of approvers must be scrutinised carefully before a conviction is based on it. (*Syed Wazir Hasan and Cuning, A. J. C.*) *MAHADEO v. EMPEROR*.  
10 O. L. J. 280.

——— *Approver—Evidence when to be used against other accused.*

The evidence of an approver should be used against the other accused only after his complicity in the crime is tested and found satisfied. (*Datal, A. J. C.*) *SANT RAM v. EMPEROR*.  
9 O. & A. L. R. 324 : 74 I. C. 543 :  
24 Cr. L. J. 799.

——— *Basis of conviction—Complainant's testimony.*

Where in a criminal trial the judge disbelieves the whole prosecution evidence as to the occurrence except the evidence of the complainant, as between whom and the accused enmity is established, a conviction cannot be sustained on such uncorroborated statement alone. (*Coutts and Das, JJ.*) *BHANGI DUBAY v. EMPEROR*.  
1 Pat. L. R. 151 (Cr.) :  
72 I. C. 360 (2) : 24 Cr. L. J. 360 (2) :  
4 Pat. L. T. 503 : 1923 P. 519.

——— *Bench Magistrates. See (1922) Dig. Col.*

504. *SULTAN v. SHAMSHER*.  
69 I. C. 376

## CRIMINAL TRIAL.

——— *Benefit of doubt.*

Where it is doubtful whether the accused was at all present at the scene and there are discrepancies in prosecution evidence benefit of doubt must be given to the accused. (*Scott Smith and Harrison, JJ.*) *MUHAMMAD v. EMPEROR*.  
1923 Lah. 195.

——— *Case of a civil nature.*

Parties should not be put to a lot of trouble in the Criminal Courts when the case is really one of a civil nature. (*Scott Smith, J.*) *KARAN CHAND v. MATHRA DAS*.  
24 Cr. L. J. 369 :  
72 I. C. 369 : 1923 Lah. 329 (2).

——— *Charge—Alternative charge—Refusal of sanction—Effect of. See (1922) Dig. Col. 504.*  
*EMPEROR v. KUHA RAM*.  
45 A. 11.

——— *Charge—Particulars not given.*

A charge which is not reasonably sufficient to give the accused notice of the matter with which he is charged, is bad. (*Ghose and Cuning, JJ.*) *OATES v. EMPEROR*.  
38 G. L. J. 163.

——— *Circumstantial evidence.*

Where a conviction is sought to be based entirely on circumstantial evidence, it ought to be strong in character. (*Campbell, J.*) *KAM GOPAL v. EMPEROR*.  
1923 Lah. 687.

——— *Circumstantial evidence—Guilt—Proof of.*

To justify the inference of guilt the circumstantial evidence must be such as to be incompatible with the innocence of the accused and incapable of explanation, on any reasonable hypothesis other than that of his guilt. (*Shadi Lal, C. J. and Campbell, J.*) *MAHOMED YAR v. EMPEROR*.  
5 Lah. L. J. 40 : 1924 Lah. 62.

——— *Circumstantial Evidence—Nature to justify conviction.*

A conviction on circumstantial evidence cannot be sustained unless and until all the inferences to be drawn from the whole history of the case point so strongly to the commission of the crime that the defence thereby appears in the face of it impossible or highly improbable. 16 P. W. R. 1911 Foll. (*Abdul Raoof, J.*) *BAHALI v. EMPEROR*.  
1923 Lah. 488.

——— *Circumstantial evidence—Punjab Canals and Drainage Act (VIII of 1873) S. 70 (12).*

The mere fact that the fields were irrigated by the accused is not sufficient to hold that they were guilty of opening an outlet of water which had been closed under the orders of the Canal authorities. (*Moti Sagar, J.*) *SHEO RAM v. EMPEROR*.  
1923 Lah. 603.

——— *Civil Dispute—Adjudication of title.*

In a case where the dispute between the parties is of a Civil nature the civil adjudication should precede, and not succeed, an adjudication by a Criminal Court.

A party should not be allowed to utilise the machinery of the criminal court to establish his title to property. (*Pipon, J. C.*) *KHEMCHAND v. EMPEROR*.  
71 I. C. 789 : 24 Cr. L. J. 145.

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## —Civil dispute—Duty of Magistrate.

Where a criminal case is launched on the basis of a civil dispute between the parties it would be proper for the Magistrate to consider whether or not the case was of a civil nature and if he came to the conclusion that only a civil wrong had been committed, he should have said so and dealt with the case accordingly. If, on the other hand, he was of opinion, that a criminal offence had been committed, though he might refer to the evidence in a manner equally appropriate to civil proceedings he should not have lost sight of this fact that he was dealing with a criminal prosecution and ultimately he should have disposed of the case purely from the stand point of the criminal law. Where the judgment of the Magistrate, is neither the one nor the other, it is liable to interference in revision. (*Buckland and Cumming, JJ.*) BHABAN PRASAD MOITRA v. HARI CHARAN BHATTACHARJEE. 38 C. L. J. 7 : 73 I. C. 938 : 24 Cr. L. J. 714.

## —Complaint—Offence under S. 211, I. P. C.—Conviction under S. 500, I. P. C.

A conviction under S. 500, I. P. C. where the complaint and charge were under S. 211, I. P. C. is illegal 18 P. R. 1889 Ref. (*Simpson, J.*) GAYA BARDAI v. EMPEROR, 26 O. C. 44 : 1923 Oudh 4.

## —Conduct of accused,

The evidence of conduct of an accused person, unless it is incompatible with his innocence, is in fact a make weight and nothing more, and care should be taken that it may not have an exaggerated effect. It depends upon temperament, surroundings and other circumstances as to how a man would act in a particular situation, and all these combine to form a most fallacious basis for assured conclusions. (*Das and Adams, JJ.*) EMPEROR v. DEWAN KAHAR, 4 Pat. L. T. 186. 72 I. C. 961 : 24 Cr. L. J. 497. 1923 P. 13.

## —Confession. See (1922) DIG. COL. 1087 NIRU BHAGAT v. EMPEROR.

4 Pat. L. T. 76 : 1 Pat. 630 : 71 I. C. 219 : 24 Cr. L. J. 91.

## —Confession how tested.

It is the universal practice of the Patna High Court not to rely or act on a confession which has been retracted, unless after consideration of the whole evidence in the case the Court is in a position to come to the unhesitating conclusion that the confession is true.

This procedure will practically effect the same results as a rule requiring proof of the voluntary character of a confession, inasmuch as though these decisions require evidence of the truth of the confession and not of its voluntary character, the truth of voluntariness may no unreasonably, though not necessarily, be inferred where the truth of the confession is established.

There is no rule or law which compels the Court to raise an inference of improper inducement from the mere fact that a confession is retracted; but as a rule of prudence, the Courts in this country have consistently declined to act on a retracted confession unless the confession is corroborated by credible independent evidence. In the case of admission or confession, courts

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cannot ignore a portion of such admission or confession and act upon what remains of that admission or confession. It is settled law that an admission or confession must be taken and considered as a whole (*Das and Adams, JJ.*) EMPEROR v. DEWAN KAHAR, 4 Pat. L. T. 186 : 72 I. C. 961 : 24 Cr. L. J. 497. 1923 P. 13.

## —Consent of accused or counsel—Irregular procedure—Effect.

Where a criminal trial takes place under a procedure which is not authorised by law, even the consent of the accused and their counsel will not validate the proceedings. (*Broadway, and Forae, JJ.*) ALLU v. EMPEROR, 4 Lah. 376.

## —Conviction based on finger prints—Verification of expert's evidence.

Where finger prints are clear, an argument by way of deduction can be as sure a foundation for a conclusion as any based on direct evidence. It is not correct to lay down that a conviction based on finger prints is absolutely unsafe. (*Oldfield and Ramesam, JJ.*) EMPEROR v. VIRAMMAL. 46 Mad. 715.

## —Conviction—Basis of.

An accused person can be convicted only on evidence that is actually on the record, and not on evidence which it is believed the witnesses might have given, had they not been won over. (*Harrison, J.*) MURAD v. EMPEROR. 1923 Lah. 128.

## —Conviction—Error—Reference to repealed enactment.

Where the Deputy Magistrate overlooked the fact that Act 1 of 1904 had been replaced by the Poisons Act of 1919 and recorded a conviction under the Act of 1904, held this error, however, was not vital and did not vitiate the conviction recorded by the Deputy Magistrate. (*Dalal, A. J. C.*) EMPEROR v. SARJU PRASAD. 10 O. L. J. 208 : 9 O. & A. L. R. 867 : 1924 Oudh 32.

## —Counter cases—To be tried by same magistrate.

It is always desirable that counter cases arising out of the same occurrence should be tried by one and the same court. (*Newbould and Suhrawardy, JJ.*) JULISTHIR GOPE v. SHEIKH SAMIR. 27 C. W. N. 700.

## —Credibility of accused—Subsequent conduct.

The subsequent conduct or statement of an accused may affect his credibility but it does not deprive him of presumption of innocence until his guilt is established beyond reasonable doubt. (*Walsh, UMED SINGH v. EMPEROR.*) 21 A. L. J. 765 : L. R. 4 A. 221 (Cr.).

## —Cross complaints—Simultaneous trial.

The simultaneous trial of the two cases before two different Courts over one and the same occurrence is undesirable and unsatisfactory, the proper course is that both cases should be tried by one Magistrate one after the other (*Newbould and Suhrawardy, JJ.*) SHEIKH SAMIR v. BENI MADHAB GOPE. 37 C. L. J. 410 : 75 I. C. 364 : 24 Cr. L. J. 940. 1923 Cal. 644.

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—Cross trial—Prosecution evidence in each treated as defence evidence in the other.

Where two cross complaints are heard together the prosecution evidence in each being treated as defence evidence in the other, only one set of findings recorded and one composite judgment delivered, the whole procedure is bad. (*Broadway and Fforde, JJ.*) ALLU v. EMPEROR. 4 Lah. 376

—Duty of counsel—Admission of guilt—Duty of Court.

*Per Mookerjee, J.* It is not the duty of an advocate for a prisoner to approach the trial judge and apprise him that in his opinion the man whose fate has been entrusted to his care, has no defence to make. It is also proper that the judge to whom this confession has been made should not hear the case against the accused. (*Mookerjee, Richardson, Ghose, Cumming and Page, JJ.*) EMPEROR v. BARENDRA KUMAR GHOSE.

28 C. W. N. 170 : 38 C. L. J. 411.

—Duty of court—Approver's evidence.

A judge must direct himself to treat the evidence of approver with the greatest caution and suspicion, but nevertheless to act on his evidence if he believes it. A conscientious jury must treat the advice of the Judge with the greatest respect, but must nevertheless give a decision in accordance with their conscience. (*Halifax and Macnair, A. J. C.*) GOVINDA v. EMPEROR.

69 I. C. 257 : 23 Cr. L. J. 673.

—Estoppel—Non-payment of license fee of municipality - Failure to appeal to standing Committee - Effect. See MADRAS CITY MUNICIPAL ACT, S. 283

45 M. L. J. 731.

—Evidence—Accused thought of as an approver—Statement made to Police

The fact that a subordinate Police Officer took the accused along with the approver to the Superintendent of Police as she was a confessing prisoner and it was necessary to decide which of them should be selected as the approver in the case is not admissible in evidence and must be ignored (*Chevis and Abdul Qadir, JJ.*) SHUA DIN v. EMPEROR.

5 Lah. L. J. 128.

—Evidence—Depositions in one case copied in another—Illegality.

It is illegal for a Magistrate trying a criminal case to take the depositions in one case and have them copied and used in another case (*Sanderson C. J. and Chotzner, J.*) MAZAHAR ALI v. EMPEROR.

50 Cal. 223 :

71 I. C. 662 : 24 Cr. L. J. 198 : 1923 Cal. 196.

—Evidence—Duty of prosecution to adduce all available evidence.

It is the duty of the prosecution to put all the evidence before the Court and the only valid excuse for not examining these witnesses would be that no reliance could be placed on their evidence. (*Newbould and Suhrawardy JJ.*) MAHOMED YUNUS v. EMPEROR.

50 Cal. 318:

1923 Cal. 517.

—Evidence—Duty of prosecution to call available evidence—Scope of the rule.

If the Police consider a witness to be a false witness or his evidence is unnecessary, they

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would be justified in not sending up that witness as a witness for the prosecution and his absence at the trial ought not to be a reason for disbelieving the prosecution witnesses if they are otherwise worthy of credit. It is of course not for the Police or for the prosecutor to champion a particular theory and to suppress the evidence of a reliable witness simply because his testimony is inconsistent with it. If the witnesses called by the prosecution are otherwise worthy of credit, the Court is not entitled to disbelieve them simply because some persons, who could have thrown light upon the case, have not been put before the Court by the prosecution, (*Mullick and Kulwant Sahay, JJ.*) RAMJIT AHIR v. EMPEROR.

2 Pat. 309 :

1 Pat. L. B. 236 (Cr.) : 74 I. C. 705 :

24 Cr. L. J. 801.

—Evidence—False implication of relation of the real culprit.

It often happens that relations of the real culprit are often implicated as concerned in a crime and where this happens the evidence against them must be scrutinised and their case should be separately dealt with (*Martineau, J.*) SHER KHAN v. EMPEROR.

5 Lah. L. J. 124 :

1924 Lah. 59.

—Evidence—First information—Dying declaration—Difference between.

A discrepancy between a first information report and dying declaration makes it incumbent on the Court to examine both pieces of evidence with extreme care, but such a discrepancy does not render the dying declaration wholly unreliable (*Broadway, J.*) MULA SINGH v. EMPEROR.

71 I. C. 593 : 24 Cr. L. J. 177.

—Evidence—Identification—Mistake as to—Evidence if untrustworthy.

The mere fact that a witness makes mistakes in identification is no reason for discrediting his evidence in other matters. (*Walsh, J.*) KHETAL v. EMPEROR.

45 A. 300 : 21 A. L. J. 143 :

73 I. C. 62 : 24 Cr. L. J. 526 : 1923 A. 352.

—Evidence—Witness not in attendance though summoned—Adjournment.

On the date fixed for hearing of a criminal case one of witnesses for the defence did not attend and the accused informed the Court that the witness was ill and asked for a postponement in order to enable him to produce the witness. The application was refused on the ground that the petitioner had not produced a medical certificate to show that the witness was actually ill. Held that the Magistrate, having once issued process against the defence witness, was bound to enforce his attendance. If he did not believe the story of the accused that the witness was ill he should have issued a warrant to enforce his attendance. The accused having obtained summons from the Court against this witness was entitled to have his attendance enforced. (*Newbould and Suhrawardy JJ.*) MIHIR LAL ROY v. EMPEROR.

72 I. C. 370 : 24 Cr. L. J. 370.

—Examination of witnesses—Magistrate calling upon accused to be ready with his

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*evidence before a certain date—Prosecution witnesses not examined.*

Where before completing the examination of the witnesses for the prosecution the Court passed an order requiring the accused to be ready with his witnesses for the defence on a certain date. *Held* that the order was improper (*Lindsay, J.*) *KESHAB DEO v. EMPEROR.*

L. R. 4 A. 124 (Cr.).

—First information—Earlier information not recorded—Effect. *See* (1922) DIG. COL. 507. *CHANDRIKA KAM KAHAR v. EMPEROR.*

(1923) Pat. 26 : 1 Pat L. R. (Cr.) 77  
71 I. C. 353 : 24 Cr. L. J. 129.

—First information report—Use of.

First information reports are not substantive evidence of the facts recorded in them and a conviction cannot be based on them. They can be used to corroborate the witnesses who made them and are of value showing that they told the same story at the first possible occasion. If they told a different story in court, it can be used to contradict them or discredit their testimony. But it is not legitimate for a court when witnesses tell a different story on the witness box and contradict the report made by them to discard the evidence given by them on oath and to rely on the report. (*Ryves, J.*) *JAMALUDDIN v. EMPEROR.*

74 I. C. 716 : 24 Cr. L. J. 812.

—First information—Statement made to police.

A statement casually made to a Sub-Inspector of Police is not first information and cannot be relied on as such. (*Coutts and Dass, JJ.*) *DASRATH SINGH v. EMPEROR.*

1 Pat. L. R. 192 (Cr.) :  
1923 P. 158

—High Court—Appeal against.

An appellate Court will not lightly set aside an acquittal by a Sessions Judge. (*Lyle and Ashworth, A. J. C.*) *EMPEROR v. NAROTAM.*

10 O. L. J. 68 : 74 I. C. 434  
24 Cr. L. J. 770 : 1923 Oudh 217.

—Identification—Doubt as to—Benefit of the doubt.

Where there was the gravest doubt as to whether the two prisoners were in fact identified as having participated in the crime in question, the court must give both the prisoners the benefit of the doubt. (*Fford, J.*) *CHUHAR SINGH v. EMPEROR.*

5 Lah. L. J. 317.

—Identification—Evidence as to.

Where it appeared that it was only in answer to questions put by the Court that witness deposed to his being able to identify accused. *Held* the danger of accepting such a testimony is apparent, since witness had ample opportunity to see the accused during the committal proceedings. (*Broadway, J.*) *REHMAN v. EMPEROR*

1923 Lah. 662.

—Interested witnesses—Corroboration.

Where some of the prosecution witnesses are interested, but their information was disclosed at the earliest possible opportunity and is corroborated by other independent evidence, the testimony can be relied upon. (*Shadi Lal, C. J. and*

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*Le Rossignol, J.*) *WARYAM SINGH v. EMPEROR.*  
75 I. C. 359 : 24 Cr. L. J. 935 :  
1923 Lah. 598.

—Interval of three years between filing of complaint and trial—Procedure defective

On the 23rd March 1920 the Food Inspector of the Corporation of Calcutta filed a complaint in the Court of the Municipal Magistrate asking for summons against the petitioners under Ss. 574-495 A (1) of Act III (B. C.) of 1899 as amended by the Calcutta Municipal Amendment Act of 1917. The offence complained of was that the petitioners had been selling adulterated *ghee* on the 4th February 1920. The Magistrate ordered summons to issue for the 17th April 1920. On that date the petitioners appeared by pleader and the Magistrate passed an order directing that proceedings be stayed for six weeks as the Food Inspector was on leave. On the record no further order appeared until 29th November 1922. On that date the Food Inspector prayed for the revival of the case and the Magistrate directed the record to be put up. On the 16th December 1922 the Magistrate passed the following order, Case revived. Issue fresh summons for 13th January 1923.

*Held* : that the procedure which results in such a long delay is defective though not illegal. 24 C. W. N. 467 Dist. (*Newbould and Suhrawardy, JJ.*) *SHERMULL v. THE CORPORATION OF CALCUTTA.*

1923 Cal. 725.

—Joint trial Separate trials—Evidence taken in one used in another.

There were three separate trials of the accused. A witness was examined in the first case. All three of the accused had been present during the course of the examination of this witness. Counsel for the three accused agreed that the statement of the witness be read over in the connected cases as well. They agreed that their clients would not be in any way prejudiced in this way and it would be a great saving of time. The court accordingly had the Statements of the witness in the previous case read out in the subsequent case. *Held* that the procedure adopted of reading out the statements of witnesses recorded in the first case was irregular, but it was quite clear that no prejudice has been caused to any of the appellants. (*Scott Smith, J.*) *NARAIN SINGH v. EMPEROR.*

72 I. C. 527 : 24 Cr. L. J. 415.

—Judge—Should hear all evidence.

It is a general rule that only an authority who has heard the evidence is competent to decide whether the accused is innocent or guilty. Any exception to this rule, such as S. 349, Cr. P. C., should be strictly construed. (*Kotwal, A. J. C.*) *BABA v. EMPEROR.*

74 I. C. 66 : 24 Cr. L. J. 738.

—Judgment—Day fixed for—Hearing of pleader not obligatory.

Where a Magistrate has fixed a day for delivery of judgment and is ready with the judgment on that day it is not obligatory upon him to hear the pleader for the accused before delivering judgment. (*Prideaux, A. J. C.*) *NYAJ KHAN v. EMPEROR,*

69 I. C. 640 : 23 Cr. L. J. 752  
1923 Nag. 208



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—Jury—Inadmissible evidence read out to jury by Public Prosecutor—Confession—Effect of

Where in a jury trial for murder, the Public Prosecutor in his opening address read to the jury the confession made by the accused, which was inadmissible in evidence not having been recorded according to law, and the accused was sentenced to death for murder.

*Held*, that however, carefully the Sessions Judge had endeavoured to remove the impression by asking the jury to ignore the confession altogether, the reading out of the confession was bound to affect in some measure the minds of the jurors and the trial was consequently vitiated and the court ordered a new trial (*Das and Bunknill, JJ.*) DAMODAR RAMJI EMPEROR.

1923 P. 142

—Jury—Misdirection—Theft—Failure to explain essentials of offence. See PENAL CODE, S. 379.

17 L. W. 236.

—Jury trial—Evidence. —How taken—Reading over deposition given before—If proper

Where accused is being tried before a jury, and on the prosecution witnesses who gave evidence prior to charge being put into the box, their previous deposition is read over to them and accepted by them as correct they are cross examined and re-examined, the procedure is illegal. The Judge and jury are entitled to see the demeanour of witnesses and their way of giving evidence and a new trial must be had in every respect, (*Fiorde, J.*) LYME v EMPEROR

4 Lah. 382 : 1924 Lah. 17

—Jury—Weight due to prosecution witness—Factions—Effect of.

The jury are entitled to discount the evidence which has been given by the prosecution witnesses because of the fact that the witnesses who have come and deposed on the side of the prosecution are witnesses who are admitted by adherents of a party opposed to that of the accused. The fact that merely all the witnesses had been at sometime or other, concerned in criminal cases either started by them or started against them is a circumstance so important that the jury can hardly be blamed if they took that into their consideration and came to the conclusion that the evidence on the side of the prosecution was one which they could not accept. (*Ghose and Chatterjee, JJ.*) EMPEROR v. NRITYA GOPAL ROY.

38 C. L. J. 1

75 I. C. 145 : 24 Cr. L. J. 897

—Local inspection—Notes of inspection if should be recorded—Effect of omission. See (1922) DIG. COL. 508 ATHAR HUSSAIN v. EMPEROR.

71 I. C. 698 : 24 Cr. L. J. 234

—Misdirection to jury—Defect in charge. See (1922) DIG. COL. 509. ABDUL GAFUR SIKDAR v. EMPEROR.

71 I. C. 121 : 24 Cr. L. J. 76

—Motive evidence of—Case made out See (1922) DIG. COL. 509 EMPEROR v. BALARAM DAS.

71 I. C. 685 : 24 Cr. L. J. 221

—Murder—Circumstantial evidence—Discovery of knife and ornaments—Incriminating circumstance.

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The discovery of jewels worn by the deceased in an obnoxious place close to the corpse and of a knife at a cattle shed and not concealed are not sufficient to connect the accused with the alleged crime (*Shadi Lal and Wilberforce, JJ.*) MT. AISHAN v. EMPEROR.

5 Lah. L. J. 78.

—Murder—Discovery of ornaments. See (1922) DIG. COL. 503 MT. SUKHIA v. EMPEROR.

24 Cr. L. J. 609 : 73 I. C. 497.

—Murder—Sentence—Political agitation—Ignorant victims.

The accused, who were ignorant peasants, were led to commit offences under Ss. 149 and 302 of the Penal Code by misrepresentations and preposterous promises of millennium the arrival of which was to be forwarded by courage and resolution on their part. Some of them entertained a belief that the person whose behest they believed they were carrying out was a worker of miracles: *Held* that this was a sufficient reason for passing on the accused the lesser sentence of transportation for life in the place of the normal sentence of death. (*Mears, C. J. and Piggott, J.*) ABDULLAH v. EMPEROR.

L. R. 4 A 145 (Cr.).

—Order of Court—Disobedience—Proceedings by court.

It cannot, be desirable that Magistrates whose lawful orders are disobeyed should, save in every exceptional circumstances try and dispose of the charge of disobedience themselves, but unless there has been a clear failure of justice, the High Court will not ordinarily interfere. (*May Oung, J.*) J. R. DAS v. EMPEROR.

1 Rang. 549 :

2 Bur. L. J. 146.

—Order directing detention of property of Stranger—Propriety of.

Criminal proceedings to which a person is not a party ought not to be made use of for detaining in court the property of such person, even though the offence under trial had something to do with that object. (*Buckland and Cuming, JJ.*) KEDAR NATH DEY v. MAHOMED SIDDIQ.

73 I. C. 807 : 24 Cr. L. J. 695.

—Plea of guilty—Conviction when valid—First information report—Record of confession

A first information report is not admissible in evidence at all, if in substance it is a confession to the Police

As a matter of practice in Sessions trials for murder many judges very properly prefer not to act on a plea of guilty but proceed to take the evidence as if the plea had been one of not guilty in order to ascertain the accused's state of mind and whether there is sufficient to reduce the offence to one of culpable homicide or only sufficient to affect the sentence.

It is not illegal to convict in a murder case on a plea of guilty, and in each case the circumstances must be examined to see whether the plea of guilty is one which should have been acted on. (*Batten, J. C. and Halifax, A. J. C.*) MANJIBO v. EMPEROR.

73 I. C. 266 :

24 Cr. L. J. 570 : 1923 Nag. 251.

—Police diary may be used for accused.

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Statements embodied in police diaries can be used in favour of an accused person, but not against him. (*Zafur Ali, J.*) RAJINDAR SINGH v. EMPEROR. 1923 Lah. 516.

—Previous conviction—Not to be let in till the end

It is illegal to let in evidence of the previous convictions of an accused till the end of the trial, as otherwise the court is likely to be unconsciously prejudiced against the accused. This is the principal underlying S. 54, Evidence Act and S. 310 Cr. P. Code. (*May Oung, J.*) MAUNG E GYI v. EMPEROR. 1 Rang 520.

—Principal and agent—Liability for acts of agent—Possession of agent. See PRINCIPAL AND AGENT. 21 A. L. J. 481

—Private defence—Duty of Court to give effect to defence.

If on the record a right of private defence can be clearly raised the Court would give effect to it, even although not pleaded by the person accused (*Broadway, J.*) WARYAM SINGH v. EMPEROR. 72 I. C. 611 : 24 Cr. L. J. 451

—Private prosecutor—Locus standi.

In prosecutions for cognisable offences, the private prosecutor has no position at all in the litigation and the Crown being the sole prosecutor and custodian of the public peace. (*Mullick and Macpherson, JJ.*) GULLI BHAGAT v. NARAIN SINGH. 2 Pat. 702.

—Procedure—Questions put by Judge to the Jury in private chambers and not in open Court—Irregularity

After the Jury had retired to consider their verdict in a criminal case they saw the Judge in his Chamber and asked him for direction on a point of Law. The Judge and the jury both went into the Court room and the Jury in presence of the pleaders put certain questions to the Judge and the answers thereto were recorded. Held that the mere fact that a question was put by the Jury to the Judge not in open Court but in Chambers did not vitiate the trial and it was at best a mere irregularity. (*Newbould and Suhrawardy, JJ.*) BILASCHANDRA BANERJEA v. EMPEROR. 27 C. W. N. 626 : 1923 Cal 647.

—Retrial—Murder—Inadmissible evidence placed before jury.

A confoss on which was opened by the Public Prosecutor and was read to the Jury in the course of the trial was not recorded according to law and had to be ruled as inadmissible. The Jury was informed that the accused had made a confession. Held that the statement may be very reasonably regarded as having been bound to affect in some measure the minds of the jurymen, however, carefully the learned Judge may have (and quite rightly) endeavoured to remove impression from their minds. A retrial was therefore ordered. (*Das and Bucknill JJ.*) MADODAR RAM v. EMPEROR. 1 Pat. L. B. 171 (Cr.)

—Search—Irregularities in—Offence committed—Effect.

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Where the evidence is clear of the commission of an offence, any irregularity or illegality in the search can neither vitiate the trial nor affect the conviction. (*Sulaiman, J.*) ALI AHMAD KHAN v. EMPEROR. 21 A. L. J. 858 : L. R. 4 A. 252 (Cr.).

—Sentence—Considerations in determining—Motive of the offence.

In criminal trials the motive with which the offence is committed always guides the measure of the sentence imposed. (*Wazir Hasan, A.J.C.*) CHINTAMAN v. EMPEROR. 100 L. J. 54 : 1923 Ouch 180.

—Sentence—Fine—Extent of.

A sentence of fine should not be imposed which it is wholly impossible for the accused person to pay without ruining himself and without inflicting great hardship upon his family. The maximum fine to be imposed upon any individual should depend in every case upon his position in life. If the offence is of an aggravated type a sentence of imprisonment is obviously more suitable than fine. (*Harrison, J.*) ABDULLA v. EMPEROR. 5 Lah. L. J. 271 : 71 I. C. 998 : 24 Cr. L. J. 278.

—Sentence—Period of detention while under trial—If can count towards sentence.

The period during which a person was kept in custody as an under-trial-prisoner cannot count as part of the sentence, nor can the court order it to be considered as such. (*Brasher, J.*) DANGER KHAN v. EMPEROR. 5 Lah. L. J. 224 : 1923 Lah. 104.

—Sentence—Protraction of trial—Strain, anxiety and mental suffering to accused—Mitigation of sentence. See PENAL CODE Ss. 120 B, 420 and 511. 27 C. W. N. 821.

—Sentence—Separate trials—If can be concurrent.

Sentences passed in separate trials cannot be ordered to run concurrently. (*Heald J.*) NGA SEIN PO. v. EMPEROR. 1 Rang 306.

—Sessions Case—Omission to examine a large number of witnesses examined before Committing Magistrate—Inconsistent defences.

Ten witnesses were examined before the Committing Magistrate on behalf of the prosecution. Of these seven were not examined in the Sessions Court, nor were they tendered for cross-examination although an application was made on behalf of the accused that this should be allowed. It was not suggested that these witnesses were discarded by the Public Prosecutor on the ground that if examined they would not tell the truth. Held the accused was entitled to have them put in the box for cross-examination. Held further that the Sessions Judge erred in holding that the accused could not set up an alternative defence which was inconsistent with the first defence set up by him. By setting up an inconsistent defence there can be no doubt that the case for the accused becomes considerably weaker than if he settled his best line of defence and set up at defence only. But there is nothing illegal in setting up an alternative and inconsistent defence and the accused's pleader

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should be allowed to argue the alternative defence before the jury. (*Newbould and Suhrawardy, JJ.*)  
NAGENDRA CHANDRA DHAR v. EMPEROR.

27 C. W. N. 820 :  
38 C. L. J. 203 : 1923 Cal. 717.

—Sessions case—Shorthand notes of proceedings.

It is desirable that shorthand notes of proceedings of Sessions Court should be maintained so as to ensure a full and accurate record of what happens in Court. (*Mookerjee, Richardson, Ghose, Cumming and Page, JJ.*) EMPEROR v. BARENDRA KUMAR GHOSE.

28 C. W. N. 170 :  
38 C. L. J. 411 : (F.B.)

—Stay of—Counter case—Stay of trial in one—Legality of.

Where there are two counter cases of rioting arising out of the same occurrence the proceedings in one cannot be stayed pending the trial and disposal of the other on the ground that after the disposal of that case it may not be necessary to dispose of the counter (*Newbould and Suhrawardy, JJ.*) RAJENDRANATH GHOSH v. AMRITALAL CHAKRAVARTI.

71 I. C. 697 : 24 Cr. L. J. 233.

—Stay of—Principles—Pendency of Civil suit.

There is no statutory provision as to the stay of criminal proceedings. The question is one of expediency and has to be decided on the merits of the particular case keeping in view the desirability of avoiding the possibility of conflicting decisions and also the necessity of protecting the accused in the civil proceedings in the sense that he should not be prejudiced.

Where the question in the civil and criminal court though arising out of the same transaction are different and can be decided independently of each other, a stay should not be granted, (*Harrison, J.*) TAJUDDIN v. TAJ MUHAMMAD NASIR.

69 I. C. 380 (2) : 23 Cr. L. J. 3.

—Suspicion if amounts to proof.

Suspicion cannot be substituted for proof in a criminal trial. (*Shah Lal C. J. and Zafar Ali, J.*) SCRAT SINGH v. EMPEROR.

1923 Lah. 42

—Witness—Deaf but literate—Failure to examine—Effect.

Failure to examine a witness who though deaf could read and write is a material irregularity which vitiates a trial. (*Ghose and Cumming, JJ.*) GANODA DASSYA v. SRIMANTA GHOSH.

73 I. C. 784 : 24 Cr. L. J. 688

—Witnesses—Duty of Court to Summon.

Within reasonable limits an accused is always entitled to the assistance of the Court in summoning all such persons as he may think are necessary in order to protect himself against the accusation and charge. Mere technicalities as to whether he applies at one moment or a little later are not material, the only important thing being that the court should ascertain the truth of the accusation. (*Bucknill, J.*) BENI v. EMPEROR.

1 Pat. L. R. 117 (Cr.) : 74 I. C. 947 :  
24 Cr. L. J. 835 : 1923 P. 536.

—Witness—Omission to Call See (1922) DIG. COL. 511 EMPEROR v. BALARAM DAS.

71 I. C. 685 : 24 Cr. L. J. 221.

## CUSTOM.

—Witness—Prosecution if bound to call all witnesses.

The Public Prosecutor is not bound to call as witnesses for the Crown any person whose evidence in his opinion is unnecessary. (*Odgers, J.*) DORAISWAMI UDAYAN v. EMPEROR.

45 M. L. J. 846 : (1923) M. W. N. 782.

—Witness—Stock witnesses—Penal Code s. 123 A.

Where in a case under S. 124-A some of the witnesses produced are Zaildars and Lambardars who have admittedly appeared as witnesses on behalf of the police in a large number of political or semi-political cases *Held*, that little reliance should be placed on evidence of such stock witnesses, and as to the police constables and Sub-Inspectors of police *Held* that where they have given a highly coloured and exaggerated statement with regard to the whole affair, it is impossible to sustain the convictions on their oral evidence alone where it is contradicted by their own police diaries. (*Moti Sagar, J.*) KISHAN SINGH v. EMPEROR.

1923 Lah. 333.

CRIMINAL TRIBES ACT, s. 22—Conviction under—Solitary confinement if can be ordered.

Where a person is convicted under the Criminal Tribes Act, the court cannot order a portion of the punishment to be solitary confinement, as S. 73 I. P. C. allows it only in cases of convictions under the Penal Code. (*Sulaiman, J.*) EMPEROR v. BIDHA.

21 A. L. J. 914.

CROWN GRANTS ACT (XV of 1895)—S. 3—Crown Grant—Tenancy determinable on six months' Notice—Right of tenant—Malabar Compensation for Tenant's Improvements Act See (1921) DIG. COL. 480., ULLATUTHODI CHOYI v. SECRETARY OF STATE FOR INDIA. 69 I. C. 475.

CUSTOM—Court's duty.

In cases where custom is alleged, a duty is imposed on the Court to endeavour to ascertain the existence and nature of that custom. (*Broadway and Zafar Ali, JJ.*) MT. DIYAN v. HIRA NAND.

4 Lah. 202 : 73 I. C. 898 : 1923 Lah. 448.

—Deductions not permissible.

Custom is not always logical and the Courts should guard against the danger of seeking to extend custom by logical processes, e.g. by analogy. (*Broadway and Campbell, JJ.*) NAIMUDDIN v. ABDUL HAMID. . . . 72 I. C. 845 : 1923 Lah. 175.

—Evidence of—Custom set up to be precisely proved—Proof of different Custom.

Evidence to prove a custom must not only be consistent with the custom which is alleged but must also prove a custom which is not wider than that alleged. If the evidence tends to prove a custom wider than that which is alleged, the party seeking to establish the custom is not at liberty to adopt part only of the evidence and to reject the rest. But this does not necessarily establish the converse, namely, that if a broad custom is pleaded the existence of a lesser custom could not if proved be found.

The defendants alleged a custom which they failed to prove; but from evidence given on behalf

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of the plaintiff to rebut the evidence given on behalf of the defendants, the Courts considered that it was apparent that a custom had been proved, of the same type as that which the defendants had alleged but of a narrower compass. *Held* that in modern times a court could have little hesitation in finding that although the entire custom alleged by the defendant did not exist but a material part of it did, (*Bucknill and Ross, JJ.*) *NATHUNI RAI v. MAHARAJADHIRAJ SIR RAMESHWAR SINGH BAHADUR.*

1 Pat. L. R. 289 : 73 I. C. 629.

## Impartibility—Proof of.

Evidence of witnesses to the effect that they had never known a case of partition does not afford in Law sufficient proof of a valid custom of impartibility. (*Schwabe, C. J. and Wallace, J.*) *VAZHAYIL PARKUM THATTAM KUNHI KUTTY v. RAMAN.*

46 Mad. 597 : 44 M. L. J. 274.

(1923) M. W. N. 173 : 72 I. C. 145.

18 L. W. 525 : 1923 Mad. 452.

—Legality of—Religious Office—Emoluments—Right to receive without performing duties—Custom invalid. *See* (1921) DIG. COL. 488, *KRISHNA AYYANGAR v. RAMAN CHETTIAR.*

69 I. C. 469

## Local Custom—Proof of—Right of way—Antiquity—Open user.

A Court should not find a local custom unless it is satisfied of its reasonableness and its certainty as to extent and application and is further satisfied by the evidence that the enjoyment of the right was not by leave granted or by stealth or force and that it had been openly enjoyed for such a length of time as suggests that originally by agreement or otherwise, the usage had become a customary law of the place in respect of the persons and things with which it is concerned. The evidence must be sufficient to show that the right has been openly enjoyed for such a length of time as suggests that originally by agreement or otherwise the usage had become customary law of the locality. The doctrine of lost grant is applicable to private rights claimed by prescription. It is inapplicable to a right claimed on the basis of immemorial custom. The question of legal origin is only of importance where it is suggested that the right claimed might have originated within the time of memory, whatever that time may be. In the case of a custom its legality depends on such considerations as its reasonableness and its certainty. As to the length of user or enjoyment which must be proved before a local custom may justifiably be inferred no definite rule can be laid down. But if the existence of the custom depends on oral evidence, and the user of enjoyment is taken back as far as living memory can be expected to go, then in the absence of rebutting evidence it is not unreasonable to say, *presumptio retro* or to infer an immemorial enjoyment of the right, or say, in Bengal, an enjoyment from the time of the Permanent Settlement. (*Richardson and Sukrawardy, JJ.*) *ALIMAHOMED v. SHEIKH KATU.*

70 I. C. 263 : 1923 Cal. 200.

## Of Privacy—Existence.

The existence of the right of privacy does not depend on the caste or creed of the person owning

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if or on the fact that it was used by the ladies. It is a custom of the country and has, as such, to be protected. 10 All. 358 and 13 A. L. J. R. 361 *Ref. (Gokul Prasad, J.) BOHRA TARA CHAND v. MUST RAYAZI BEGLM.*

73 I. C. 1040 : 1923 A. 404 (i).

## Proof of.

Proof of custom is not confined to judicial precedents alone and the fact that no contest has taken place in the past may well raise a presumption that the custom was so well recognised that no one thought of contesting it. Custom is not a matter of inference but of proof, and it is the evidence adduced in support of the custom set up that can, and must, alone be looked to ascertain whether or not it has been proved to exist, 29 C. 433 (P.C.) Foll. and 77 P. R. 1904 Foll. (*Broadway and Campbell, JJ.*) *NAJM-UD-DIN v. ABDUL HANID.*

72 I. C. 845 : 1923 Lah. 175.

## Proof—Oral evidence.

A rule of custom may be established and held to be of binding force even where no instance is forthcoming, if there is an overwhelming preponderance of oral testimony of those governed by it and likely to know of its existence in its favour. (*Abdul Raoof and Abdul Qadir, JJ.*) *MT. CHANNI BIBI v. AHMAD KHAN.*

69 I. C. 331.

## Right to bury dead in another's land. If can be acquired.

A right to bury the dead in a certain land can be acquired by custom and a court will enforce the same if it is satisfactorily proved. (*Po Han, J.*) *MG. SHWE KYE v. MG PO THA.*

2 Bur. L. J. 186.

## CUSTOM (PUNJAB).

## CUSTOM—Adoption—Brother's son—Punjab.

A sonless proprietor has power to adopt his brother's son under the customary law governing the Mahomedan Bhatti Rajput Jats of Dasuya Tahsil in the Hoshiarpur district. (*Harrison, J.*) *AMIR v. WAZIR.*

72 I. C. 305.

## Adoption—Collateral—Succession—Onus Ross of Sutana in Panipat Tahsil of Karnal District

A valid custom exists among Ross of Sutana in the Panipat Tahsil of the Karnal District by which a widow can adopt a son and that son can succeed collaterally. The onus is upon the adoptee to prove the custom. (*Broadway, J.*) *KANHAYA v. NAURANG.*

1923 Lah. 374.

## Adoption—Daughter's sons—Hindu Jats of Mauza Liddar, Tahsil and District Jullundur.

*Held* that it was not proved that by custom among Hindu Jats of Mauza Liddar, Tahsil and District Jullundur, the gift of ancestral property to daughter's sons is valid, (*Leslie Jones and Abdul Raoof, JJ.*) *KHUSHAL SINGH v. NANDA.*

5 Lah. L. J. 63.

## Adoption—Proof.

In a case where the power of customary adoption by a sonless proprietor is not disputed all that is necessary to constitute an adoption is the clear expression of an intention on the part of the adoptive father to adopt the boy concerned as his

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son, and a sanction manifestation of that intention is the execution and registration of a deed of adoption coupled with a clear declaration in court and subsequent treatment as adopted son. The proof of such subsequent treatment cannot, however, be reasonably demanded in a case where very soon after the execution of the deed of adoption the reversioners of the adoptive father sue for a declaration that the adoption did not in fact take place. (*Scott Smith and Fforde, JJ.*)  
**MLHAN SINGH v. KEHAR SINGH.**  
 75 I. C. 317 : 1923 Lah. 523.

——— *Adoption—Rights of adopted son in natural family*

The ordinary rule under the customary law is that an adopted son does not lose the right of succeeding in his natural family. The mere appointment of an heir would not have the effect of depriving the appointed heir of his right to succeed in the natural family. 16 I. C. 712 foll.  
*(Abdul Raouf, J.)* **NUR DIN v. ROSHAN DIN.**  
 69 I. C. 705.

——— *Adoption—Sister's son—Hindu jats—Heharpur District.*

Having regard to the fact that the *riwaj-i-am* of the Heharpur District prepared in 1884 and 1915 declared that the adoption of a sister's son had the sanction of custom and that the entry was supported by instances, the Court held that the burden of proving that such an adoption was not valid lay on the plaintiff and that they had failed to discharge the same. 59 P. R. 1893; 84 P. R. 1895; 94 P. L. R. 1911; 84 P. R. 1917; 45 P. R. 1917 foll. (*Scott Smith and Jafar Ali, JJ.*) **NAMAN v. BAFAN SINGH**  
 4 Lah. 102; 5 Lah. L. J. 253.  
 74 I. C. 589 : 1924 Lah. 37.

——— *Agreement to sell—Failure of consideration—Mortgage—Validity.*

Where the vendor agrees to sell and receives part payment and there is failure of the consideration, the sale not being completed the mortgage in favour of the vendee in consideration of the part payment is not a mortgage in lieu of a debt voluntarily incurred (*Abdul Raouf and Moti Sagor, JJ.*) **AZAD KHAN v. NASIB GUL.**  
 1923 Lah. 553.

——— *Agricultural community—Law governing—Hindu Law—Burden of proof.*

In the case of a community like the Raj Brahmins whose occupation is agriculture the presumption is that they are governed by custom, but if a party sets up they are governed by Hindu Law he has to prove it. (*Martineau and Mohi Sagor, JJ.*) **BASHU RAM v. PIARA RAM**  
 4 Lah. 434.

——— *Alienation—Ancestral land—Son's right.*

If a father *bona fide* and without collusion or intention to injure the reversioners gives consent to an alienation by a female in possession of property such consent is binding upon his son in a suit for a declaration that the alienation shall not affect his reversionary rights. But in the case of non-ancestral land to which his father is heir, he has no such right. (*Scott Smith and Zafar Ali, JJ.*) **MT JASWANT Kaur, v. WASAWA SINGH.**  
 5 Lah. L. J. 346 : 1923 Lah. 353.

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——— *Alienation—Ancestral property—Property acquired by pre-emption.*

Property acquired by pre-emption is not ancestral property in the hands of the acquirer even though the property had at one time belonged to an ancestor of the acquirer. 59 P. R. 1909 followed. (*Martineau, J.*) **PHUL DEVATI**  
 71 I. C. 561 : 1923 Lah. 210

——— *Alienation—Brahmans of Gokalgarh—Ambala District—Hindu Law.*

The Brahmans of Gokalgarh in the Ambala District are not governed in the matter of alienation by agricultural custom but by Hindu Law. (*Shadi Lal, C. J., and Zafar Ali, J.*) **SALI RAM v. BADHAWA.**  
 73 I. C. 759 : 4 Lah. 254.  
 1923 Lah. 501

——— *Alienation—Consent of reversioners—Sons of reversioners when bound.*

The assent of the plaintiff's father to the alienation by a female in possession, if made *bona fide* without collusion or intention to injure the reversioners, is binding upon the plaintiff in a suit for a declaration that the alienation shall not affect his reversionary rights. (*Abdul Raouf, J.*) **MAKHAN SINGH v. KISHEN SINGH.**  
 73 I. C. 273

——— *Alienation—Exchange—Suit to set aside—Burden of proof.*

Where ancestral land is given in exchange for other land by a male proprietor and the transaction is challenged by a reversioner, though the initial onus is on the transferee to show that the transaction was a prudent one the onus is easily discharged if the surrounding circumstances show that the transaction was beneficial. (*Shadi Lal, C. J., and Brasher, J.*) **NAGINA SINGH v. MOTI SINGH.**  
 69 I. C. 521 (2).

——— *Alienation by female—Right to challenge. See (1922) DIG. COL. 513* **GOBINDA v. NANDU.**  
 74 I. C. 644

——— *Alienation—Gakhars of Malpur—Gift by sonless proprietor—Riway-i-am.*

Where the *Riway-i-am* contains an entry that among gakhars a sonless proprietor can alienate ancestral property as he liked, the onus is on the person who contests the validity of such a gift to prove it. Held also on the other evidence in the case, such a right in the sonless proprietor was in accordance with the custom of the land. (*Martineau and Harrison, JJ.*) **MT. SARDAR KHANAM v. AMIR ZAMAN KHAN.**  
 70 I. C. 227 : 1923 Lah. 125

——— *Alienation—Gift—Daughter's Sons—Hindu jats of Mauza Liddar Tahsil and District Jullundur.*

Held that it was not proved in the case that by custom among Hindu Jats of Mauza Liddar, Tahsil and District Jullundur the gift of ancestral property to daughter's sons is valid 50 P. R. 1893 94 P. R. 1913; 1 Lah. 15 Ref. (*Leslie Jones and Abdul Raouf, JJ.*) **KHUSHAL SINGH v. NANDA**  
 5 Lah. L. J. 63.

——— *Alienation—Gift—Sister and collaterals—Jats of Issan mahar.*

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It is open to a male sonless proprietor among the Makwal Jats of Isan mahar, Tahsil and District Muzaffargarh to make a gift of the property to a sister or sister's son in the presence of a collaterals. (*Broadway, J.*) HAYAT v. AHMAD OMED. 73 I. C. 216.

— *Alienation — Gift — Widow — Gift to daughter and son-in-law.*

Under the customary law it is not competent to a widow to make a gift of her husband's non ancestral land in favour of her daughter and son in law jointly. (*Le Rossignol and Martineau, JJ.*) SANDHI v. BUDHA SINGH. 5 Lah. L. J. 178 : 69 I. C. 721 : 1924 Lah. 25.

— *Alienation — Gift — Will — Pathans of Charsadda — Peshawar — Sonless proprietor — Bequest to daughters.*

The distinction under Customary Law between the power of gift *inter vivos* and the power of testation is a matter of degree and form only, and where the power of gift is shown to exist, an initial presumption arises that there is a co-extensive power of testation.

Where the practice of gift-making has established itself, the effect must be to incline public opinion favourably towards the practice of testamentary bequests which are really in the nature of deferred gifts which are more easily revocable.

They are undoubtedly special customs upon special points existing among the various Pathan tribes of the Charsadda and Peshawar Tahsils, but there is a strong presumption that their customs are substantially similar, unless some special reasons for divergence can be established.

The power of a sonless proprietor to make a bequest in favour of his daughters, was held to be established among the Pathans.

No restriction exists upon the testamentary power of a Muhammadzai proprietor except that which prohibits, in certain circumstances, the disinheritance of sons. (*Pipon, J. C.*) ABDUL MANAN v. MT. FARQA. 73 I. C. 79

— *Alienation — Legal necessity.*

It is not the duty of the alienee to see to the application of the money or to find out if the whole of the money due to the antecedent creditor was actually paid if a decree was in existence, the payment of that decree constitutes a valid necessity. The fact that the decree-holder subsequently accepted only a portion of the amount due and gave up the rest of his claim is of no consequence and does not in any way affect the validity of the debtor of the alienation. (*Moti Sagar, J.*) BALBIR SINGH v. GOBIND. 1923 Lah. 532.

— *Alienation — Legal necessity — Presumption.*

The mere lapse of time does not remove the need for proving necessity. Although it may render the quantum of proof comparatively small, it certainly cannot be presumed. (*Broadway, J.*) WALI MAHAMMAD v. FATEH KHAN. 75 I. C. 680 : 1923 Lah. 307.

— *Alienation — Limited owner — Reversioner.*

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The alienation of a female limited owner can be challenged by another female who is the next reversioner. (*Le Rossignol and Martineau, JJ.*) MAWAZ KHAN v. MT. ZOHRA JAN. 73 I. C. 533.

— *Alienation (Mortgage) by agriculturist — Money borrowed for trade.*

Where the mortgage was for trading purposes, held : this would not justify an alienation of ancestral land by an agriculturist. The previous mortgage, (the money on which had also been borrowed for trading purposes) cannot be considered as an antecedent debt because it was in favour of the same mortgagee and was effected only a few days before the mortgage in dispute and the two mortgages formed practically one transaction. 19 P. R. 1915 Foll. (*Broadway and Brasher, JJ.*) MD. USMAN KHAN v. ATA MOHI UD-DIN. 5 Lah. L. J. 304 73 I. C. 871 : 1923 Lah. 142

— *Alienation — Necessity — Decree — Effect of.*

The mere fact that a decree has been obtained cannot be treated as if in itself it amounted to legal necessity justifying an alienation especially where the decree is *ex parte*. (*Leslie Jones and Abdul Raoof, JJ.*) BARIAM SINGH v. PHAGGU MAL. 5 Lah. L. J. 99.

— *Alienation — Necessity — Money borrowed for the purposes of subsistence.*

Where a Saiyed agriculturist alienates a *serai* for the purposes of his subsistence and he has no other means of livelihood, the alienation is justified by legal necessity. (*Scott Smith and Moti Sagar, JJ.*) MAHOMED HASSAN-UD-DIN v. SAIF ALI SHAH. 4 Lah. 122 5 Lah. L. J. 246 : 74 I. C. 451 : 1924 Lah. 41

— *Alienation — Necessity — Proof of — Old alienation — Onus — Ancestral property. See (1922) DIG. COL. 1087. SUHAWA v. DEVI DIAL. 70 I. C. 1002.*

— *Alienation — Necessity — Small debt — Lapse of time. See (1922) DIG. COL. 516. RAMJI LAL v. RAM SARUP. 72 I. C. 448.*

— *Alienation — Powers of — Robtak Tahsil — Rivaj-i-am. See (1922) DIG. COL. 517, GIANI v. TEK CHAND. 4 Lah. 111.*

— *Alienation — Proprietors — Consent of — Necessity for.*

Held on the evidence that in Mauza Raja Jang, Tahsil Kasur, District Lahore which was a village and not a town non-proprietors had no right to transfer their rights of residence without the consent of the proprietors. Acquiescence of the proprietors in past sales does not mean that they are precluded from objecting to future sales. (*Campbell, J.*) MAHOMED DIN v. LABH SINGH. 73 I. C. 220

— *Alienation — Residential houses with the houses by non-proprietors in Sankali Kalam Tahsil.*

There is no custom in the Punjab which takes away from the zemindar the right to the site or the tenants' holding. On the determination of the

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tenancy, such a right would make the tenancy into a permanent one. (*Abdul Raof and Moti Sagar, JJ*) *SEWA SINGH v. GHULAM*.

1923 Lah. 467.

—*Alienation—Right to challenge—Son unborn at the time.*

A son can challenge an alienation made by his father before his death, if at the time of the alienation there were heirs who could challenge it and the transaction was not satisfied before his birth. (*Moti Sagar, J.*) *BHUP SINGH v. PREM SINGH*.

5 Lah. I. J. 384.

—*Alienation—Sale of portion beyond legal share.*

Where the vendor transferred without legal necessity property beyond the share that would fall to him on partition. Held the other reversioners can claim joint possession. (*Campbell, J.*) *RAM NATH v. RAM SARUP*.

1923 Lah. 395.

—*Alienation—Setting aside—Right of remote reversioners.*

Where a male proprietor who has alienated ancestral land has adult sons living it is not open to the remote reversioners to sue to challenge the alienation in the absence of proof that the adult sons of the alienor waived their right to impeach the alienation. 84 P. R. 1918 Ref. (*Abdul Qadir, J.*) *SUBA SINGH v. GOPAL SINGH*.

71 I. C. 841.

—*Alienation—Sonless proprietor—Ancestral land.*

In respect of alienation of ancestral land in the Rohtak Tahsil, Rohtak District, a sonless proprietor has unrestricted powers. 45 P. R. 1917 Ref. 73 P. R. 1895 dist. (*Campbell, J.*) *UGAR SAIN v. TELU*.

4 Lah. 113.

71 I. C. 829 : 1923 Lah. 193.

—*Alienation—Sonless proprietor in Rohtak.*

A sonless proprietor of the Rohtak Tahsil of the Rohtak District has unrestricted powers of alienation in respect of ancestral land. (*Martineau and Moti Sagar, JJ.*) *KALA v. MAM CHAND*.

4 Lah. 282 : 5 Lah. I. J. 404 : 73 I. C. 988

—*Alienation—Suit by collateral challenging.*

A collateral governed by the customary law of the Punjab does not derive his right to sue from or through his father but from or through the common ancestor who owned the land. (*Scott Smith and Fforde, JJ.*) *SARUP SINGH v. PAL SINGH*.

73 I. C. 357 : 1923 Lah. 642.

—*Alienation by widow—Legal necessity.*

A widow can alienate her husband's land after his death to pay off his just debts. Every person having an interest in property whether absolute or as a life tenant, e. g., a widow, can sell or mortgage such property for a necessary purpose. (*Scott Smith and Brasher, JJ.*) *HASSAN MAHOMED v. MAHANDA*.

5 Lah. I. J. 292 :

1923 Lah. 245.

—*Alienation—Widow—Necessity—Debts of husband—Future maintenance.*

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A widow in possession of ancestral property inherited from her husband has only a limited right therein and she cannot alienate the estate in anticipation of future expenses. Where the debts of her husband are not charged on ancestral property the widow is not justified in alienating the property for the discharge of such debts. Nor is the widow justified in alienating the property for raising money for her future maintenance. 4 P. R. 1913; 17 P. R. 1919 followed. (*Broadway J.*) *SUCHA SINGH v. PAL SINGH*. 69 I. C. 554 (2).

—*Alienation—Widow—Powers of—Daughter of collateral in fifth degree—Bandus.* See (1921) DIG. COL. 486. *MT. DIYAL KAUR v. MT. MEHTAB KAUR*. 74 I. C. 639.

—*Alienation—Will—Self-acquired property—Peshawar District.*

The practice of will-making in the Peshawar District is of comparatively recent date and it must be regarded as a growth of customary law. In other words Courts are faced with a custom which not only have developed in the past but is developing and will continue to do so in the future. The whole pathan community though it follows its own custom in preference to Mahomedan law, continued attempts are made by Courts to introduce features borrowed from Mahomedan law. As regards will-making in general and in particular in the kamalzai tribe an owner, who has sons, can make a will subject to two known restrictions, (a) he cannot disinherit a minor son, and (b) he cannot disinherit an adult son except for disloyalty. (*Pipon, J. C.*) *FIRDANS KHAN v. SHAH SOWAR*. 69 I. C. 853.

—*Alienation—Will by sonless proprietor—Khot Sarang of Talagang Tahsil Attock District.*

A sonless *awan* of Kot Sarang Tahsil Talagang, has not a free power to dispose of his ancestral property by Will. (*Broadway, J.*) *MT. RAKSHI v. BAZA*. 75 I. C. 659 : 1923 Lah. 305.

—*Applicability of agricultural custom.*

One of the most important tests to be applied in determining whether a particular caste is or is not governed by agricultural custom is to ascertain whether or not they form a compact village community or, at least a compact section of the village community. If they do so, the presumption is strongly in favour of the applicability of custom. This presumption in favour of custom has been applied even in cases of Brahmins, and must be still stronger when applied to a tribe whose religious and social status is much inferior. Where the caste concerned forms a compact section of the village community there is a strong presumption in favour of custom. (*Scott-Smith and Fforde, JJ.*) *PREM SINGH v. DARBARA SINGH*. 72 I. C. 775 : 1923 Lah. 557.

—*Burden of proof—Opposition to Hindu Law and agricultural custom.*

When a litigant in the Punjab sets up a custom which is contrary both to the Hindu Law and the agricultural custom of the Province, the onus is heavily on him to prove it. (*Abdul Raof and Campbell, JJ.*) *RAM NARAIN v. MT. HAR NARIN-KAN KUR*. 4 Lah. 297.

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—*Gift—Gift to two donees without defining shares—Tenants-in-common.*

Among the Mahomedan agriculturists of the Punjab a gift in favour of two or more persons without defining their shares creates a tenancy-in common among the donees without benefit of survivorship. (*Abdul Qadir, I*) *MUSA v. GUL MAHOMED.* 69 I. C. 538

—*Gift by male proprietor to collaterals—Gilatar Jats of Jhang District.*

Among the *Gilatar Jats* of the Jhang District there is a custom by which a male proprietor is empowered to make a gift in favour of a collateral. (*Broadway and Moti Sagar, JJ*) *SAMAIL v. AHMADA.* 4 Lah. 189: 73 I. C. 452. 1923 Lah. 517

—*Heirship—Persons of the same caste and Got,—Inference.*

The mere fact that plaintiff is of the same caste and Got as the alienor does not necessarily lead to the inference, that he is descended from the same common ancestor and is his heir. (*Moti Sagar, J*) *KIRPA v. MT. CHINTI.* 1923 Lah. 530.

—*Legal Necessity—Reversioner—Gift of self acquired property and charge on ancestral property.*

There is no authority for the proposition that a male holder of land both ancestral and acquired, must charge his just antecedent debts on the non-ancestral land. Custom permits the alienation of ancestral land for the purpose of paying just antecedent debts and a provision that this cannot be done, if there is self acquired land to alienate for that purpose would give the reversionary heirs a control over self acquired property to which they are not entitled. A person has a perfect right to gift his self-acquired lands to his daughter's son and to charge the ancestral land with debt. (*Campbell, J.*) *ARJUN v. JUG LAL.* 1923 Lah. 422.

—*Pre-emption—Mohala in a town—District Karnal—Sub-divisions of a town.*

Where a town is divided into sub-divisions, the pre-emptor must prove affirmatively the existence of the custom of pre-emption in the particular sub-divisions in which the property is situate and the onus is not discharged by proof of the custom in the neighbouring sub-divisions.

A judgment based upon a compromise or confession, though of some probative force, cannot be placed on the same footing as one in which after contest a custom is held to be proved or negated.

One or two solitary instances of admission of the custom supported by a few instances in the neighbouring sub-divisions are not sufficient to discharge the onus of proving the existence of the custom in *Mohalla* Bagarian which lay heavily upon the plaintiffs. (*Moti Sagar, J*) *LEKH RAJ v. INDAR MAL.* 4 Lah. 176: 73 I. C. 658.

—*Proof of—Custom at variance with law—Onus.*

The person who sets up a custom must establish it to the whole length of abrogating the law under which the opposite party claims title and if this is not done the general law must prevail. Possible inferences or probable implications

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cannot uphold a custom. (*Simpson and Wazir Hasan, J. J. C*) *BALBHADDAR PRASAD v. NARAYAN DAS.* 73 I. C. 727. 1923 Oudh 102.

—*Proof—Pleading—Variation—Evidence of—Judicial decisions.*

Although a custom must be sufficiently defined for its application to the facts of the particular case in which that custom is pleaded, so that it may be clear and undoubted, yet the party pleading the custom can be allowed to prove the same in a sense narrower than that stated in the pleadings. Decisions by courts on questions of custom afford valuable evidence as to the existence of the custom. 45 C. 450; 49 I. A. 119 Ref. A usage of recent date cannot be regarded as a custom. A custom must be proved by clear and unambiguous evidence to be ancient and invariable. In this respect there is no difference between a family custom and local custom. 14 M. I. A. 570, 45 C. 450, 461, 3 C.W.N. 21 Ref. (*Ashworth and Simpson, J. J. C*) *THAKUR RUDRA PRATAP NARAIN SINGH v. THAKUR NIRMAL PRASAD SINGH.* 1923 Oudh 61: 74 I. C. 225.

—*Proof of—Entry in wajib-ul arz.*

An entry in a *Wajib ul arz*: that in a village a Sale or mortgage can only be made to co sharers and not to strangers is the record of an existing custom. (*Cunning, A. J. C.*) *RAM KUMAR v. HAR PRASAD.* 9 O. & A. L. R. 648.

—*Proof of—Entry in Wajib-ul-arz—Presumption, See WAJIB-UL-ARZ.* 21 A. L. J. 822.

—*Reversioners—Declaration not of right.*

Grandfather's brother's sons cannot seek a declaration as reversioners in the presence of uncle. No one can ask for a declaration of a non-existing right but of a  *spes successionis* i. e., the chance or possibility of acquiring a right in the future. It will be open no doubt to him when succession opens out to sue for possession of the property if possession is denied him. (*Abdul Raouf and Moti Sagar, JJ.*) *LALU v. FAZIL DIN.* 4 Lah. 106. 73 I. C. 893: 1923 Lah. 403

—*Reversioner—Declaratory suit—Alienation by widow—Daughter.*

Even a remote reversioner is entitled to maintain a declaratory suit regarding a widow's alienation in the life time of the daughter.

A gift to a son-in-law, by any widow (whether the wife or mother of the last male holder) is not sanctioned by custom. 149 F. R. 1908; 4 P. R. 1890 followed. (*Campbell, J.*) *LUDDAR v. MT. BANSI.* 72 I. C. 873: 1923 Lah. 28

—*Sale of materials of house.*

Sale by non proprietor of standing house i. e. materials of house is ordinarily allowed by custom. (*Martineau, J.*) *SARDAR DIN v. MT. AJAH BIBI.* 1923 Lah. 394 (2).

—*Sonless proprietor—Appointment of heir*

According to the customary law, a sonless proprietor has the power to appoint one of his kinsmen to succeed him as his heir. The appointment in order to be valid must be made in some unequivocal and customary manner and the execution of a deed coupled with a long course of treatment has always been recognised as one of



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the modes of manifesting such an appointment. 9 P. R. 1893, 4 P. R. 1892, 94 P. R. 1893, 3 P. R. 1901, and 40 P. R. 1905. Foll. (*Broadway and Moti Sagar, JJ.*) *BAJ SINGH v. PARTAP SINGH* 1923 Lah. 497 (2).

———*Succession—Agnates of a land owner—*

*Prima facie* agnates of a deceased person are entitled to a share in his estate even though they live in another village and own no land in the village in which the land in dispute is situated. 47 P. R. 1917 Foll. An entry in the *Riwaj-i-am* is a strong piece of evidence in support of the custom mentioned therein. (*Scott Smith and Fforde, JJ.*) *MT. SANT KAUER v. SHER SINGH* 4 Lah. 392 73 I. C. 786 1923 Lah. 476.

———*Succession—A neshal property—Presumption—Equal shares.*

Where two branches of a family were found holding equal areas of property, while some were still joint, the presumption is that the properties were originally ancestral. This is also probablisied by the fact that a pedigree table mentions a common ancestor to whom the properties must have belonged. (*Shadi Lal, C. J. and Fforde, J.*) *MT. MARYAM BIBI v. GHULAM MUHAMMED* 73 I. C. 881.

———*Succession—Collaterals—Sister—Competition—Preference—Khotis of Pind dad Khan—Jhelum—District.*

As between collaterals of the eighth degree and sisters the burden of proving that the sister has a preferential right is on her especially when the entry in the *riwaj-i am* is against their contention. So held in a case of succession to non-ancestral property among the Khotis of Thasil Pind Dadan Khan, Jhelum District. (*Abdul Raoof and Adul Kader, JJ.*) *HAYAT v. AHMUN* 71 I. C. 201

———*Succession—Daughter—Brother—Preference.*

Under the customary law prevailing among the agriculturists of the Punjab the daughter takes the self acquired property of a deceased in preference to the brother. (*William and Ganga Ram, JJ.*) *WAZIRI MAL v. GANGA RAM* 69 I. C. 573.

———*Succession—Daughter and daughter's son and collaterals—Beris Sub-caste of Khatris—Hindu Law.*

Hindu Law is applicable to *Khatris Beries*, according to which the daughter and daughter's son excludes collaterals. Held plaintiffs, collaterals failed to prove that there was a custom among *Beris* (and specially the particular family) that the collaterals excluded daughter or her son. A single instance, however valuable is inconclusive. (*Broadway and Harrison, JJ.*) *BAL MUKAND v. MT. KISHAN DEVI* 72 I. C. 445 : 1923 Lah. 6.

———*Succession—Jats of Hoshiarpur Tahsil Rights of appointee's heirs.*

In the absence of a special custom among the Jats of Hoshiarpur Tahsil that in the presence of descendants of the appointee's (adopted son's) natural father, the descendants of the appointee are excluded from inheritance in his natural father's family simply because he has succeeded to the

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property of his adoptive father, it must be held that the tie of kinship with the natural family was not dissolved and the fiction of blood relationship with the members of the new family has no application to the appointed (adopted) heir and that the descendants of an adopted son can succeed to estate of the adopted son's natural family in the presence of the descendants in the natural family. (*Moti Sagar, J.*) *ISHER v. HUKUM SINGH* 73 I. C. 738 : 1923 Lah. 495.

———*Succession—grant—Special rule of devolution—Burden of proof.*

On a question arising as regards the succession to certain paikan lands (lands granted for the maintenance of paiks in a temple) held that the burden of proving that the daughters were excluded from inheritance was on the person alleging such custom. (*Chatterjee and Pearson, JJ.*) *SRIMAT DHARINI KALITANI v. SISURAM KALITA* 70 I. C. 36.

———*Succession—Jats—Sisters—Collaterals.*

The position of females generally, as has been established in many decisions, is every much stronger in the Western Punjab than elsewhere. According to the customary law of the Muzaffargarh District a sister or sister's son of a deceased jat excludes his collaterals of the third degree in the matter of succession to the estate. (*Harrison, J.*) *KADIR BAKHSH v. ALLAH DITTA* 73 I. C. 308

———*Succession—Joshi Brahmans of Hoshiarpur—Daughters.*

There is no custom among the Joshi Brahmans of Hoshiarpur District under which the widow and daughter of a predeceased son are entitled to succeed in preference to the daughters of the deceased. (*Martheau and Zafar Ali, JJ.*) *MT. BAL KUAR v. DEOKI* 4 Lah. 236 : 75 I. C. 109 : 1923 Lah. 579.

———*Succession—Koreshtis—Law Governing Sec (1922) DIG. COL. 524 MT. GHULAM ZOHR A v. NUR HASAN.*

69 I. C. 1000

———*Succession to a landowner—Contest between sisters and cousins—Onus.*

Where the contest is between the sisters of the deceased landowner on the one hand and the uncle and cousins on the other. The onus lies on the sisters to prove that they have a better claim to succeed to the property in dispute than the uncle or cousins. (*Scott Smith and Fforde, JJ.*) *MT. SANT KAUER v. SHER SINGH* 4 Lah. 392 : 73 I. C. 786 : 1923 Lah. 476

———*Succession—Law governing Koreshtis of Taragarh—Onus of proof. See (1922) DIG. COL. 524. NUR HASAN v. GULAM ZOHR A*

69 I. C. 693.

———*Succession—Mukwal Jats of Isan mahar Muzaffargarh District.*

All the tribes of the Muzaffargarh District recognise that on a man dying without male lineal descendant and leaving neither widow nor daughters nor daughter's sons the property passes to his (1) father, (2) brother or their descendants, and (3) sisters or their descendants. The position of a sister, therefore, in this District

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in matters of succession is a strong one. (*Broadway, J.*) HAYAT v. ALI MAHOMED. 73 I. C. 216.

—*Succession—Pagwand and Chandawand*  
In matter of inheritance the Gakhars of Bara Gowah village follow the rule of *Chandawand* (*Scott Smith, J.*) SAKHI MAHOMED KHAN v. MAIZ ALI KHAN 1923 Lah. 604.

—*Succession—Pagwand—Whole blood and half blood—Gagians of Peshawar.*

In the case of parties following the pagwand rule of succession, if a party sets up that whole blood excludes half blood he must prove it. Among the *Gagians* in Peshawar such a rule of exclusion exists.

General dicta on nature of custom, and duty of courts laid down. (*Pirpon, J. C.*) SARDAR KHAN v. MUHAMMAD ZAMAN. 73 I. C. 577.

—*Succession—Partly Muh Law and partly Custom.*

Although an heir may get inheritance according to Muh Law his estate may be governed by custom (*Martineau, J.*) RASUL KHAN v. MT. HAWASI. 75 I. C. 458 : 1923 Lah. 284 (2).

—*Succession—Per capita or per stirpes—Jats of Mauza Gurdaspur.*

The normal custom in the Punjab undoubtedly prescribes a division according to the *pagwand* rule, and the onus lies heavily upon the person who relies upon the *chundawand* rule i. e. division per stirpes. Not only is there a general presumption in favour of the division of property per capita but there are judgments relating to the Jats of Gurdaspur Tahsil in which the rule *chundawand* was held not to be proved and the rule of *pagwand* was followed in the matter of inheritance. Held also defendant failed to prove a family custom or to discharge the onus (*Shadi Lal, C. J. and Abdul Qadir, J.*) SHANKAR v. BAHADUR. 5 L. L. J. 212 : 71 I. C. 864. 1923 Lah. 37.

—*Succession—Qureshis of Multan—Special custom in contravention of the Islamic Law—Proof See MAH. LAW* 1923 Lah. 184

—*Succession—Rajputs of Rohtak District—Self acquisitions.*

Though under the customary law of the Punjab a daughter succeeds to the self acquisitions of the father in preference to the collaterals, among the Rajputs of Rohtak District the reverse is the case. The onus is on the collaterals to show the general custom did not apply, but the entries in the *Riwayat* are shifted the burden of proof. (*Broadway and Abdul Qadir, JJ.*) NANDOO SINGH v. BALJIT SINGH. 5 L. L. J. 203 : 69 I. C. 495.

—*Succession—Reversion—Descendants of donee alive.*

There is no reversion to the collaterals of the donor so long as the descendants of the donee whether male or female are existing. 100 P. R. 1917 and 82 P. R. 1918 Foll. (*Shadi Lal, C. J. and Brasher, J.*) MT. CHHOTU v. MT. SONA DEVI. 70 I. C. 299 : 1923 Lah. 11 (2).

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—*Succession—Sadoz family—Exclusion of females.*

In the absence of proof of special custom, the personal law of parties must govern. The Sadozis are descendants of Shah Shuja and are governed by Mahomedan Law in matters of succession, and females are not excluded. (*Pirpon, J. C.*) FATEH MAHOMMED KHAN v. MT. WAFIA BEGUM 73 I. C. 609.

—*Succession—Self-acquired property—Collaterals if exclude daughters.*

Among the agricultural tribes of the Sialkot Dt., the collaterals of a sonless proprietor do not exclude daughters from succession in the case of self-acquired property. (*Scott-Smith and Zafar Ali, JJ.*) BUDHA v. MT. FATIMA BIBI. 4 Lah. 99 : 1923 Lah. 401.

—*Succession—Shaikh converts from Bahal Khatri.*

Among sheikhs who are converts from Bahal Khatri sons exclude daughters from succeeding to their father's estate. Sons exclude daughters from succession to their maternal estates.

Brothers exclude sisters from succession to a childless brother's estate. (*Broadway and Campbell, JJ.*) NAJM-UD DIN v. ABDUL HAMID. 72 I. C. 845 : 1923 Lah. 175.

—*Succession—Sister—Khatri of Attock District.*

The sister of a childless male owner among the Khatri of Attock District is entitled to succeed to his non-ancestral property in preference to the collaterals of her father (*Abdul Raof and Abdul Qadir, JJ.*) MT. CHANNI BIBI v. AHMAD KHAN. 69 I. C. 331.

—*Succession—Sodhis—Rights of widows.*

There is no custom among the Sodhis of Anandpur whereby widows get no rights of inheritance but are only entitled to maintenance. (*Abdul Raof and Campbell, JJ.*) RAM NARAIN v. MT. HAR NARINJAN KUAR. 4 Lah. 297.

—*Succession by Step-mother—Aroras of Montgomery District—Presumption.*

There is no agricultural custom among the Aroras of Montgomery District by which a step-mother succeeds to her step-son. The fact that the tribe to which the parties belong have in many matters adopted agricultural custom is no doubt a fact to be considered in deciding whether or not the said tribe have adopted the particular custom set up by the plaintiff. But the fact by itself does not afford basis for the deduction that in the said tribe a custom exists by which a step-mother succeeds to her step-son. (*Broadway and Zafar Ali, JJ.*) MT. DIYAN v. HIRA NAND. 4 Lah. 202 : 73 I. C. 898 : 1923 Lah. 448

—*Succession—Superior and inferior holder.—Ala and Adna Malik.*

In the case of the *Ala Malik* of Mauza Shalwa in the Ludhiana Tahsil of the same district held that on the death of an *Adna Malik*, who has died heirless, the land held by him does not revert to the *Ala Malik* free of all encumbrances created

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by the former, if any. (*Comp. of and Moh. Sagat, JJ.*) DAL SINGH v. PULMAN 1923 Lah. 626.

-----Succession—Swath's—Pagawand rule—Exclusion

Among Swath's, the whole blood excludes the half blood. It is not always the case that under the Pagawand rule whole blood should succeed along with half blood relations. Under the chundawand rule, the whole blood excludes the half blood. (*Piton, J. C.*) GUL AHMAD v. GHULAM RABANI KHAN. 73 I. C. 675

-----Succession—Whole blood and half blood—Chundawand rule—Pagawand rule.

In cases of collateral succession arising under the customary law of the Punjab where the dispute is as regards the property of a common ancestor or the deceased and of the claimants, if the chundawand rule of distribution prevails the whole blood excludes the half blood, if the pagawand rule prevails both succeed together. (*Abdul Raouf, J.*) RIZK RAM v. SANWAT 69 I. C. 474 1923 Lah. 65.

-----Trade custom—Unreasonable—Not to be recognised.

A trade custom to be recognised by a Court of law must be universal as well as reasonable. A custom allowing an agent to make himself to a principal and thereby profit himself at the expense of the principal, is unreasonable, and cannot be implied in a contract of agency. (*Piggott and Walsh, JJ.*) KISHORI LAL v. JIWAN LAL. 1923 A. 242.

-----Wajib-ul-arz—Ambiguous statement—Evidentiary value.

A custom is not established by an ambiguous statement of it in a Wajib-ul-arz. But when it is not shown by reliable evidence that the Settlement officer neglected to perform his duty or was misled in recording a custom, and it does not appear that the statement of the custom is ambiguous, the record in a wajib-ul-arz of a custom is most valuable evidence of the custom, much more reliable evidence than subsequent oral evidence given after a dispute as to the custom has arisen. (*Sir John Edge*) BALGOBIND v. DADRI PRASAD. 45 M. L. J. 289 : 26 O. C. 217 : 45 A. 413 : 38 G. L. J. 302 : 33 M. L. T. 317 (P.C.) (1923) M. W. N. 799 : 9 O. & A. L. R. 581 : 10 O. L. J. 368 : 74 I. C. 449 : 50 I. A. 196 : 21 A. L. J. 578 : 1923 P. C. 70

-----Widow—Powers of alienation.

The powers of a widow in possession of her husband's property to make an alienation by way of gift not wider under the customary law of the Punjab than under the Hindu Law. (*Abdul Raouf, J.*) MT. DURGA v. PREM SINGH. 74 I. C. 653.

-----Widow—Right of partition—Burden of proof.

A widow of a deceased co-sharer has a statutory right to demand partition and the onus lies on the party who disputes such right to prove that it does not exist. (*Martineau and Moh. Sagat, JJ.*) GHANSHAM v. RAMJI LAL. 4 Lah. 344 73 I. C. 441 : 1923 Lah. 625.

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-----Succession—Widow—Right of—Relinquishment.

A widow who takes a life interest in her husband's property is competent to make a bona fide relinquishment to accelerate the reversion. It is however not open to her to do so merely in order to convert her limited title into an absolute one by collusion with the presumptive reversioner. More distant reversioners are entitled to impeach such a transaction exactly as they would be entitled to impeach an alienation to outsiders made by the life-holder with the assent and collusion of the presumptive reversioner. (*Piton, J. C.*) MT. RAM RAN v. ZARGUL. 70 I. C. 39.

-----Succession—Zargais of Batala—Law governing.

The Zargais of Batala are non-agriculturists and *prima facie* they would follow Mahomedan and not agricultural custom. The onus is on the party who wants to set up succession by custom to show it. (*Broadway and Abdul Qadir, JJ.*) ABDUL KARIM v. M. AMAT-UL-HABIB. 70 I. C. 205 : 1923 Lah. 121.

DAMAGES—Cause of action—False imprisonment—Warrant of arrest issued by error of court

No action will lie against any person for issuing execution or otherwise acting in pursuance of a judgment or order of a court of justice, even though it is erroneous. A valid order, though erroneous in fact or law, is a sufficient justification for any act done in pursuance of it. Where a person is arrested in pursuance of a warrant of Court, though illegal, he has no cause of action for false imprisonment against the person executing the warrant. (*Mulla, J.*) BACHOO BHAIIDAS v. VELJI BHIMSEY & Co. 25 Bom. L. R. 595.

-----Cause of action—Institution of legal proceedings—Injury—Compensation—Costs. See (1922) DIG. COL. 529. ARJUN SINGH v. PARBATI. 69 I. C. 173.

-----Cause of action—Injunction—Malice. See (1922) DIG. COL. 529. L. EVANS v. ARTHUR MINCK 69 I. C. 523.

-----Contract to marry—Implied promise.

The law does not say there must be an express promise of marriage to sustain an action for damages for breach of promise of marriage. (*Maung Kim, J.*) MAUNG SHWE THE v. MA E BON. 1 Bur. L. J. 259 : 74 I. C. 128 : 1923 Rang. 128.

-----Contract for sale of goods—Breach—Conversion of English currency into rupees—Date of.

The date at which the damages for a breach of contract are to be calculated is the date of the breach, and, following the English authorities, it is clear that the date on which the rate of exchange is to be taken for the purpose of converting the amount in English currency into rupees is the date on which under the agreement the money was to be paid and on which a breach occurred by its not being paid. (*Robinson, C. J. and Beasley, J.*) Y. A. SHAKOOR & Co v. FINLAY FLEMING & Co. 1 Rang. 339 : 2 Bur. L. J. 130 : 1923 Rang. 265.

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—Contract to sell—Mutual obligations—Effect.

In a case where there are mutual obligations on the parties, it is on the plaintiff to show that on the date fixed for performance of the contract, he was ready and willing to perform his part of the bargain. It may perhaps not have been necessary for him to prove that he made an actual tender of the money but it was, at any rate, incumbent on him to show that he had made arrangements for the purchase-money and was in a position to hand it over to the first defendant as soon as he was satisfied that the bulk of the goods was in accordance with the sample and that everything was satisfactory, (*Rafique and Lindsay, JJ.*) MAHOMED ISMAIL KHAN v. HASAN ALI KHAN. 1923 All 220

—Doctrine of frustration of contract.

To interpret a business bargain, expressed in the language of commerce, it is no doubt important to appreciate the methods and the point of view of business men, but this is merely a prudent way of qualifying the mind to construe their words, and so to determine their meaning, and is a very different thing from postulating that reasonable men would have been likely to agree to one kind of liability and not to another, and from this concluding that, whatever the words of the contract say that kind of liability, and that alone, is the obligation of the contract. As a matter of fact there is nothing surprising in a merchant binding himself to procure certain goods at all events. It is a matter of price and of market expectations. No doubt it is a speculation, but many dealings even in cotton goods are of that character.

Where the vendor performed a subsequent contract with Govt. during war after breaking the contract with plaintiff to supply goods as and when they may be received from mills, Held the adventure, of which the commercial purpose is suggested to have been frustrated, is of course, the purchase and sale of these goods between the parties to this contract, and this adventure was not frustrated. All that happened was, that the defendants failed to perform their contract. When they have paid the damages, one commercial purpose, at any rate, will, so far from being frustrated, have been fulfilled. The Mills, from which the goods were to come no doubt were contemplated as continuing to exist, though it does not follow that in a bargain and sale the closing or even the destruction of the Mills would affect a contract between third parties, which is in terms absolute; but where the Mills did continue to exist and did continue to manufacture the goods in question, only they were made for and delivered to somebody else, the matter is completely outside the principle enunciated in (1903) K. B. 740 or (1903) K. B. 756 (*Lord Sumner*). HARNANDRAI FULCHAND v. PRAG RAJ.

44 M. L. J. 498 : 47 Bom. 344 : 25 Bom. L. R. 537 : 27 C. W. N. 879 : (1923) M. W. N. 547 : 18 L. W. 441 : 72 I. C. 485 : 38 C. L. J. 248 : L. R. 4 P. C. 61 : 32 M. L. T. (P. C.) 171 : 50 I. A. 9 : 1923 P. C. 54 (2) (P. C.)

—Failure to execute proper lease.

A failure to execute a properly stamped lease according to agreement renders the lessor liable

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for damages. 42 C. 801 : 13 C. P. L. R. 163 : 20 C. W. N. 149 Foll (*Haltija A. J.*) Mr. MAKIUMBI v. ANANT RAM. 1923 Nag. 73

—Foreign currency—Conversion into Indian currency—Rate of exchange applicable. See FOREIGN JUDGMENT. 25 Bom. L. R. 143 : 2 Bom. L. J. 130

—Measure of—Contract—Tort—Trespass—Bona fides. See (1922) DIG. COL. 530. SHAN LAL v. LALA AMBA PRASAD. 69 I. C. 633.

—Measure—Proof—Loss caused by Rty.—Damage caused to goods and its value.

Where the plaintiff sought to prove by producing the invoices sent to him by the consignors showing that the value of the goods amounted to Rs. 304. Held it is *prima facie* evidence of what the plaintiff was charged for the goods and what presumably he would have to pay for them and in the absence of cross-examination it is perfectly admissible evidence and it would not be necessary to call the consignors and put them into the box to prove what was the actual value of the goods sent. (*Ryves, J.*) DUKHI RAM BARUA v. B. N. W. RAILWAY. 73 I. C. 440 : 1923 All 145.

—Measure of—Wrongful detention by Railway Co. and its servants or passenger for refusal to pay excess fare. See TORT.

1923 Bom. 172

—Negligence—Injury to workman on account of negligence of employer—Measure of damages.

The defendants (employers) for the purposes of their own business used a method of breaking up caste iron which consisted of dropping a heavy weight on pieces of iron on a bed of iron with the intention that these pieces should be broken into smaller pieces. The weight was dropped from a height of 35 feet with the inevitable result that pieces of iron flew about. It was found that the iron pieces habitually flew to distances of four or five yards from the pit. The fencing around the pit was only three feet high and in spite of it iron pieces were flying about. The plaintiff's husband who was employed under the defendants was working at a distance of 70 to 80 yards from the pit was hit by a piece of iron and killed. In an action by the plaintiff for damages held that the defendants owed a duty not only to the public but to their servants to take adequate precaution that the pieces of iron shall not cause injury, and that they were obviously negligent in putting up an inadequate screen round the pit. The defendants were therefore liable in damages, and they could not succeed on the plea of *volenti non fit injuria* as they failed to prove that the person injured knew of the danger, appreciated it, and voluntarily took the risk. As regards damages the High Court increased the award of the lower Court by giving three years' wages instead of one year's wages awarded by the lower Court. (*Sir Muller Schwabe, C. J. and Wallace, J.*) SOUTH INDIAN INDUSTRIALS v. ALAMELU AMMAL.

45 M. L. J. 53 : (1923) M. W. N. 344 : 72 I. C. 632 : 17 L. W. 495 : 1923 Mad. 565.

—Nominal—Trespass—Use of force—No loss to reputation or to person.

Where a person was given a slight push on the

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wrong assumption that he was a trespasser but it is found he has not suffered in person or in reputation, he is entitled only to nominal damages. (*Newbold and Pantor*, 31 FCMR KANI CHIVARURUTHY v. BIGNOLD. 1923 Cal 308)

—Prize—Proceedings—Claim as alternative to claim for release. See (1922 Dig Cal 198) SOCRATES ATACHIDES v. SECY. OF STATE

32 M. L. T. (P. C.) 81: 27 C. W. N. 557:  
1923 M. W. N. 846 18 L. W. 661

—Shipping—Warranty of seaworthiness—*Named vessel—Law of Canada*

Under S. 921 of the Canada Shipping Act a contract for a named vessel excludes any implied warranty and the damages for negligence would be limited to the extent specified in the section. (*Lord Philimore*, POINT ANNE QUARRIES, LTD. v. THE SHIP M. F. WHALEN. 32 M. L. T. 190 (P. C.))

—Statutory duty—Breach—Corporation—*Liability*

The Corporation of the City of Montreal was entrusted by statute with the duty of providing sewers and drains for the streets. Owing to its failure to provide safety valves for the sewers and as a result of extraordinary rain, the plaintiff's cellars were flooded. In a suit for damages against the corporation, *Held* that though the unusual rain might be described as *force majeure*, still as the corporation might have avoided the flooding by proper means, it was liable to the plaintiff for the damages caused. (*Lord Dunedin*,) THE CITY OF MONTREAL v. WATT, 32 M. L. T. (P. C.) 36.

DECLARATION—Suit for, that certain decrees were illegal—Maintainability—Decree for profits by Revenue Court in favour of recorded co-sharer.

H mortgaged certain property to four persons, one of whom was the predecessor of defendant B. B. transferred a part of his share to his wife and both B and his wife afterwards sold their share to S and another. Possession was however, not given as the whole of the purchase money was not paid. B and his wife sued S and another for the unpaid purchase money obtained a decree which was discharged in 1913. Their names were on the revenue papers before that date and they sued *tambardar*, who was a representative of the mortgagor, for their share of profits for those years obtained decrees in 1913 and 1915 and realised the amounts decreed. In 1911 the representatives of H had deposited the mortgage money in court for payment to Mr. and Mrs. B but on the court refusing to order payment, as there was a dispute between B and S, had withdrawn. The mortgagors then redeemed their property from S. and another and sued B and his wife for refund of the profits paid to them under decrees of 1913 and 1915, on the ground that the decrees were unlawful. *Held*, that B and another, being recorded co-sharers on the dates in respect of which decrees for profits were made, the decrees were good and the suit was not maintainable. (*Banerji and Wallace*, JJ.) MAHABIR PRASAD v. BASANT LAL. 70 I. C. 444.

DECREE—Compromise—Selling aside—Misapprehension of counsel—Effect

## DECREE.

Where under a *bona fide* mistake, the counsel in a case entered into a compromise, and before the decree was drawn up they wanted to withdraw their consent, the court will allow it and rehear the matter. If the decree is signed, a fresh action is usually necessary to set it aside. (*Heaton A. C. J. and Master*,) JA JAMSHEIJI NAOROJI v. SORABJI NAORJI. 25 Bom. L. R. 1137.

—Construction—Decree for sale on a mortgage—Description of property in the body of the mortgage deed and in the schedule—Mortgage of a Zemindari village—Residential buildings if included.

A mortgage decree directed the sale of a Zemindari village as described in the mortgage deed. In the body of the mortgage the property was thus described: "We (the mortgagors) have mortgaged to you for Rs. 15,000 the village of K. which is included in the four boundaries given below and which is attached to our Zemindari and which ancestrally belongs to us and is in our enjoyment . . . and which is capable of yielding an annual melvaram kist of Rs. 3,000". At the foot of the document was given a specification of the mortgaged property in these terms: "The four boundaries of the village of K attached to Zemini. (Then followed a description of the boundaries. The village of K situate within the four boundaries is inclusive of poramboke, nanja 52 velis (and odd) panjah 204 velis (and odd). The total of nanjah and panjah is 256 velis (and odd) excluding the lands sold up to date, the remaining lands and all the rights and privileges I possess in the waste lands, poramboke and other lands attached thereto all kinds of trees, topes, wells, ponds tankbunds, etc. have been given as security." On a question arising as to whether the residential buildings of the Zamindar situate in the village of K and within the four boundaries above-mentioned, were included in the security, *Held* (1) that the specification at the foot of the mortgage controlled the general words in the body of the deed, (2) that the words "and other lands attached thereto" occurring in the specification of the property were *ejusdem generis* with waste lands and poramboke, etc. enumerated previously; and that the residential buildings of the Zemindar did not pass under the mortgage. (*Spencer and Venkatasubba Rao*, JJ.) RAJAGOPALA PANDARATHER v. THIRUPATHI PILLAI. 44 M. L. J. 285: (1923) M. W. N. 230 72 I. C. 258: 1923 Mad 511.

—Construction—Costs—Order for—Several respondents.

If costs are awarded against a number of respondents without indicating the proportion in which those costs shall be borne by the different respondents such an order is always taken to mean that the respondents are jointly and severally liable for the costs, and the order for costs may be executed against any one of them, who will have a right of contribution against the others. (*Dawson Miller, C. J. and Mullick, J.*) THE MIDNAPORE ZEMINDARY CO. v. MADAN MARWADI. (1923) Pat. 17: 70 I. C. 782: 1923 P. 215

## DECREE.

—Construction—Interest chargeable under decree—Calculation of.

When under a decree the contractual rate of interest ceases to be payable at a given date and the court rate is substituted for it then from up to the date of realisation, the court rate will be chargeable on the whole amount due with interest at the contractual rate up to that given date. (*Ashworth and Simpson, JJ.*) **NAWAB MIRZA FAGHUR MIRZA v. KHUSHAL CHAND,** 26 O. C. 59: 74 I. C. 246. 1923 Oudh 241.

—Construction—Mortgage—Foreclosure decree—Village—Khudkasht land.

Where a foreclosure decree in respect of a whole village specifies particular *khudkasht* fields by their number the decree holder cannot claim other *Khudkasht* lands not specified in the decrees as falling within the general description of lands held in *khudkasht* right. (*Kotwal, A. J. C.*) **HAZARI LAL v. HAZARI MAL,** 1923 Nag 130.

—Construction—Mortgage—Redemption—Decree for redemption on payment of mortgage money in *chaitra* of any year—Rights of parties.

A consent decree was passed in a suit for redemption of the year 1886 in these terms: The plaintiff (mortgagor) do pay to debts 2 and 3 mortgagees) Rs. 55 in respect of the debt on mortgage in the month of *Chaitra* of any year and the plaintiff do obtain possession of the lands in suit considering the same to have been redeemed from the mortgage. It should be understood that plaintiff is not entitled to take possession of the lands in dispute in any other month except the month of *Chaitra*. The plaintiff applied in 1919 to execute the decree and claimed in the alternative that the application be treated as a suit. Held that the effect of the decree of 1886 was not to put an end to the mortgage, that the relationship of mortgagor and mortgagee continued to exist between the parties and only the amount due was ascertained. Even if the application of 1919 be considered to be one for the execution and as such barred under S. 48 C. P. Code still it could be converted into a suit for redemption under S. 47 C. P. Code. (*Macleod, C. J. and Croomf, J.*) **HANMANT ANANT v. SHIDU SANBHU**

47 Bom. 692: 25 Bom. L. R. 358: 72 I. C. 556: 1923 Bom. 300.

—Construction—Mortgage—Sale of interest of Judgment-debtor—priority set up but negatived—Rights of parties.

The owner of a village mortgaged it subject to certain alienations of the *Kudivaram* interest already made by him. The mortgage itself as well as the alienation were made to discharge a decree on a prior mortgage. The mortgagee brought a suit to enforce his mortgage and claimed priority over the alienee of the *Kudivaram* interest. The alienee who had purchased the *Kudivaram* interest set up his own priority as regards one of the items but said nothing as to the other two. The priority set up by the alienee was negatived and the decree directed the sale of the right title and interest of the mortgagor. The alienee took objection in execution proceedings to the sale of the whole property inclusive of the *Kudivaram* interest. Held that as regards one of

## DECREE.

the items in respect of which the alienee set up his priority there was an adjudication negativing his claim and that that item was liable to be sold in execution. As regards the other two items, there was no claim negativing the priority set up by the alienee and that the decree should be construed strictly so as not to affect the interest of the alienee. (*Spencer and Venkatasubba Rao, JJ.*) **SAMI GERUKKAL v. THIRUPATHIYA PHILLAI.**

18 L. W. 288. 72 I. C. 798

—Construction—Reciprocal reliefs.

A decree provided "that the plaintiff's claim be and is hereby decreed for cancellation of the bond in suit but the defendant shall have the right to recover Rs. 5000 from the plaintiff's property". Held that the latter portion of the decree was not a mere declaratory decree incapable of execution and that the defendant could execute it. (*Kanhaya Lal, C. J.*) **JHANDA SINGH v. ANWAR KHAN** 1923 Oudh 160.

—Setting aside—Grounds for—Perjury.

False evidence in a suit would not be fraud vitiating a decree unless the effect of that false evidence was to prevent the other party from putting his case before the Court. (*Phill, J.*) **GOKUL DAS PITAMBER v. ODHAVJI GAGABHAI.**

25 Bom. L. R. 393

—Effect of—Decree not put into execution.—Lapse of time—Declaration.

Where the plaintiff's title was established by a decree of 1907, the fact that the decree was not put into execution cannot affect the declaration of title made therein. The decree would only cease to have effect if it was set aside and otherwise it is erroneous on the part of the Court to go behind the decree into the question of title again. (*Ross, J.*) **JHUMAK SINGH v. MAHINDRA SINGH.**

71 I. C. 560.

—Fictitious decree—Effect of.

A decree which is fictitious does not require to be set aside; for a collusive and fraudulent proceeding in a court is not a judicial proceeding and is to be treated as availing nothing to the party who sets it up. (*Greaves and Cumings, JJ.*) **SOSHI KUMAR v. CHANDRA KUMAR**

1923 Cal. 204.

—Setting aside—Consent decree—Mistake—Unilateral mistake—Effect of revival of suit.

The law requires men in their dealings with each other to exercise proper vigilance and to apply their attention to those particulars which may be supposed to be within the reach of their observation and judgment and not to close their eyes to the means of information which are accessible to them. Where two parties are at arms length, either of them may *prima facie* remain silent, and avail himself of his superior knowledge as to facts and circumstances equally open to the observation of both or equally within the reach of their ordinary diligence. A consent decree could be set aside only on a ground which would justify a cancellation of the agreement on which the decree is passed. Though a suit does not lie to set aside a decree in a previous suit on the ground that the judge in passing that decree made a mistake, yet as an agreement may be rectified for

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an appeal is made in stake so may also the consent be given upon such agreement. A consent is not the act of one party only, not caused by the fraud induced by the act of the other party but of both, the agreement or the decree is not vitiated. 43 C. 217, 34 C. L. J. 257 8 C. W. N. 473 34 C. 703 Pat. L. J. 465 Rel. When a decree is set aside, the effect is to revive the original suit which was terminated by the compromise decree. 2 C. 184; 6 C. 687 9 C. 810, 11 C. L. J. 459, 15 C. L. J. 217; 22 C. L. J. 215, 55 M. 823 Rel. (*Mookerjee and Chatterjee, JJ*)

*MAJOR A. Y. RAJA v. RUKUMARI.*  
27 C. W. N. 575; 72 I. C. 33; 1923 Cal. 645

—Setting aside—Consent of parties—*Review of parties.*

A party is not to be allowed to correct its own consent when it is satisfied that in passing a compromise decree it was misled by one of the parties. A dispute has been drawn between fraud practiced upon the Court, where the question is whether there was a consent in fact of the parties to a decree, there is power to investigate the matter in a properly constituted application and to set aside the decree if satisfied that a party never consented to it, but where there was a consent in fact but a party alleges his consent was procured by fraud, the Court cannot investigate the fact either in review or in exercise of its inherent power and the only remedy is by suit. In other words the factum of consent can be investigated in summary proceedings, but not so the reality of the consent. (*Das and Kulwant Sahay, JJ.*) *SADHO SARAN RAI v. ANANT RAI.* (1923) Pat. 197; 2 Pat. 731 1923 P. 483.

—Setting aside—Construction—Aulad—Meaning of. See (1922) DIG. COL. 536. *MT. SAIDAN v. FAZLA.* 69 I. C. 177.

—Setting aside—Ex parte decree—Fraud—Non service of summons.

The mere fact that an ex parte decree has been passed does not show that there was no service of summons on the defendant and if anything, the presumption is that the Court passing the decree was satisfied that there had been a proper service of summons. It is incumbent on a person seeking to set aside the ex parte decree in a subsequent decree to prove that it was obtained by fraud. *ROSS, J.* *HARNARAIN PANDEY v. NAND KESHWAR PANDEY.* 1 Pat. L. R. 127; 71 I. C. 573; 1923 P. 406.

—Setting aside—Ex parte—Suppression of summons—Incomplete statement in plaint.

To set aside an ex parte decree on the ground of fraud in not serving the summons, there must be a finding that there was a fraudulent suppression of summons at the instance of the plaintiff.

An incomplete statement of a proposition of law in the plaint does not constitute fraud. (*Ghose and Pantar, JJ.*) *MAHAUL PRASAD v. MAHABIR PRASAD.* 1923 Cal. 569

—Setting aside—Fraud—Ex parte decree—Suppression of summons.

Where a decree is obtained *ex parte* after suppression of summons and on a misrepresentation of the facts to the Court, such a decree can

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be set aside by a separate suit and it stands on a different footing from a decree obtained by perjury. (*Chatterjee and Pearson, JJ.*) *THE INDIA PROVIDENT CO. LTD v. GOVINDA CHANDRA DAS.* 27 C. W. N. 359; 1923 Cal. 425

—Setting aside fraud—Nature of.

A decree can be set aside on the ground of fraud, if the fraud is extraneous to the suit. But one Court cannot entertain a suit to set aside a decree of another court, when the sole point is whether the latter court erred in believing the evidence before it. (*Behlsey, J.*) *MUSTHAN v. BABU MOHENDRA NATH SINGH.* 1 Rang 500

—Setting aside—Fraud—Non service of summons.

A suit to set aside an *ex parte* decree on the ground of non-service of summons is not maintainable when the same ground was taken unsuccessfully in an application under O. 9, R. 13, but if other grounds of fraud are alleged, it will lie. (*Mullick and Bucknill, JJ.*) *MAHANTH RAMRUP GOSHAIN v. MAHABIR SHAH.* 2 Pat. 833; 74 I. C. 825

—Setting aside—Fraud—Non service of summons—Deliberate suppression—Effect. See FRAUD. (1923) Pat. 336

—Setting aside—Fraud—Plea in defence—Decree acted upon.

Where a decree has been obtained by fraud, a party to the decree as a defendant in a subsequent suit can plead that the decree was vitiated by fraud and therefore not binding on him even though he had not sued to avoid the decree. 26 C. 891, 27 C. 11 Rel. If however he had acted in accordance with the decree, he cannot be allowed to challenge its validity unless he proves specifically the circumstances which constitute the alleged fraud on him of the Court. (*Mookerjee and Chatterjee, JJ.*) *PULIN BEHARI DEY v. SATYA CHANDRA DEY.* 70 I. C. 548; 1923 Cal. 79.

—Setting aside—Fraud—Suppression of evidence—If amounts to.

Suppression of evidence in a case where the onus of proof is on the other party does not amount to fraud on the basis of which the decree could be set aside. (*Macleod, C. J. and Crumf, J.*) *SHRINIWAS SARJERAO v. NARAYANRAO NAVLOH-RAO.* 1923 Bom 379.

—Setting aside—Fraud—Suppression of evidence—False claim.

The mere fact that a notice of a suit was not served on a party is not necessarily fraud. If, on the other hand, it is shown that there was any deliberate suppression of notice particularly in order to give effect to any scheme such as that alleged, then such suppression of notice would be clearly fraud. Further it is not necessarily fraud on the part of any person to put forward a claim which is in fact unfounded in law. A person may make a claim to which he is not entitled and his conduct is not fraudulent merely on that ground. It must be found that there were circumstances which establish that the

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over-claim, if there be one, was made with knowledge and for a fraudulent purpose. (*Woodroffe and Suhrawardy, JJ.*) JOGESH CHANDRA GHOSE v. PROSANTA KUMAR TALUKDAR. 71 I. C. 962

——— *Setting aside—Fraud—What constitutes—Procedure on setting aside decree.*

The test as to whether a suit lies to set aside a decree is whether there was fraud practised in relation to the proceedings in court by which the defendant in the original suit was prevented from placing his case before the court.

Where a decree is set aside as fraudulent, the suit cannot be re-heard. Where a suit is brought to set aside an *ex parte* decree as fraudulent, the onus is upon the plaintiff to show that the summons was suppressed, and he can show that the claim was false so as to lead to an inference as to the fraudulent suppression of summons. It is not upon the defendant to show that his claim in the previous suit was a true one. (*Das and Bucknill, JJ.*) DAMODAR PRASAD v. RAMSARUP KUMAR. 4 Pat. L. T. 102 : 71 I. C. 843 : 1923 P. 327 (1923) Pat. 137

——— *Setting aside—Grounds for—Suppression of evidence.*

A suit to set aside a decree on the ground that in the former suit accounts were suppressed is not maintainable. 45 I. C. 775 foll. (*Pratt, J.*) ARLANDU v. C. T. A. A. L. SITHAMBARAM CHETTY 74 I. C. 278 : 1923 Rang 82 (1)

——— *Setting aside—Grounds for—Reliefs going beyond the prayer in the plaint.*

In a suit to set aside a decree in a prior suit as having been passed without jurisdiction the facts found were these. In the plaint in the previous suit it was alleged that a certain lease hold property was pledged as security for the unpaid commission or royalty and though no specific prayer was inserted for enforcement of that charge, the facts upon which the charge might have been asked for were stated in the plaint. The plaintiff prayed for a much wider relief namely possession of the leasehold property according to the terms of the kabuliyat which gave him a right to reenter. The Court passed a decree for a certain amount and directed that in the event of the same not being paid within a certain time, the leasehold property was to be sold. *Held* that in the prior suit a case had been made which could serve as a foundation for the relief granted in the prior suit, though it had not been specifically asked for consequently it could not be said that the relief was not within the scope of the prior suit and that the decree in the prior suit was not without jurisdiction. Under O. 7 R. 7 C.P.C. it is competent to the court to grant a general or other relief even though it had not been asked for. (*Miller C. J. and Foster, J.*) SATYATARAN CHAUDHURY v. JYOTI PRASAD SINHA DEO. (1923) Pat. 153 : 1923 P. 386

——— *Setting aside—Inconsistent relief*

A person cannot sue to set aside a decree against a firm on the ground that he was not a member of the firm and that the decree was obtained against the firm by fraud and collusion. (*Harrison, J.*) JAWAHAR SINGH v. SASSOON & Co. 75 I. C. 165 : 1923 Lah. 290

## DEED.

——— *Setting aside—Jurisdiction—Void and Voidable decrees—Distinction between—Absence of jurisdiction—Irregular assumption of jurisdiction—Minor—Guardian—Appointment of.*

There is a clear distinction between a judgment which is voidable and that which is void. An erroneous judgment is a voidable judgment for the argument that a judgment is erroneous assumes both the regularity of the procedure and the jurisdiction of the court to render it. An erroneous judgment is one which, though regularly rendered, is contrary to law or facts, and is, therefore liable to be reversed by an appellate tribunal. An irregular judgment is also a voidable judgment; but the distinction between an erroneous judgment and an irregular one is this, that whereas an erroneous judgment will always be reversed by an Appellate Court, an irregular judgment will be reversed in appeal or ignored in a collateral proceeding only when it is shown that the irregularity in the proceeding has affected the merits of the case between the parties. A void judgment on the other hand, is a judgment where there was a total lack of jurisdiction in the Court to render it. Such a judgment is a mere nullity. It is not necessary to set it aside. It can be completely disregarded whenever it is pleaded in support of a claim or in answer to a claim. There is also a distinction between existence of jurisdiction and exercise of jurisdiction. Where there does not exist any jurisdiction to try and determine the cause, the judgment is void, and it can be impeached collaterally. But where there does exist such a jurisdiction, but in the exercise of the jurisdiction, the Court has acted illegally or with material irregularity, the judgment is voidable, and it can be vacated in an appropriate proceeding either by the Court which rendered it, or, under the C. P. Code, by the Appellate Court, either in appeal or in revision, (1905) 33 Cal. 68; (1920) 24 C. W. N. 723 followed.

Jurisdiction is of four kinds:—

(1). Territorial jurisdiction (2) Pecuniary jurisdiction (3) jurisdiction of the subject-matter, and (4) jurisdiction of the person.

Jurisdiction as to person is conferred on the Court by suing the person in a court competent to try the cause as against that person before the Court. Where the conditions for the assumption of jurisdiction as against a person exist, the authority of the court to try and determine the cause as against him is complete, and the mode which the court adopts to bring that person before it affects the exercise of jurisdiction, and not its existence. A judgment will not be regarded as a nullity, although it has been rendered in direct contravention of a statutory provision. (1893) 21 C. 66; (1901) 25 Bom. 337, (1920) 24 C. W. N. 723 followed. (*Das and Adams, JJ.*) PANDE SATDEO NARAIN v. RAMAYAN TEWARI. 4 Pat. L. T. 147 : 71 I. C. 705 : 2 Pat. 335 : 1923 P. 242 (2).

——— *Setting aside—Minor—Mortgage suit—Negligence of guardian—Omission to raise valid plea—Necessity.* *cc* (1922) DIG. COL. 535. CHUNDURU PUNNAYAH v. RAGAN VIRANNA 70 I. C. 668.

## DEED—Construction.

A deed recited that there was originally one house and it then proceeded that three houses were



## DEED.

afterwards built anew and "are hereby sold to you with the right of ingress and egress through the main door, and given over to your possession". Then followed the particulars of boundaries. Then a clause "there is an open Chowk belonging to these three houses, and in front of the door of my other house. All may use the said Chowk according to the limits of their respective houses and the inmates of all the four houses have the right of egress and ingress through the main Kadki door". *Held* that the words "Open Chowk belonging to these three houses" do not mean having regard to the context that the Chowk was to be in the exclusive ownership and possession of the three houses. The words "all may use the said Chowk" meant all four houses and that they have the same meaning as "in front of all the four houses" referred to in the next sentence. The words "according to the limits of their respective houses" meant not all might use the Chowk and this means the whole Chowk. (*Marten and Fawcett, JJ.*) *SHAH EULAKHIDAS v. SHAH GUNPATRAM.* 1923 Bom. 281.

## —Construction.

Clause 2 of the document provided that the vendor shall draw upon the purchasers through any bank in sterling for the total amount of the invoice at 60 days sight free of interest, the bill of lading and shipping documents to be handed to the purchasers on payment of the draft. The purchasers further bind themselves to accept such drafts upon presentation and pay at maturity notwithstanding any objection they may have on account of any variation whatever from the terms of the indent, such objections if any, to be settled privately or by arbitration. Clause 8 contained the provisions as to arbitration and commences with the statement that the purchasers shall not raise any claim in respect of the transaction unless they have accepted and relied the draft or drafts. *Held* upon the true construction of that agreement that purchasers are bound to accept the drafts upon presentation or tender of the bills of lading and shipping documents and that no claim by the purchasers can be raised, nor arbitration invoked, until such payment has been made. (*Shadi Lal C. J., and Ffordce, J.*) *BUBBY HURBY AND CO. v. HERTZ AND CO.* 4 Lah. 215 : 73 I. C. 421 : 1923 Lah. 541.

## —Construction—Consideration.

A sale purported to be for a sum of Rs. 1,200. It was recited in the sale-deed that a sum of Rs. 550 was being left with the purchaser to redeem a prior mortgage and the balance of Rs. 650 was to be paid before the registering officer. It was found that the money was handed over to the vendor before the registering officer but that after it had been so made over it was returned again to the purchaser. It was found that the market value of that property sold was not more than Rs. 500; *held* that if by this transfer the vendor was getting rid of the liability to pay a sum of Rs. 550 it cannot be said that there was no consideration for the transfer. (*Lindsay and Sulaiman, JJ.*) *ALAMA CHAND v. CHHABU.* 45 A. 559 : 1923 A. 530 : 74 I. C. 339.

## —Construction—Ambiguity—Conduct of parties.

## DEED.

Where a document is ambiguous, it is always to construe it by showing how the parties have acted under the document (*Wazir Hasan A. J. C.*) *SHAIKH ALI ABBAS v. RAJA KUMAR SHER BAHADUR SINGH.* 9 O. & A. L. R. 815 : 75 I. C. 267.

—Construction—Aulad—Meaning of. See (1922) DIG. COL. 535 *Mr. SAIDAN v. FAZLA.* 69 I. C. 177.

—Construction—Boundaries and area—Conflict between—Land found to be of less area. See (1922) DIG. COL. 536. *NARAIN DAS v. JAWAHIR SINGH.* 69 I. C. 827.

—Construction—Clause altering rule of succession and restraining alienation—Effect, See (1922) DIG. COL. 536. *MT. MAHADAI KUAR v. BAGESHAR RAI.* 69 I. C. 777.

—Construction—Conflict between area and boundaries.

Where a deed contains an adequate and sufficient definition of the property intended to pass, any erroneous statement contained in it as to the dimension or quantity of the property will not vitiate the description. (*Das and Foster, JJ.*) *LINTON MOLESWORTH AND CO. v. JAGANNATH SUPAKAR.* 1 Pat. L. R. 377.

## —Construction—Consequence.

A document purporting to be an adoption deed contained the following words, "you (the adopted-son) alone are the full owner of my moveable and immoveable property." *Held* the executant in executing the deed, which was to evidence the previous adoption did not intend to transfer thereby all his immoveable and moveable properties unless he used in the document words of conveyance or transfer. (*Macleod, C. J., and Crump, J.*) *SHIDAPPA v. SANTAWA KOM.* 1923 Bom. 302.

## —Construction—Description of property—Conflicting description.

When the premises is sufficiently described, as by giving the particular name of close, or otherwise, an erroneous additional description will be rejected as a 'false demonstration', but if there is not this certainty in the first description as if it is expressed in general terms and a particular description is added, the latter controls the former and limits the generality of the earlier description. Where there is a conflict between the two descriptions, the question which the court has to consider is, whether the words constituting the second description, should be rejected as a false description, or whether they should be read as words of restriction. The test is this, if the first description is sufficient in itself to identify the land which is conveyed, then, if there is a conflict between the first description and the second description, the second description ought to be rejected as a false description, but if the first description is not sufficient by itself to identify the lands intended to be sold, then the second description ought to be read as restricting the operation of the grant. The question then is this: is the first description sufficient in itself to identify the lands in dispute? (*Das and Kulwant,*

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*Sahay, JJ.*) GOPAL MISSEER v. PARTAP MANDAL.  
4 Pat. L. T. 652 72 I. C. 643

## —Construction—Endorsement—

An endorsement appended to the Registrar of Sunads will not be a sufficient proof that the property is vatan property. 25 B 470 Foll. (*Macleod, C. J., and Crump, J.*) DULAKRI KOM v. MAHOMED HANIF. 1923 Bom. 296 (1).

## —Construction—Evidence of acts and conduct of parties.

Evidence of the acts and conduct of parties is inadmissible to show that document is not what it purports to be, namely, that it is not a mortgage but really a sale. (*Walmisley and B B Ghose, JJ.*) KAMALA KANTA v. ANNADA CHANDRA CHAKRABURTY. 71 I. C. 1030

## —Construction—Fixed rent.

A document purporting to be a lease provided. "You will enjoy from generation to generation keeping intact the boundaries as before. The profit and loss are yours. You will on no account be entitled to claim a reduction of rent. When required by me you will submit to Jarip Jamabandi.....If any new imposition be made by the Government you will pay it besides the Jama of this Potta". Held that the lease was not one of fixed rent. (*Chatterjee and Pearson JJ.*) KRISHNENDRA NATH SARKAR v. RANI KAMANI DEBI. 1923 Cal. 351.

## —Construction—Further Charge—Description of properties—Sufficiency.

Where a mortgagor took a fresh advance under the terms of a document styled a mortgage and the document gave the boundaries and description of the properties as in the original mortgage, Held that the document constituted a deed of further charge. 64 I. A. 83; 20 A. L. J. 601, 6 A. L. J. 255; 31 A. 482 Rel. (*Simpson, A J C.*) GAYA PRASAD v. RACHPAL. 70 I. C. 66. 1923 Oudh 24

## —Construction of—General rule.

(1922) DIG. Col. 538. RAJA BHUPENDRA NARAYAN SINGHA BAHADUR v. MIDNAPORE ZEMINDARY COMPANY LTD. 37 C. L. J. 556.

## —Construction—Gift to adopted son—Adoption invalid—Effect.

Where a testamentary disposition contains a gift to an adopted son, but the adoption fails courts have to consider whether under the circumstances of the particular case whether the adoption was the reason or motive for the gift or whether the mention of the donee adopted son was merely description, in which latter case he would still take (*Shadi Lal, C. J. and Lumsden, J.*) ISHER SINGH v. SURAT SINGH. 4 Lah. 356 : 74 I. C. 294

—Construction—Gift by husband to wife—*malik mustakil Kamal*. Provision in favour of future son or daughter—Effect.

Where a husband gifted away properties to his wife, making her the permanent and full owner *malik mustakil Kamal*, but adds a final clause to the effect that if a son or daughter is born and lives at her death, that person is to be the permanent or full owner.

## DEED.

Held, the deed should be construed as a whole and the mere use of the words "*malik mustakil Kamal*" did not confer an absolute estate, as it would be inconsistent with the last clause. Taking the document as a whole, it conferred only a life interest. (*Coutts and Ross, JJ.*) SORABHAI PANDE v. RAJ KUMAR PANDE 69 I. C. 957 (1) : 1923 P. 87.

## —Construction—Gift of occupancy and inam rights

In a gift deed of inam lands the Inamdars stipulated that the lands were free from assessment and undertook to be liable for the same, in case the donee had to pay it. Held, it was a gift of occupancy and inam rights and the donors and their heirs were liable in respect of the stipulation. (*Shah A. C. J. and Coyajee, J.*) RAMCHANDRA MADHAVRAO v. TRIMBAK SHRIDHAR. 25 Bom. L. R. 1074.

## —Construction—Gift or will

A document though called a will, if the intention as gathered is to make a transfer in *praesenti* is really a deed of gift. (*Abdul Raouf, J.*) MT DURGEO v. PREM SINGH 74 I. C. 653.

## —Construction—Gift or will. See (1922)

DIG COL 539 MAHOMED ABDUL GANI KHAN v. FAKHR JAHAN BEGAM. 37 C. L. J. 1 (P. C.).

## —Construction—Heirs and representatives

## —Meaning of.

In construing an instrument carrying out a decision of court, the maxim *ut res magis valeat quam pereat* should be borne in mind. The words "heirs and representatives" are words of limitation and not of purchase and following words conveying a life estate, are intended to convey an absolute estate. (*Lord Phillimore*). LAL RAM SINGH v. DEPUTY COMMISSIONER OF PARTABGAR. 45 A. 596 21 A. L. J. 777 : 26 O. C. 257 : 33 M. L. T. 355 (P. C.) : 9 O. & A. L. R. 746 : 50 I. A. 285 : (1923) M. W. N. 591 : (1923) P. C. 160 (P. C.).

## —Construction—Intention of parties,

The intention of the parties to a document must be gathered from the terms of the deed itself and oral evidence is excluded by S. 92, Evidence Act. (*Ryves and Daniels, JJ.*) BISHAMBHAR NATH v. MUHAMMAD UBAIDULLAH KHAN. 45 A. 581 : 21 A. L. J. 503 : L. R. 4 A. 433 : 1923 A. 586.

## —Construction—Intention of parties—Subsequent admissions—Value of.

Whatever title may have vested in a mortgagee from a tenant must be traced to the mortgage bond and cannot be rested on an admission of the tenant himself. The question clearly is not, what the tenant intended to mortgage, but what was conveyed by virtue of the description actually inserted therein. The admission of the tenant cannot be utilized to contradict the document, and it would be dangerous to allow outside evidence to show the intention of the writer, which is not disclosed by the authorised channel, namely, the words which he himself selected. (*Mookerjee and Rankin, JJ.*) MANMATHA NATH KAR v. PROBODH CHANDRA. 37 O. L. J. 52 : 73 I. C. 416 : 1923 Cal. 102.

## DEED.

—Construction—*Kan*—Meaning of.

Held on the interpretation of the document in question that an exemption from liability to pay any Kar covered revenue, rent or any kind of tax including road cess. (*Newbould and Cuming, JJ*)  
ANNADA CHANAN DE SARKAR v. HABIBULLA.  
1923 Cal. 283 (1).

## —Construction—Lease or mortgage.

Where the consideration for a document is an old debt and possession of the property was given over to the other party for a fixed period of time but there were no terms making him accountable for profits or for the repayment of the debt, the document is a lease and not a mortgage. (*Batten, J. C*) BHICKA v. SHAIK AMIR.  
19 N. L. R. 1: 69 I. C. 511: (1923) Nag. 60.

## —Construction—Lease or sale deed—Terms and conditions.

A document purported to be a perpetual lease of 5 bighas, 5 biswas and 8 dhurs for a premium of Rs-493, the rent reserved being Rs. 5-5-0. The lease went on to provide that the lessee, generation after generation, shall be entitled to remain in possession of the leased property as pattadar and would have the right to have his name recorded in the revenue papers as tenant and perpetual pattadar, that he would be liable to pay the rent reserved year after year and instalment after instalment; in the event of the rent falling in arrears, the lessor would have all the rights of an owner with respect to its realisation, but that there would be no right to have the lease cancelled, the rent enhanced or to eject the lessee.

It was clear that the lessor and his representatives would for all time to come have the right to recover the rent reserved though it may be small. They would also under the law have the right of reversion in case the line of the lessees became extinct. As under the terms of this document the proprietary interest of the lessor, had not ceased, there could possibly be no escheat to Government. The liability to pay Government revenue rested on the lessor, and he could not escape it.

Held it could not be open to any of the representatives of the lessee to deny that the transaction was anything other than a lease or to refuse to pay rent. In spite of the direction as to non-enhancement of the rent, it was clear that if at the next settlement the Government revenue were to increase the lessee would be bound under section 49 of the Agra Tenancy Act to submit to an enhancement of rent or to allow the lease to be avoided. So long as these rights are reserved to the lessor it was impossible to hold that this transaction was an out and out sale. (*Lindsay and Sulaiman, J.J.*) BHAIRO TEWARI v. RAMNATH RAI.  
21 A. L. J. 734:  
I. R. 4 A. 529: 75 I. C. 404.

—Construction—Life estate or estate of inheritance—*Patta Dawani*.

A *patta dawani* is no doubt the same thing as a *Patta Ismarrari* and in order to determine the question whether it conveys a life estate or estate of inheritance, the Court must arrive as well as it can at the real intention of the parties to be collected chiefly, no doubt, from the terms of the instrument itself, but to a certain extent also from the

## DEED.

circumstances existing at the time of its execution and further by the conduct of the parties since its execution. (*Fremantle, S. M. and Burn, J. M*)  
MR. KAUSHLA v. RAI BAJRANG BAHADUR.  
I. R. 4 A. 142 (Rev.).

## —Construction—Limited owner—Gift by—What passes.

When a limited owner recited in a document that she had a limited interest in the property and gifted it to another, what passes is only her limited interest. (*Ashworth, J. C.*) MT. MAHESHA v. RAMESHAR.  
74 I. C. 295

## —Construction—"Malik"—Gift to wife.

The words "*malik*" or "*malkiyat*" in a formal document imply an absolute estate unless there is something in the context to qualify it, and deeds in favour of females must be interpreted in the same way as any other deeds (*Scott Smith, J*) MT. MUHAMMADI v. KARAM BAKHSH.  
72 I. C. 977.

## —Construction—Meaning of words—Question of inference from words used—Distinction between.

The distinction as to how far a decision upon the contents of a document is a question of law and how far it is a question of fact may be thus stated. The expression "construction" as applied to a document, at all events as used by English Lawyers means two things; first, the meaning of the words; and secondly, their legal effect, or the effect which is to be given to them. The meaning of the words is a question of fact and the effect of the words is a question of law. (*Stuart, J.*) SHEIKH MUHAMMAD SHAKUR v. ABDUL GHANI.  
71 I. C. 369: 1923 A. 362.

## —Construction—Mortgage—No provision for payment of interest—Redemption

In a deed of mortgage there were four conditions: (1) that within three years the mortgage would be redeemed on payment of the mortgage money namely Rs 180; (2) that the mortgagor would pay interest at the rate of one rupee six annas per cent, (3) that the mortgagee would retain possession of the mortgaged property and (4) that the mortgagee would be responsible for repairs. Held, on a construction of the mortgage that the condition as to redemption on payment of the mortgage money was complete in itself, and that the condition as to payment of interest constituted a separate account and there was nothing in the deed which made it obligatory on the mortgagor to pay interest as a condition precedent to redemption. (*Scott Smith, J. on a difference of opinion between Marlineau and Harrison, J.J.*) JWALA SINGH v. TEJA SINGH.  
71 I. C. 801.

## —Construction—Object of instrument—Statutory provisions—Relevancy of.

Where there is more than one possible interpretation of a deed it is proper and necessary to look to the statute by which the form and purposes of the instrument are prescribed to fix, upon that construction which is consistent with the statute. (*Sir Henry Duke*) THE UNITED STATES FIRE AND GUARANTEE Co. v. THE KING.  
33 M. L. T. 436 (P. C.).

## DEED.

## —Construction—Other deeds of similar character.

The construction placed upon an instrument in one case does not necessarily determine the construction to be placed upon a different instrument in another case, even where the expressions used are similar. (*Chandrasekhara Aiyar, C. J. and Ramaswamy Iyengar, J.*) *EREGOWDA v. MARAPPA.* 1 Mys. L. J. 84.

—Construction—Pattah—Increase of rent—Accretion. See (1922) DIG. COL. 539. *PARBATI CHARAN SAHA v. SECRETARY OF STATE FOR INDIA.* 69 I. C. 188.

## —Construction—Possession of land includes possession of superstructures also.

In a suit in ejectment of the defendant from certain land on which there were some huts. The huts were found by the lower Courts to belong to the plaintiff. There was no reference to the huts in the plaint but the decree was as follows. "The suit being decreed with costs and interests, the plaintiff will get *khas* possession of the disputed land on ejecting the defendant therefrom, as prayed. The defendant himself must remove all his personal properties from the disputed land within one month. In default the plaintiff will have to remove the same with the help of the Court and he will get *khas* possession of the said land."

Held that the decree directing *khas* possession by ejecting the defendant, would necessarily give the plaintiff a right to *khas* possession as against the defendant in respect of the huts also. (*Chatterjee and Cuming, J.J.*) *JNANENDRA NATH MOOKERJEE v. BRAHMAPADA PRAMANICK.*

1923 Cal. 704

## —Construction—Power of attorney—If amounts to disposition.

Where a body executed a *mukhtearnama* appointing somebody manager and general agent till a minor grandson attained majority, there is no conveyance of title to the grandson, nor could it be treated as a will or declaration of trust. (*Bucknill and Ross, J.J.*) *RAM BAHADUR SEN v. GANESH BHAGAT* 2 Pat. 554 : 73 I. C. 542 : 1924 P. 49.

## —Construction—Principle of.

No general rule can be laid down with regard to the construction of documents and each document must be interpreted according to its own terms. (*Kanhaiya Lal, J. C. and Dalal, A. J. C.*) *SHAIKH RUTAB ALI v. MAHOMED ZAMAN BEG.* 1923 Oudh 47

## —Construction of property—Conflicting descriptions—Preference.

Where there is a discrepancy between one specification of property and another in the same document, that which is more certain, stable, and the least likely to have been mis taken or inserted inadvertently must prevail. If it sufficiently identifies the subject-matter. (*Wazir Hasan, A. J. C.*) *RAGHO PRASAD v. SECRETARY OF STATE.* 9 O. L. J. 629 : 74 I. C. 389 : 1923 Oudh 114.

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## DEED.

## —Construction—Release of a share-Father's property—Share of brother's property on his death—Estoppel.

Plaintiff at the time of partition with his brothers for a certain sum of money released his share in his father's property in favour of his brothers. On the death of a brother (one of the releasees) he sued for his share. The deed of release ran as follows : "Said releasor, (plaintiff) for himself, his heirs, executors and administrators relinquishes all his right, title and interest in and to the firm of "M. Hakimji" and all the remaining moveable and immoveable properties hereunto jointly owned and possessed by the said releasor and the said releasees (his brothers), or to the ownership or possession of which they may now or hereafter be entitled as heirs of the late Seth Mamoonji and proprietors of the said firm of M. Hakimji." Held it is clear that what the plaintiff was relinquishing was only his claims as an heir of his deceased father and as joint owner of the firm M. Hakimji. Had it been his intention to give up any future right of inheritance that might accrue to him from the death of one of the releasees this would have been expressed in the deed. Plaintiff was not estopped by the deed of release. Halsbury's Laws of England Vol. X page 461 F ; 20 Cal. 373 Dist. (*Martineau and Campbell, J.J.*) *SETH YUSAF ALI MAMOONJI v. SETH ALI BHOY.* 1923 Lah. 8.

## —Construction—Relation of principal and agent—How created.

Where a document did not say that a person was appointed an agent to carry on the business of another or an agent with full power to represent it, but merely 'as agent in the share brokerage business', the document read as a whole was construed to mean only relation of sub-broker and broker. (*Fawcett and Coyager, J.J.*) *MORARI PREMJI GOKULDAS v. MULJI RANCHHOD VED & CO..* 25 Bom. L. R. 1014.

## —Construction—Rule of.

According to the general rule of construction, no part of a document should as far as possible be left out as redundant. (*Abdul Raouf, J.*) *MT. DURGO v. PREM SINGH.* 74 I. C. 653.

## —Construction—Sale or lease.

Where a lease deed conferred on the lessee very extensive rights including the right to sink a well or to construct a house and no right of re-entry was reserved. Held that these are sufficient grounds as between parties to the document for holding that the lease is not a lease but a sale. (*Daniels, J.*) *INDER DEO RAI v. RAM CHARIT-TER RAI.* 74 I. C. 971 : 1923 A. 560.

## —Construction—Sale of staircase—Landing if included.

Held that a sale of a staircase included also the "tharri" or landing since no one would buy a share merely in the staircase if the purchase did not include a right to go over the landing at the foot of the staircase. (*Martineau, J.*) *SHAMBHU SAHAI v. GAMAN.* 5 Lah. L. J. 73

## —Construction—Settlement of property on trust—Gift of absolute estate.

## DEED.

A parsi lady executed a deed of settlement of which she appointed one M. and her son Rustomji the trustees, and by which she settled the immoveable properties for herself for life, and after her death on Rustomji for his life and after Rustomji's death in trust for his "sons and their male heirs in equal shares absolutely as tenants in common." The deed contained no power of revocation. There was a maintenance clause referring to the share to which an infant son or his male heirs should be entitled. The settlor first died and her son died next himself leaving three sons. Held that the three grandsons of the settlor took on the settlor's son's death the trust properties absolutely in equal shares as tenants-in-common. (*Shah, A. C. J. and Marten, J.*) DADABHAI FRAMJI CAMA v. COWASJI DORABJI. 47 Bom. 349 : 1923 B. 177.

—Construction—Valuation for Stamp duty—Weight due to.

The natural and obvious meaning of the words in a deed cannot be refused to be given to them, merely because it is suggested that the words have been inserted in the deed for the purpose of ascertaining and specifying the stamp duty which was to be paid. If that were the object of inserting the words in the deed, it ought to have been so stated. (*Sunderson, C. J. and Richardson, J.*) FANINDRA NATH ROY v. BHOLA DASSI DEBI. 38 C. L. J. 21 : 75 I. C. 402.

—Construction—Will—Postobit bond—Revocation.

The deceased, a few years before his death, executed a document containing the following terms : "Owing to my health becoming weak day by day I give this paper in writing of my free will that you will kindly accept Rs. 10,000 for the fee for the nursing which you have done for me and my family for 10 to 12 years and Rs. 10,000 as a present from me in all 20,000 to be paid after my death out of my estate." and a suit by the plaintiff for recovery of the said sum of Rs. 20,000 as being due to her under the will of the deceased, the defendants, executors, contended that the plaintiff attended only once on the deceased as a nurse for which she had been paid, that the relations between the plaintiff and the deceased were of an immoral character and that the document which was of a testamentary character had been revoked by the last will of the deceased. The court held that the document was not a postobit bond but one of a testamentary character and that the testator had by a later will effectively revoked the provision of this document and viewed as a bond, it was not enforceable, because the consideration was immoral and illegal. (*Macleod, C. J. and Crump, J.*) HUSSEINALI CASAM MAHOMED v. DINBAL. 25 Bom. L. R. 252.

—Execution—Effect on note—Executants—Estoppel.

Where it was found that the appellants were minors at the time the deed of gift was executed and that they were wrongly described as minors in the deed of gift in question. Held that they were estopped in executing the deed of gift and cannot be bound by any alienation effected in

## DEFENCE OF INDIA RULES, R. 25.

favour of the plaintiff-respondent's father without their permission and consent. (*Moti Sagar, J.*) CHHITRU v. CHHAJU. 1923 Lah 611.

—Execution—Non-appearance to admit, if amounts to denial.

It is doubtful if the non-appearance of a party to admit execution of a document is equivalent by itself to a denial of execution. (*Abdul Raoof and Moti Sagar, JJ.*) UTTAM SINGH v. MT. RUTTAN DEVI. 5 Lah L. J. 217 : 74 I. C. 688 : 1924 Lah. 28.

—Execution—Formalities—Corporation—Execution of deed on behalf of.

Where by the constitution of a corporation any special mode of execution of its deeds is prescribed or any particular formality is required to be observed in affixing the corporate seal, every deed of the corporation must, in order to be completely binding be executed in the manner or with every formality so prescribed. A public corporation should comply strictly with provisions in the statute regarding execution of contracts. 34 C 103 Ref. (*Mookerjee and Chotzner, JJ.*) J. D. EZEKIEL v. ANNADA CHARAN SEN. 50 Cal. 180 : 70 I. C. 794 : 1923 Cal. 35.

—Material alteration—Suit on.

A material alteration in a bond does not destroy the original debt if the same can be proved to have not merged in the bond, in which case an action can be brought on the debt apart from the bond. (*Newbould and Rankin, JJ.*) DULA MEAH v. MOULAVI ABDUL RAHAMAN. 28 C. W. N. 70.

DEFAMATION—Privilege—Plea of—Essentials.

An action lies for the malicious publication of statements which are false in fact and injurious to another, unless they are fairly made by a person in the discharge of some public or private duty or in the conduct of his own affairs. In the latter class of cases the occasion prevents the inference of malice and a qualified privilege attaches to the statements made if fairly warranted by any reasonable occasion or exigency and honestly made or made in good faith. Three elements are necessary to make the defence of qualified privilege good i.e., the occasion must be fit, the matter must have reference to the occasion and it must be published from right motives. If a man comes to know of the commission of a crime, he owes a duty to society and the state to communicate it to the authorities and he cannot be liable if it turns out the person is not guilty. (*Kanhaya Lal, J. C.*) KISHORI LAL v. MOOSA RAZA. 9 O. & A. L. R. 302.

DEFENCE—Contract capable of specific performance—If can be set up—Part performance. See T P. Act, S. 54. 45 M. L. J. 528.

DEFENCE OF INDIA RULES, R. 25—Material alteration—Suit on original consideration—Maintainability.

Though a bond is materially altered by an addition to the amount due thereunder, the plaintiff could succeed on proof of the loan by independent evidence and obtain a decree for the amount of the loan. 5 C. W. N. 56 Ref. (*Newbould and Panton, JJ.*) KHOSAL MAHOMED v. AMIRUDIN MAHOMED PRAMANIK. 1923 Cal. 318.

**DEKHAH AGRICULTURESTS' RELIEF ACT, S. 2.****DEKHAH AGRICULTURISTS' RELIEF ACT, S. 2**  
**—Agriculturist—Test of—Joint family.**

If a family is joint, the only way to test if the members are agriculturists is to ascertain what is the joint income of the family provided they are living together. If the income from the land cannot amount or falls far short of the real income, they are not agriculturists within the meaning of the Act. (*Macleod C. J. and Crump, J.*) *NARAYAN BAPULAL v. SONUSINGH.* 1923 Bom. 383.

**S. 10 A—Suit by ward after majority—Transaction a sale and not mortgage—Limitation Act, Art. 44.**

More than 3 years after a minor attained majority, he brought a suit for a declaration that a transaction entered into by his mother was not a sale but a mortgage. *Held*, he was entitled to do it under S. 10 A of the Act, and the suit would not be governed by Art. 44, LIM. ACT. (*Shah, A. C. J.*) *SHIVBASAPPA NINGAPPA v. BALAPPA BASAPPA.* 25 Bom. L. R. 1209.

**Ss. 11 and 20—Ex parte decree—Execution proceedings—Application for instalments.**

A decree for money was obtained ex parte on the Original Side of the Bombay High Court against the defendant who was described as a merchant in the plaint. During the course of the execution of the decree deft. applied for instalments on the ground he was an agriculturist. *Held* that the defendant could not raise the plea that he was an agriculturist in execution proceedings as the point must be deemed to have been decided against when the original side of the High Court entertained the suit and decreed it. If he were an agriculturist the High Court would not have had jurisdiction to entertain the suit and as the deft. was not an agriculturist at the date of the decree he could not raise the plea in execution proceedings. 37 B. 486 Ref. (*Shah, A. C. J. and Crump, J.*) *MULJI PURSHOTTAM v. GOVERDHAN DASS.* 1923 Bom. 36.

**S. 15—Decision that plaintiff is an agriculturist—Whether a preliminary decree. See (1922) DIG. COL. 544. JAISHINGRAO v. VENKATARAIO.****S. 15 B—Decree under—If to be made absolute.**

A mortgage decree passed under S. 15 B. of the Dekhan Agr. Relief Act need not be made final. (*Shah, A. C. J. and Crump, J.*) *SUKLYA JAIRAM PATIL v. SUKLAL MOTICHAND VANI.*

25 Bom. L. R. 1214.

**S. 22—Immoveable property of agriculturist—Attachment and sale in execution of money decree—Exemption—Limits of. See (1922) DIG. COL. 545. MARUTI BABAH TOTRE v. MARTAND NARAYAN KULKARNI.****S. 22 (2)—Execution of decree for money against agriculturist—Death of judgment-debtor—Liability of heirs.**

Where an agriculturist against whom a money decree had been passed dies, no order can be passed under S. 22 (4) of the Dekhan Agr. Rel. Act against the immoveable property in the hands of the heirs of the deceased. (*Macleod, C.*

**DIVORCE.**

*J. and Crump, J.*) *HIRACHAND MOTICHAND v. HANSABAI GANPAT RAO.* 47 Bom. 527 : 25 Bom. L. R. 76 : 72 I. C. 62 : 1923 Bom. 190.

**Ss. 43, 44 and 45—Award by conciliator not accepted by the court—Suit on award—Maintainability.**

Plff. a mortgagee from an agriculturist, with a view to enforce his mortgage applied for a certificate to the conciliator. Subsequently the parties agreed to have their dispute settled by arbitration and appointed the conciliator as their arbitrator. He made an award on the same day; the plff. applied to the court for filing the award and a decree thereon but the court refused to file the award after hearing the other side. The plff. thereupon sued to enforce the award. *Held*, that having regard to Ss. 43 to 45 of the Dekhan Agriculturists' Relief Act the award could not be treated as a valid award. (*Shah, A. C. J.*) *SAKHARAM MARUTI v. RAJMAL GIRDHARLAL.*

47 Bom. 298 : 25 Bom. L. R. 52 : 1923 Bom. 173.

**DEPOSIT—Forfeiture of—Breach of contract—Interference with forfeiture—Penalty. See CONTRACT ACT S. 74.****DIVORCE—Adultery—Proof.**

*Per Macleod, C. J.*—The mere fact that two people of opposite sexes are together under the same roof is not sufficient proof of adultery from the reports of divorce cases, it has always been considered that there must be some evidence that they occupied the same room. (*Macleod, C. J. Marten and Crump, J.*) *ALFRID WILKINSON v. WILKINSON.* 47 Bom. 843 :

25 Bom. L. R. 945 : 1923 Bom. 321.

**Adultery—Proof of—Corroboration—Necessity for. See (1922) DIG. COL. 545. COLLARD v. MARIE AGNES COLLARD.**

69 I. C. 579.

**Costs—Practice—Liability of husband Rule as to—Exceptions—Appeal.**

A wife who is charged in a Divorce court, is entitled to be provided with funds by her husband for purposes of her defence and the only exceptions are (1) where she has ample means of her own and (2) the solicitor who is employed is guilty of misconduct. But when a decree nisi is passed and she appeals but fails, the husband is entitled to his costs. (*Schwabe, C. J. and Ramesam, J.*) *PRITCHARD v. PRITCHARD.*

45 M. L. J. 327 : 18 L. W. 354 : 74 I. C. 139.

**Jurisdiction.**

*Per Macleod, C. J.*—Jurisdiction in matrimonial causes was not based on a so-called matrimonial domicile when the Indian Councils Act was passed in 1861.

The Indian Divorce Act does not confer jurisdiction of the Courts to dissolve the marriages of non domiciled parties. Relief not involving the status of the parties may be granted under the Act if the conditions of residence is satisfied. Undoubtedly a country by its Municipal Law may lay down its own tests for creating jurisdiction within its own boundaries even in cases where the status of the parties is involved. When the jurisdiction of the Court is exercised according to the rules of International Law, as in the case

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where the parties have their domicile within its forum is decree dissolving their marriage ought to be respected by the Tribunals of every civilized country. The Court in considering a petition for divorce will follow the principles of International Law, whatever doubts may have been felt on the question until the decision in *Le Mesurier v. Le Mesurier* 1895 A. C. 517. As the legislature has not directly given to the Indian Courts the power to dissolve marriages between non-domiciled parties, the District Court has no power by implication even if the argument that residence has been made the test of jurisdiction was a sound one.

*Marten, J.*—Jurisdiction over residence, with reference to judicial separations as opposed to decrees for dissolution of the marriage itself, is now well recognised by the English Courts as a principle of private International Law and a similar jurisdiction is exercised by the Bombay High Court or its predecessor the supreme court for 100 years. History of the Court for divorce and matrimonial causes in England discussed.

The Court has not any jurisdiction to dissolve the marriage by reason of the appearance of the parties without protest. The High Court has no jurisdiction to dissolve their marriage, notwithstanding that it was solemnized in India and that adultery was committed in India. But on the other hand the court has jurisdiction to grant the husband a decree for judicial separation and to provide for the custody of the children. This is because the word 'reside' in S. 2 of the Divorce Act should be construed as such, and not as meaning 'domiciled', and because under S. 7 the principles of the English Courts should be applied which in such cases will grant judicial separations to non-domiciled parties. Having regard to S. 7 Indian Courts give or withhold relief on the principles of jurisdiction now finally established in the English Courts and it is no objection to their so doing, that those principles as now enunciated are not the same as those enunciated in the English Court of Appeal in *Niboyet v. Niboyet* 4 P. D. 1. The jurisdiction to dissolve a marriage as opposed to granting a judicial separation, did not exist until it was given by the Matrimonial Causes Act, 1857.

*Crump, J.*—The jurisdiction, whatever it may be, is conferred by the Act in express terms, and the provisions which confer that jurisdiction are not in any way subject to any rules or principles which may from time to time be laid down by English Courts. Those provisions, confer upon the Courts in India jurisdiction to give decrees for dissolution of marriage between British subjects domiciled in England who in other respects are within the conditions prescribed by the Act. (*Macleod, C. J. Marten and Crump, JJ.*) *ALFRED WILKINSON v. WILKINSON*, 47 Bom. 843 : 25 Bom. L. R. 945 : 1923 Bom. 321.

—*Matrimonial suit — Costs — Security for — Omission to furnish — Procedure.*

If in a matrimonial suit the husband is ordered to give security for the wife's costs and fails to give it then where the husband is the petitioner his petition should be stayed and not dismissed. Where the wife is the petitioner, the husband's defence should not be struck out but he should be

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proceeded against for contempt if he is proved to be able to pay but contumaciously refuses to do so. (*Marten, J.*) *WILHELMINA CODD v. BERTIE ELIJAH CODD*, 47 Bom. 664 : 25 Bom. L. R. 339.

—*Practice—Evidence of adultery, etc.—Corroboration.*

In cases of divorce, the evidence of the husband or wife alone should never be accepted without some corroboration either by a witness or by strong surrounding circumstances, as otherwise collusion will become easy (*Schwabe, C. J. Courts Trotter and Ramesam, JJ.*) *ARULANANDAN v. ARUL PAKKIAM*, 44 M. L. J. 385 : 17 L. W. 235 : 32 M. L. T. (H. C.) 245 : 72 I. C. 134 (2) : 1923 Mad. 375 (2).

## —(IV OF 1869)—Validity of the Act.

Per *Marten, J.*—The Indian Divorce Act 1869 is, and always has been, within the legislative powers conferred upon the Indian legislature by the Indian Councils Act, 1861. (*Macleod C. J. Marten and Crump, JJ.*) *ALFRED WILKINSON v. WILKINSON*, 47 Bom. 843 : 25 Bom. L. R. 945 : 1923 Bom. 321.

S. 2—Christianity—Person professing—Meeting—Ex communication by Sect. or Church to which a Christian belongs—Effect—Hindu Law—Marriage—Dissolution—Conversion of either party to Christianity—Effect—Native Converts Marriage Dissolution Act XXI of 1886.

A person does not cease to profess Christianity within the meaning of S. 2 of the Indian Divorce Act of 1869 merely because she has been excommunicated by the sect or the Church to which she belongs. The question of profession of Christianity is a question of her own action and not of the action of her Church.

The conversion to Christianity of one of two married Hindus does not dissolve the marriage. The convert can, under the Native Converts' Marriage Dissolution Act of 1866, obtain dissolution of the marriage by application to the Court first of all for restitution of conjugal rights and then after the lapse of a year for dissolution of the marriage if conjugal rights are refused. (*Schwabe C. J., Oldfield and Ramesam, JJ.*) *PAKKIAM SOLOMON v. CHELLIAH PILLAI*, 45 M. L. J. 208 : 35 M. L. T. (H. C.) 231 : 75 I. C. 17 : 46 Mad. 839 : 1924 Mad. 18.

Ss. 2 and 7 — Persons domiciled in England—Power of Indian Courts to grant divorce.

The Courts in India are not empowered to decree dissolution of the marriage between persons not domiciled within their jurisdiction, it is no doubt true that sec 2 lays down that relief may be granted where the petitioner professes the Christian religion and resides in India at the time of presenting the petition and that, in addition, in the case of dissolution of marriage, it may grant decrees where the marriage has been solemnised in India or where the adultery complained of has been committed in India. In spite of the decision of their Lordships of the Privy Council in *Le Mesurier v. Le Mesurier* (1895) A. C. 517 the courts in India have considered that



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they had jurisdiction to grant decrees of dissolution of marriage.

While it is true that the Courts in India are directed to "act and give relief on principles and rules, which in the opinion of the said Courts, are as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief," this is only to be the rules subject to the provisions contained in the Indian Divorce Act.

The provisions of Sec 2 as to residence, no doubt, apply to cases where the parties are domiciled in India, but where the parties are domiciled in England they cannot override the express provisions in Sec. 7 of the Act (*Robinson, C. J., May Oung and Busley, JJ.*) *A. H. D. JONES v. K. JONES.* 2 Bur L J. 106 : 1923 Bang. 223.

**—S 2—Reside—Meaning of.**

*Per Marten, J.*—The word "reside" in S 2 of the Divorce Act should be construed as such and not as meaning "domiciled". (*Macleod C. J. Marten and Crump, JJ.*) *ALFRED WILKINSON v. WILKINSON.* 47 Bom. 843 : 25 Bom. L. R. 945 : (1923) Bom. 321.

**—Ss. 4 and 7—Suit for declaration of validity of marriage—Maintainability of—Letters Patent (Patna) Cl. 27.**

A suit for a mere declaration that the plaintiff's marriage with her deceased husband's brother is valid and illegal is not sustainable on the matrimonial side of the Patna High Court. The jurisdiction of the Patna High Court in matters matrimonial is only such jurisdiction as is comprised within the provisions of the Divorce Act. (*Buckmill.*) *ADELAIDE CHRISTIANA LISH v. DAVID LISH,* (1923) Pat. 127 : 1 Pat. L. R. 129 : 72 I. C. 657 : 1923 P. 301

**DIVORCE ACT (1869, S. 7—Procedure—Decree nisi—Petitioner to go into the witnesses box.**

In all divorce cases the petitioner must come into the witness box, petitioner must be sworn, and he must prove his case because, among other things, the judge has to satisfy himself whether there is any collusion between the parties and he has further to satisfy himself as to the complete truth and honesty of the petition. Where this procedure had not been followed, the High Court set aside the decree nisi. (*Mears, C. J. Walsh and Kanhaiya Lal, JJ.*) *HOWARD v. HOWARD.* L. R. 4 A. 1 : 69 I. C. 509 : (1923) A. 43.

**—S. 7—'For the time being', meaning of.**

*Per Crump, J. (contra Marten, J.)*—There is the possibility of reading into S. 7 of the Divorce Act an intention on the part of Legislature to adopt whatever test the Court of Divorce in England might from time to time lay down upon the matter of divorce but, that is, a forced and unnatural construction. Also it would be necessary to omit the words 'Subject to the provisions contained in this Act.' Had the Legislature intended any such result, it would have been easy to say in express terms that the provisions of the Act must be read as subject to the rules and principles applied from time to time by the Matrimonial Courts in England. They have chosen to say precisely the contrary. Any such

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construction would introduce an element of uncertainty where certainty is essential. The doctrine of English Courts has varied from time to time upon this point since 1895 domicile alone is recognized as conferring jurisdiction.

S. 7 is a residuary section intended to provide for any matters which by inadvertence or otherwise are not expressly dealt with in the Act. It is not unusual in statutory drafting to insert provisions of this nature *ex majore cautela* more especially where an attempt is being made to codify in this country an unfamiliar branch of English Law. The expression 'rules and principles' points rather to the rules and principles on which the Courts deals with these matrimonial cases in requiring a certain degree of evidence and other cogulate matters (*Macleod, C. J. Marten and Crump, JJ.*) *ALFRED WILKINSON v. WILKINSON* 47 Bom. 843 : 25 Bom. L. R. 945 : 1923 Bom. 321.

**—S. 7—Proceedings for divorce—Uncorroborated testimony—Charge of adultery against a known person—Necessity of impleading him as respondent.**

In proceedings for divorce the evidence of the husband or wife alone ought never to be accepted without corroboration either by witness or at least by strong surrounding circumstances. Where charges of adultery are made against a known person, he ought to be made a co-respondent unless the judge should otherwise direct. (*Sir Walter Schwabe C. J., Coultis Trotter and Kumarswamy Sastri, JJ.*) *PENDURTI JOSEPH v. PENDURTI RAMAMMA.* 1923 Mad. 9.

**—Ss. 7 and 17—Decree nisi for dissolution of marriage—No proof of service of petition—Confirmation by High Court—Proof of cruelty.** See (1922) DIG. COL 546. *PAYNE v. PAYNE.* 70 I. C. 43 (1).

**—S. 15—Suit for divorce—Counter claim by husband alleging adultery on the part of wife—Jurisdiction to add foreigner as co-respondent.**

Speaking generally, a guilty party cannot obtain relief by way of judicial separation any more than she can obtain relief by way of divorce. Desertion to justify judicial separation must be a wilful abstention by the husband against the wish of the wife. 13 P. D. 141 ; 17 B. 624 Ref. Where a wife sues her husband for divorce on the ground of his adultery it is open to the husband in his written statement to counter-petition for a divorce on the ground of his wife's adultery. It is not necessary that the husband should take an independent proceeding. Where a husband alleges adultery on the part of the wife with a foreigner, the Court has jurisdiction to add such foreigner as a co-respondent to the proceeding. 1913 P. 75, 1910 P. 271 Ref. (*Marten J.*) *ROSE HILL v. LUKE C. HILL.* 47 Bom. 657 : 25 Bom. L. R. 289 : 73 I. C. 304 : 1923 Bom. 284.

**—Ss. 15 and 37—Suit for dissolution of Marriage on the ground of wife's adultery—Dismissal of suit—Grant of alimony—Order ultra vires.**

Where a husband's suit for dissolution of marriage on the ground of his wife's adultery is dis-



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missed on the ground that the adultery alleged was not proved, it is not competent to the court as part of the decree in the suit to grant permanent alimony to the wife. (*Krishnan and Ramesam, JJ*) *DEVASAHAYAM v. DEVAMONY*. 46 Mad. 133 : 17 L. W. 90 : (1923) M. W. N. 184 : 69 I. C. 994 : 1923 Mad. 211.

**—S. 16—Decree nisi for divorce—Rescission of decree nisi.**

A decree nisi was passed ex parte in a suit for divorce. On an application to make the decree absolute the respondent tried to show that the petitioner had been guilty of adultery and that he was not entitled to relief. Held that it was incumbent on the court to inquire into the truth of the allegations and examine the evidence in support of them even though the respondent was not entitled to costs under S. 16 of the Divorce Act. (*Marten, J.*) *WILHELMINA CODD v. BERTIE ELIJAH CODD*. 47 Bom. 664 : 25 Bom. L. R. 339.

**—S. 17—Scope of. See (1922) DIG. COL. 547 GARLINGE v. GARLINGE. 44 A. 745.****—Ss. 17 and 44—Decree nisi—Death of petitioner after decree—Confirmation.**

Where a person had obtained a decree nisi for dissolution of marriage and custody of the children and dies before its confirmation by the High Court under S. 17 of the Divorce Act, the Court has no jurisdiction to confirm the decree for dissolution of the marriage or to make any order as regards the custody of the children: *Stanhope v. Stanhope* 11 P. D. 103 followed. (*Sanderson, C. J. Woodroffe and Richardson, JJ.*) *BUTTERFIELD v. BUTTERFIELD*. 50 C. 153 : 74 I. C. 250 : 1923 Cal. 426.

**—S. 37—Application for alimony—When to be made—Order made several years after confirmation of decree. See (1921) DIG. COL. 515 LLOYD v. LLOYD. 69 I. C. 746.****DOCUMENT—Material alteration—Effect on rights.**

Any material alteration in a document after its execution and without the privity of the party to be affected by it, is fatal to its validity and the right of action based thereon is destroyed (*Prideaux, A. J. C.*) *PANDURANG v. KISHAN*. 19 N. L. R. 79 : 74 I. C. 20 : 1923 Nag. 295.

**DOMICILE—Commercial domicile—Prize of war, See (1922) DIG. COL. 1089. SOCRATES ATYCHIDES v. SECY. OF STATE FOR INDIA.**

32 M. L. T. (P.C.) 81 : 27 C. W. N. 557 : 18 L. W. 664 : (1923) M. W. N. 846 (P. C.)

**EASEMENT—Air—Access of wind.**

There is no easement for the free access of breeze, *Webb v. Bird* 13 C. B. N. S. 841 Rel. (*Mookerjee and Cholsner, JJ.*) *SAROJINI DEBI v. KRISHNA LAL HALDAR*. 72 I. C. 576 : 1923 Cal. 266.

**—Customary easement—Distinction between.**

*Per Odgers, J.*—The distinction between a customary right and customary easement is seen in 20 Mad. 369. No fixed period is laid down by law as necessary to establish the former. (*Ayling*

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*Odgers, JJ.*) TALUK BOARD. DINDIGUL v. VENKATRAMA AIYAR 46 Mad. 866 : 45 M. L. J. 333 : 18 L. W. 366 : 33 M. L. T. (H. C.) 40 : 75 I. C. 38.

**—Customary easement—Power to take earth for repairs of house.**

A custom by which earth is taken from a piece of waste land to repair houses in a village after inundations is not unreasonable. On the contrary, it seems to be an eminently reasonable custom that the people of the village should take earth from a ditch which serves no other purpose, in order to repair their houses. It was not shown that it was destructive of the subject-matter. (*Ross, J.*) *BABU BIKOO MAHTON v. NARAYAN SAHU*. 72 I. C. 431.

**—Customary right—Right of way—Local custom—Prescription—Lost grant.**

A customary right is not an easement in the legal sense of that term. Customary rights have their origin in grant or prescription but it is not necessary that in every case there should be evidence from which a lost grant may be presumed. Nor is not necessary that the custom should be traced back for the whole time necessary to make it immemorial (*Richardson and Suhrwardy, JJ.*) *ALI MAHOMED v. SHEIKH KATU*. 70 I. C. 263 : 1923 Cal. 200.

**—Extinction.**

An agreement to build a common wall with holes indicating permission to end the rafters of the next storey which may be constructed, does not imply consent to close ventilators by building such next storey. (*Martineau, J.*) *NANDU SHAH v. SANT RAM* 1923 Lah. 249.

**—Extinguishment—Merger—Landlord and tenant—Purchase of holding by landlord—Tenant continuing in possession at enhanced rent—Effect of.**

The unity of the dominant and servient estates in the same person extinguishes the easement appurtenant to the dominant estate for no person can have an easement in land which he himself owns. But unity of title of the two estates will not extinguish an easement, unless the ownership of the two estates be co extensive, equal in validity, quality and other circumstances of right. If there has been unity of possession merely and not unity of seisin for estates in fee simple an easement which has been thereby suspended will revive on severance of the union but if there has been unity of seisin for estates in fee simple and not unity of possession merely, all easements are absolutely extinguished and will not revive, unless they are recreated on severance of the former dominant and servient estates. Where though there was an execution sale of the tenancy and a purchase by the landlord the tenant continued in occupation in the undisturbed enjoyment of the right of irrigation and the only visible result of the sale was that the rent was substantially enhanced Held, that the right of irrigation from the landlord's tank possessed by the tenant was not extinguished but momentarily suspended and revived. (*Mookerjee and Cholsner, JJ.*) *TINKARI PATHAK v. RAM GOPAL PATHAK*. 50 Cal. 356 : 70 I. C. 663 : 1923 Cal. 8.

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———*Grant—Long user—Presumption.*

Continuous and peaceable user of an easement of light and air for more than 20 years may give rise to a presumption that it existed with the consent of the owner of the servient heritage. 6 C. 394 referred to. (*Hallifax, A. J. C.*) *SONBA v. DATTATRAYA* 6 N. L. J. 59 : 71 I. C. 831 : 1923 Nag. 192.

———*Landlord and Tenant—Acquisition of easement right—Grant—User—Right to take water.*

Although a tenant cannot acquire a prescriptive right of easement in land belonging to his lessor he may claim a right of easement based on immemorial user, as there is no reason why an owner of land should not grant any privilege he pleases to his tenant. Where the enjoyment of a right to take water from the landlord's tank was continued uninterrupted for a long series of years such enjoyment should be attributed to a legal origin and the court should presume a grant of an agreement. A tenant can establish his right to irrigate his field from his landlord's tank by proof of open and continuous user from time immemorial. 29 C. 363; 38 M. L. J. 28 : 6 C. 394 : 4 C. 633; 30 C. 281 Rel.

If the user of the easement had actually commenced before the property over which it was claimed passed into the possession of the lessee, the mere act of the intervention of such tenancy should not be sufficient to defeat the right acquired by the lapse of time, unless, indeed, it is further shown that the landlord, up to the time he granted the lease was in ignorance that any such right was claimed. (*Mookerjee and Chotzner, JJ.*) *TINKARI PATHAK v. RAMGOPAL PATHAK*, 50 Cal. 356 : 70 I. C. 663 : 1923 Cal. 8.

———*Light and air—Obstruction—Injunction—Form of.* See INJUNCTION. 25 Bom. L. R. 239.———*Light—Extent of.*

As regard an easement of light, there is no rule defining the measure of the dominant owner's right or requiring an angle of 45° through which the rays of the sun are to be received. To sustain an action, there must be a substantial privation of light enough to render the occupation of the house uncomfortable according to ordinary notions. (*Walsh, J.*) *MT. CHANDAN KUNWAR v. NARAIN*, 73 I. C. 531 : 1923 A. 542.

———*Natural right—Trees—Damage Caused by shade—Liability.*

A plaintiff cannot claim damages for injury caused to the crops on his land by the shade caused by trees standing on his neighbour's land.

If cannot be said that every owner of a field has the right to have the sun's rays fall on it from every possible direction. There cannot be such a right for if it were allowed the use and enjoyment of the adjoining fields by their owners would be very largely restricted. (*Kotwal, A.J.C.*) *GUMAN SINGH v. UM RAO SINGH*, 19 N. L. R. 191 : 75 I. C. 559.

———*Origin of—Lost grant—Presumption from long user—Way of necessity—Inconvenience.*

Where it is found that the plaintiffs have used a path-way, without interruption, peacefully, pub-

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licly and as of right, it may be presumed that the user had a lawful origin, although the circumstances relating to the origin of this user may not be known. It may be presumed in such a case that the origin is traceable to a lost grant. As regards easement of necessity the general rule is that there cannot be such an easement in respect of a right of way if there is an alternative route or way. But where the alternative route is extremely inconvenient, there may exist an easement of necessity in respect of a more convenient path-way. (*C. C. Ghose and B. B. Ghose, JJ.*) *KALI PADA BOSE v. FANI BHUSAN ROY*, 70 I. C. 173.

———*Permissive user—Bar to acquisition of right.*

Where in a suit for a declaration of a right of easement and for demolition of a certain building erected by defendant so as to infringe the right it was found that the user of the defendant's land by the plaintiffs for the purposes of procession as alleged by them was with the permission of the defendant, *Held* that no question of easement could arise, as the user of the defendant's land was permissive. (*Banerji and Gokul Prasad, JJ.*) *PANNA LAL v. BOHRA PANNA LAL*, 21 A. L. J. 436 : L. R. 4 A. 274 : 74 I. C. 481 : 1924 A. 50.

———*Right by custom—Right by prescription—Distinction between.*

What may suffice to establish a customary easement may be wholly insufficient to establish an easement by prescription and *vice versa*. The two rights are different although the result may be the same. Consequently where a claim of easement is based on a prescriptive title it is not open to the appellate Court to treat the case as one based on custom. (*Broadway and Abdul Qadir, JJ.*) *SITARAM v. GHANNO*, 69 I. C. 528.

———*Right to drain water on lower lands.*

Where through his own fault flood water accumulate on a main's land, his neighbour has a right to put up bunds to protect his land. The former cannot claim a right of natural drainage and restrain the latter from putting up the bund. (*Duckworth, J.*) *MOKSODALI v. MA HLI*, 1 Rang. 427.

———*Right of the public—Grant—Prescription—Dedication.*

The public as such cannot acquire the ownership of immovable property or an easement on such property by prescription. But the user by the public may be evidence of a dedication. A dedication to be valid must be to the public at large and not to any section of it. (*Oldfield and Ramesam, JJ.*) *USSAM KASIM SAIT v. SECY. OF STATE*, 44 M. L. J. 638 : (1923) M. W. N. 315 : 17 L. W. 610 : 74 I. C. 25 : 1923 Mad. 624.

———*Right of way—Prescription—Proof of claim.*

It is not the law that because there is no regular or defined pathway over the waste land of the defendants which is said to be the servient tenement, no right of easement can be acquired by the dominant owners. If the plaintiffs claiming the right of way by prescription stop the two

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termini of the path-way their suit ought to fail on the ground that the pathway passed over a piece of waste land in different tracks. 22 C. W. N. 922 referred to. (*B. B. Ghose, J.*) **HARIDAS GHOSE MRIDHA v. GOURI CHARAN GHOSE.**

71 I. C. 309.

———**Riparian rights—Acquisition of.**

Even riparian rights can be acquired by prescription as an easement (*Shadi Lal, C. J. and Le Rossignol, J.*) **BALI RAM v. BELA SINGH.**

1923 Lah. 594.

———**Suit for—Parties,**

It cannot be disputed that, as a general rule, where a person claims a right of easement on a servient tenement all the owners of the servient tenement ought to be made parties, as any decree in the absence of a necessary party declaring a right of easement would be infructuous. But there are cases which may well be taken as exception to the general rule, such as where any of the co-sharers took no part in obstructing the plaintiff's right. (*Ghose, J.*) **AMRITANATH BISWAS v. JOGENDRA CHANDRA BHATTACHARJEE.**

69 I. C. 183 (2).

———**Water supply—Right to dam Channel—Burden of proof.**

A right to dam a channel against the will of the owner of the adjacent land can only be a right by user or prescription and it is incumbent on the plaintiff if he claims any particular right, to prove that he is entitled to it.

The question in each case must be, what is the exact nature of the right which is shown by the evidence to have been acquired by the party? (*Phillips and Devadoss, JJ.*) **HOTA VEERABADRAYYA v. VENKATAKRISHNA RAO.**

(1923) M. W. N. 454 : 18 L. W. 404 : 73 I. C. 66 : 1923 Mad 674.

**EASEMENTS ACT (V OF 1882), S. 7—Easement—Surface water—Right to collect and use—Right to let water on lower land—Rights of servient owner**

Every land-owner has a natural right to collect and retain upon his own land the surface water not flowing in a defined channel and put it to such use as he may desire. He may also allow it to flow away in the usual course of nature upon the lower lands of his neighbour and cannot be bound to prevent it from so doing. He cannot do this, however by an artificial discharge upon his neighbour's land unless he has acquired an easement which his neighbour is bound to submit to. If he should acquire such an easement the owner of the servient tenement acquires no reciprocal rights as against the owner of the dominant tenement with regard to the flow of surface water, that is, water not passing through a defined channel. The owner of the servient tenement cannot compel the owner of the dominant tenement to continue the exercise of his right even where the right has been exercised uninterruptedly for over 20 years and even if its exercise should be beneficial to the servient tenement. *Arkright v. Giff,* (1889) M. & W. 203 ; *Don v. Shrewsbury Ry. Co.* L. R. 6 Q. B. 578 ; 2 C. L. R. 141 Ref.

**EASEMENTS ACT (V OF 1882), S. 13.**

(*Miller, C. J. and Mullick, J.*) **MT. SARBAN v. PHUDO SAHU.** 4 Pat. L. T. 81 : 2 Pat. 110 : 69 I. C. 947 : 1923 P. 65.

———**Ss 7 and 13—Natural right—Right to light and air—Privacy—Easement by implication—Partition.**

Every one may build upon or otherwise utilise his own land regardless of the fact that his doing so involves an interference with the light which would otherwise reach the land and building of another person. On the other hand, every man may open any number of windows looking over his neighbour's land, for the interference with a neighbour's privacy or with his prospect does not by itself, give the latter a cause of action, in the absence of other circumstances. If windows are opened, the neighbour may, by building on his own land obstruct the light which would otherwise reach them. Whether a grant of an easement arises by implication on a conveyance of land depends on the intent of the parties, which must clearly appear; in order to determine the intent, the court will take into consideration the circumstances attending the transaction, the particular situation of the parties and the state of the thing granted. This principle holds only where there is no express contract relating to the matter for, where there is a valid express agreement fairly made the law does not indulge in presumptions and the rights of the parties will be upheld according to the terms of such agreement; in such circumstances, no question arises as to grant of easement by implication.

Where the owner of an entire tract of land or of two or more adjoining parcels employ a part thereof so that one derives from the other a benefit or an advantage of a continuous and apparent nature, and sells the one in favour of which such continuous and apparent quasi-easement exists, the easement being necessary to the reasonable enjoyment of the property granted, will pass to the grantee by implication. *Ewart v. Cochrane*, (1861) 4 Mac. H. L. 117 *Wheelden v. Burrows*, 12 Ch. D. 31 ; *Bayley v. O. W. Ry. & Co.* 26 Ch. D. 434 ; *Brown v. Alabaster*, 37 Ch. D. 490. *Wait v. Kelson* 6 Ch. A. 166 ; *Swan v. Cotton*, (1916) 2 Ch. 459 Ref.

The same principle has been applied to partition of joint properties. On a severance of tenements by a partition of joint property, and in the absence of a contrary intention, expressed or necessarily implied, all such easements as are apparent continuous and necessary for enjoying any of the undivided shares when the partition was effected, pass to the co-parceners to whom such shares are respectively allotted in severalty. 14 C. 797 ; 26 C. 516 ; 8 B. H. C. R. 181 ; 14 B. 452, 28 M. 495 (*Mookerjee and Chotzner, JJ.*) **SAROJINI DEBI v. KRISHNA LAL HALDAR.**

72 I. C. 576 : 1923 Cal. 256.

———**S. 13—Right of way—Apparent and continuous easement.**

A person cannot claim a right of way on the ground of convenience if he has other means of access available. An easement of necessity is an easement without which the property sold could not be used at all, and not one merely necessary for the more convenient enjoyment of the pro-

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perty. An easement of necessity contemplates that there must be an absolute necessity, not removeable by anything, which the dominant owner can be reasonably expected to do before the law will compel an adjacent proprietor to submit to so detrimental a right as an easement on his land imposed against his will. 15. A. 270 : 33 A 467 ; 19 B 79, 28 M. 495 referred to. (*Kanhaiya Lal. J. C.*) *KUNJ BEHARI v. BHUTA* 72 I. C. 199 : 9 O. & A. L. R. 381 : 1923 Oudh 250.

—S. 13 (b)—Easement of necessity—Existence of vents—Continuous and non-continuous—Distinction.

The existence of vents through which adjoining lands were being irrigated is evidence of an apparent, continuous and necessary easement which passes to the transferee under S. 13 (b) of the Easements Act.

An act done for the proper enjoyment of an easement such as closing the vents after irrigation or in the course of the enjoyment of an easement which is continuous would not make the easement a non-continuous easement. (*Devadoss, and Coleridge, JJ.*) *MORLA GANGULU v. THATA JAGANNATTAM.* 45 M. L. J. 724

—S. 13 (e) and (f)—Scope of—Partition—Right to easements.

There is a distinction between the cases falling under S. 13 cl. (e) and cl. (f) of the Easements Act. Under the former the plaintiff has to prove that the easement claimed was necessary for the enjoyment of the property allotted to him by partition and under the latter he has to prove four things (1) that the easement was apparent (2) that it was continuous (3) that it was necessary for enjoying his share after partition as it was enjoyed at the time when the partition took effect and (4) that no intention inconsistent with the easement claimed was expressed or necessarily implied in the partition. No right of easement after partition arises on the ground that the easement is necessary for enjoying a share as it was enjoyed immediately before partition. (*Iskroorth, A. J. C.*) *BRU MOHAN LAL v. CHANDRIKA SINGH.* 70 I. C. 930 : 1923 Oudh 57.

—S. 15—Right by prescription—Irrigation—Interruption.

The enjoyment necessary to qualify for a right of easement is something different from actual user. In order to establish a right to an easement, the enjoyment of it must continue for twenty years ; but in the case of discontinuous easements, this does not mean that the actual user is to continue for the whole period of twenty years. On the contrary, there may be days and weeks and months, during which the right may not be exercised at all, and yet during all those days and weeks, and months, the person claiming the right may have been in full enjoyment of it when necessary ; 30 C 1077 foll.

Where the water of the plaintiffs' well was always used for irrigating the defendant's lands and there was a user by the defendant whenever it was necessary for a period of more than twenty years, the right to irrigate from the well would be deemed to have been substantially enjoyed for

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the requisite period (*Kanhaiya Lal, J.*) *SRI RAM v. MANI RAM.* 21 A L J. 569 : L R. 5 A 24 : 74 I. C. 922

—S. 15 (5)—Meaning of.

Under S. 15 (5) plaintiff has to show a period of 20 years continuing up to some point within 2 years before the institution of the suit. The 5th paragraph of S. 15 of the Easements Act seems to render it impossible to acquire statutory prescriptive title to an easement, unless and until the claim thereto has been contested in a suit. (*Simpson, A. J. C.*) *BASDEO SINGH v. BHAGWAT, PRASAD.* 72 I. C. 909 : 1923 Oudh 29.

—S. 18—Customary easement—Right of way—Zemindar's right to close.

A customary easement is not limited to easements of a kind which could not be recognised at all apart from official customs. Any kind of easement recognised by the custom of a province will fall within the term. Thus the Zemindars in U. P. cannot arbitrarily close a right of way used by occupancy tenants for more than 30 years (*Davids, J.*) *KARAN SINGH v. DAL CHAND.* 74 I. C. 703 (2).

—S. 22—Extension of easement right—If allowed.

Under S. 22 of the Easements Act the dominant owner must exercise his right in the mode which is least onerous to the servient tenement and cannot impose any additional burden on it.

Where the easement right is only to use a roof as an open space, the holder cannot build over that portion. (*Abdul Qadir, J.*) *HANS RAJ v. MALAWA MAL.* 69 I. C. 406.

—S. 27—Under ground water-flowing in defined channel—Interference with—Injunction.

Where water flowing underground in a defined subterranean channel which forms the source of supply for the plaintiff's springs, is abstracted by the defendants by cutting off a channel on their own land very near the springs. Held that the plaintiff having acquired a right of easement to the supply of water through the subterranean channel, could restrain by injunction any attempt to divert the underground channel or diminish his water supply. (*Pratt and Faw Cett, JJ.*) *BABAJI RAMLING v. APPA VITHAVJI.* 25 Bom. L. R. 789.

—S. 30—Division of dominant heritage—Right to easements

When a dominant heritage is divided between two or more persons the easement becomes annexed to each of the shares, provided that such annexation is consistent with the terms of the instrument under which the division was made. (*Phillips and Devadoss, JJ.*) *HOTA VEERA-BADRAYYA v. VENKATAKRISHNA RAO.*

(1923) M. W. N. 454 : 18 L. W. 404 : 73 I. C. 66 : 1923 Mad. 674

—S. 59—License—Enjoyment for a long time—Revocation.

A licensee cannot by enjoying the license for any length of time acquire rights adverse to that of the licensor. Where certain tenants of a Zamindar built thatched sheds on waste lands

## EASEMENTS ACT (V OF 1882), S. 60.

with his permission but these sheds were not appurtenant to their holdings, the tenants did not acquire a right adverse to the Zemindar and the latter could revoke the license at his pleasure (*Mearns, C. J. and Gokul, Prasad, JJ.*) BHOJ RAJ HARDEVA.

44 A. 726 :  
1923 A. 140 (1)

—§ 60—License when revocable—Licensee whether liable to ejectment on denying Licensor's title.

A licensee in possession does not, like the tenant, by denying title of the grantor of the license forfeit the license and become liable to ejectment, 15 A. L. J. R. 592 Ref. (*Stuart, J.*) MR. DURGA Z. BABU RAY.

75 I. C. 596 : 1923 A. 403.

**EJECTMENT**—Failure to comply with terms of lease—Relief against forfeiture—T.P. Act, S. 114. See (1922) Dig. Col. 554. AHINDRA NATH CHATTERJEE v. TWISS.

70 I. C. 75.

—Identification—Test of.

The criterion regarding identification of plots in ejectment cases is not whether the plot or plots are demarcated on the spot but whether they are capable of demarcation or identification on the ground. (*Fremantle, S. M. and Burn, J. M.*) JAINTI PRASAD v. MATHURA SINGH.

L. R. 4 All. 415 (Rev.).

—Landlord and tenant—Trespasser—Right of landlord to sue.

It is open to a landlord, where his title is in jeopardy from the aggression of a neighbouring zemindar and where his title may be damaged by a denial of his rights over the land, to bring a suit for the purpose of being put into possession of the land as against them. 10 C. 1076 foll. (*Mookerjee and Chotzner, JJ.*) RAJ KUMAR.

MANDAL v. ALI MIA. 37 C. L. J. 94 :  
70 I. C. 792 : 1923 Cal. 192.

—Landlord and tenant—Trespasser—Right of landlord to sue in ejectment.

It is open to a landlord to sue to eject a trespasser even though the tenancy subsists. 11 N. L. R. 124, 18 N. L. R. 82 referred. (*Batten, J. C.*) DEBURAM v. PAHLAD PRASAD.

69 I. C. 559 (1) : (1923) Nag. 79.

—Lease the basis of suit—Failure to prove lease—Decree on title—If can be awarded.

Where a suit in ejectment is based solely on a lease and Court Fee is paid only on a year's rent under the Court Fees Act, if the plaintiff fails to prove the lease relied on, he cannot claim a decree on the basis of title. (*Subbanna and Ramaswamy Iyengar, JJ.*) LINGANNA v. MAMOO SABI.

1 Mys. L. J. 126.

—Onus—Cr. P. C., S. 145—Survey proceedings.

Where plaintiff failed in proceedings under S. 145 Cr. P. Code to prove possession and also in survey proceedings. Held, the onus thus lay heavily on the plaintiffs to show that the defendant was not in possession of the properties by virtue of the

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title he alleged (*Mr. Amcer Ali*) RAJA INDRAJIT BAHADUR SAHI v. AMAR SINGH.

45 M. L. J. 578 : 2 Pat. 676 :  
33 M. L. T. 233 (P. C.) : 18 L. W. 728 :

25 Bom. L. R. 1259 : 28 C. W. N. 277 :

74 I. C. 747 : 50 I. A. 183 : 21 A. L. J. 554 :

4 Pat. L. T. 447 : L. R. 4 P. C. 123 :

1 Pat. L. R. 345 : (1923) P. C. 128 (P. C.)

—Possessory suit—Title not proved.

A suit based on title could not succeed on the ground of possessory title in case plaintiff failed to prove his real title. (*Gokul Prasad, J.*) WALI MUHAMMAD v. ANTOO KOERI.

72 I. C. 924 :  
1923 All. 117.

—Possessory title—Suit on—Transfer.

A person having a possessory title to immoveable property or a transferee from such persons can maintain a suit to eject a trespasser. (*Schwabe, C. J. and Wallace, J.*) PARTHASARATHY IYER v. SUBBARAYA GRAMANY.

45 M. L. J. 175 : 17 L. W. 763 : 72 I. C. 558 :  
1924 Mad. 67.

—Proof of title—Effect.

In a suit for possession where plaintiff proves his title, but the defendant who is in possession failed to prove a title by adverse possession, the suit must be decreed 13 A. C. 793 foll. (*Pratt, J.*) KALI MUTU ASARI v. MEERA HUSSAIN.

1923 Rang. 23 (2).

—Suit for—Demarcation of land.

In suits in ejectment the question is whether the land is capable of demarcation and not whether it is actually demarcated. If the land is capable of demarcation the plff. is entitled to a decree. (*Hopkins, S. M. and Fremantle, J. M.*) CHANDRA SEKHAR v. LALA KANJI MAL.

L. R. 4 A. 7 (Rev.)

—Suit for—Parties to Suit—Person in receipt of rents and profits.

All persons who are actually in physical possession of the property should be made defendants to a suit for ejectment. It is neither necessary nor proper to join any person who is merely in receipt of the rents and profits of the land. (*Ross, J.*) BABU POONIT SINGH v. KAMAL SINGH.

72 I. C. 1038.

—Title—Possession—Proof of.

Where the action is in ejectment it is incumbent upon the plaintiffs not only to prove their title but also they have been in possession within twelve years of the date of the suit. (*Das and Kulwant Sahay, JJ.*) BABU CHATRAPAT PRATAP BAHADUR SAHI v. C. G. LEES.

1 Pat. L. R. 322 :  
72 I. C. 648.

—Title—Possession—Proof of—Presumption.

It is only in cases where there is no evidence of the plaintiff as to dispossession or, what amounts to the same thing, where the evidence is valueless, that the plaintiff fails to make out his case by merely proving that he had an antecedent title and possession.

If from the evidence given by both sides the Court has a difficulty to come to a definite conclusion or if the Court considers that evidence is not

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altogether satisfactory, in such circumstances, the Court can give weight to the probabilities of the case or to any presumption which might properly arise from the fact that the plaintiff had previously been in possession and had title. (*Miller, C. J., and Mullick, J.*) **MATUK SINGH v. TIAN SAHU**  
2 Pat. 1.

———*Title—Proof of—Plea of tenancy not proved.*

In a suit for ejectment based on title a person alleged to be a tenant denied the plaintiff's title. At the trial the plaintiff proved his title but was unable to prove the tenancy alleged by him. *Held* that the plaintiff was nevertheless entitled to a decree for ejectment. (*Gokul Prasad, J.*) **LACHMAN DAS v. MULCHAND.**  
71 I. C. 441:  
1923 A. 411.

———*Trespasser—Compensation—No duty to pay.*

Where a person trespasses on the land of another and spends considerable money in effecting improvements on that land, he is not entitled to compensation from the true owner when the latter seeks to eject him. (*Chevis and Harrison, JJ.*) **WAZIRI MAL v. GANGA RAM.**  
69 I. C. 573

**ELECTION—Petitions if to be verified.**

An election petition need not be verified as in the case of plaints unless the particular Act under which the petition is put in specifically requires it. (*Mears, C. J. and Piggott, J.*) **SURAJ NARAIN v. JANG BAHADUR,**  
45 A. 687:  
74 I. C. 2.

———*Temple committee—Meeting—Notice of—Want of quorum—Adjourned meeting.*

With very limited exceptions where a special meeting of a committee or any other body has to be specially convened for a particular purpose every member of that body ought to have notice of and a summons to the meeting. The election, being by a definite body on a day of which, till summons, the electors had no notice, they were all entitled to be specially summoned and if there was any omission to summon any of them, unless they all happened to be present, or unless those not summoned were beyond summoning distance, as for instance, abroad—there could not be a good electoral assembly. A meeting of a temple committee for the election of trustees for a temple was adjourned for want of quorum and no notice of the adjourned meeting was given to the other members of the committee. On the adjourned date the election was held. *Held* that the election was invalid for want of notice of the meeting to the members of the Committee. (*Marten and Fawcett, JJ.*) **NIL KANTH DEVRAO v. MURARI GOVIND.**  
25 Bom. L. R. 315: 73 I. C. 178:  
1923 Bom. 272.

———*Temple trustees—English law—Applicability—Voters' lists.*

The common law of England relating to Parliamentary elections should not be applied to regulate the election of temple trustees in India, though the principles which underlie that law may be invoked if they appear to the court to be

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in conformity with the rules of justice, equity and good conscience.

The fact that persons whose names were not in the list of voters participated in the election did not invalidate the election in the absence of anything to show that the right depended on an entry in the voters' list. (*Mookerjee and Chotzner, JJ.*) **RAGHUNATH SARMA v. JIBAN CHANDRA SARMA.**  
27 C. W. N. 312: 50 Cal. 202:  
70 I. C. 874: 1923 Cal. 467.

———*Who can challenge.*

It is only a person who has actually contested an election and who claims to have been validly elected or a body of electors who can challenge the validity of an election. (*Mears, C. J. and Piggott, J.*) **SURAJ NARAIN v. JANG BAHADUR.**  
45 A. 687: 74 I. C. 2.

**ELECTION OF REMEDIES—Conversion—Creditor's petition in insolvency based on—Effect of adjudication—Maintainability of suit to recover article pledged.**

A person who had lent a ring to another presented an insolvency petition to have that other adjudged insolvent, and proved in insolvency a debt based on the value of the ring. The ring had been pledged to a third party a few days after the petition was put in. The plaintiff failed to get anything for his debt in the insolvency proceedings, and then brought a suit against the pledgee for return of the ring or its value.

*Held*, in treating the value of the ring as a liquidated debt for purposes of the insolvency proceedings, plaintiff had already elected to abandon all rights to the ring and as such the action was not maintainable. Moreover the pledgee had obtained a good title on the principle of estoppel feeding the title. (*Schwabe, C. J. Olfield and Ramesam, JJ.*) **SINNAN CHETTY v. ALAGIRI AIYAR.**  
45 M. L. J. 516:  
46 Mad. 852: 18 L. W. 545:  
(1924) M. W. N. 6 (F. B.)

**ELECTRICITY (ACT IX OF 1910) Sch. Cl. 6 (2) (e)**  
—*Seals of cut out not in good order—Discontinuance of electric supply.*

It was found as a fact that a part of the electric apparatus on the appellant's premises, namely the seals of the cut-out were not in good order and condition. As a result of this defect there had been a leakage of energy, whether by theft of the current or otherwise. *Held* that such a state of things must certainly be deemed to be likely to affect injuriously the use of energy by the licensee or by other persons, and accordingly, the Electric Supply Company were entitled, upon discovering this condition of things to discontinue the electric supply. (*Scott Smith and Fford, JJ.*) **KARORI MAL v. THE E T AND LIGHTING CO. LTD.**  
4 Lah. 182: 75 I. C. 456.

**EQUITY—Grantor derogating—Applicability to B. T. Act.**

The equitable principle that a person cannot derogate from his own grant does not apply to the case of a surrender by a *raiwat* after he has sold a portion of the non-transferable holding to another. The B. T. Act governing the case restricts powers of surrender only to certain specified instances. The equities are all in favour of the

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a landlord, because the transfer from the *Raiyat* must have known the precarious title he was purchasing. (*Miller, C. J. Mullick, Jwala Prasad, Foster and Macpherson, JJ.*) *MT SHEORAJI KUER v. DHANI MIAN.* 4 Pat. L. T. 581 : 1 Pat. L. B. 402 : 1923 Pat. 305 : 1924 F. 1 (F.B.)

## ESTOPPEL—Acquiescence—Planting of trees—Ejectment

A grove holder after cutting the trees in the grove was allowed to remain in possession on payment of rent. He planted fresh trees and for 3 or 4 years, the Zemindar did nothing to prevent it. *Held*, he was estopped by his inaction from ejecting the grove holder. (*Premantle, S. M.*) *RAM SINGH v. HANNU*

L. R. 4 All 352 (Rev.) : 9 O. & A. L. R. 1087.

Attestation of document—Effect—Knowledge of contents. See EVIDENCE ACT, S. 115.

1923 A. 28

—Auction sale—Failure of judgment debtor to appear and help in the settling of sale proclamation—Effect. See C. P. CODE O. 21, R. 66.

1923 Pat. 283.

—Compromise—Title—Recognition of—Proceedings under S. 145.

A dispute under S. 145, Cr. P. Code relates only to the possession of the properties and consequently a compromise of the proceedings does not estop a party from denying the title of the other. (*Banerji and Gokul Prasad, JJ.*) *GOPI DASS v. MADHO LAL.* 45 A. 162 : 1923 A. 77.

—Conduct.

Where a person gets another's name recorded as owner of a moiety of the property, and on the faith of that another purchases it at an auction sale, the former cannot later on claim ownership of the same. (*Ryves and Daniels, JJ.*) *MATHURA PRASAD v. ANANDI KUNWAR.* 21 A. L. J. 498 : L. R. 4 A. 555 : 74 I. C. 911. 1924 A. 63.

—Conduct—Admission of adoption—in documents, Effect

Where a person executed a registered document declaring he had adopted another, and in mutation proceedings described himself as the guardian of such adopted son and even entered into a compromise wherein for valuable consideration he gave up all intention of repudiating such adoption, he would be estopped from alleging there was no adoption. (*Rafique and Piggott, JJ.*) *KUNWAR UBIT NARAYAN SINGH v. DIVAN RANDHIR SINGH.* 1923 A. 68.

—Conduct—Agreement regarding division of property—Enjoyment of benefit thereunder—Effect of.

Where an agreement relating to division of family properties is entered into and the parties enter into possession of the properties allotted and occupy it for a long time, they are estopped from setting up their independent rights *dehors* the agreement and from denying the rights of the other parties. (*Ryves and Gokul Prasad, JJ.*) *BAHADUR SINGH v. RAM BAHADUR.*

45 A. 277 : 21 A. L. J. 140 : L. R. 4 A. 105 : 71 I. C. 405 : 1923 A. 204.

—Co-sharer—Dealing with common land as his own property—Partition—Allotment.

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Where a co-sharer had been allowed by the other sharers to treat certain land as his exclusive holding and he grants a perpetual lease of a small portion of the land so as to confer occupancy rights on the tenant and at a subsequent partition the land was allotted to another co-sharer held that the co-sharers were estopped from disputing the title of the occupancy tenant to the land. (*Burn, S. M. and Pearson, J. M.*) *TEJ SINGH v. MUNSHI.* L. R. 4 A. 54 (Rev.) : 9 O. & A. L. R. 435.

—Criminal trial—Non-payment of license fee of Municipality—Failure to appeal to Standing Committee—Effect. See MADRAS CITY MUNICIPAL ACT, S. 288. 45 M. L. J. 731.

—Equitable estoppel—Doctrine of—Conversion of land granted for a certain use—Standing by. See EVIDENCE ACT, S. 115.

1923 All 11 (1).

—Execution—Objection—Declaration of judgment debtor's interest—Jurisdiction to sell—Bundelkhand Land Alienation Act.

The decree holder being resisted in execution, obtained a declaratory decree that the property belonged to the judgment debtor. The latter then objected that it could not be sold under the Bundelkhand Land Alienation Act. *Held*, he was not estopped from raising it. (*Sulaiman, J.*) *SATDHAR v. RAM CHANDRA.* 21 A. L. J. 917 : L. R. 4 All. 607.

—Execution—Purchaser subject to mortgage—Estoppel affecting mortgagor—Purchaser if bound.

A purchaser at an execution sale is bound by the same rule of estoppel as the judgment-debtor and consequently he cannot dispute the validity of a mortgage which the mortgagor himself is estopped from questioning. 22 C. 909, 10 C. L. J. 150, 21 C. L. J. 441 Rel. (*Mookerjee and Cuming, JJ.*) *NANDA LAL AGRANI v. JOGENDRA CHANDRA DATTA.* 70 I. C. 980 : 1923 Cal. 53.

—Execution sale—Decree-holder selling his own properties by mistake—Purchase in execution—Subsequent setting aside the sale. See (1922) Dig. Col. 558, *RAMASWAMI KONAN v. KOLANDAIVELU PILLAI.* 70 I. C. 569.

—Feeding of title—Doctrine of. See ELECTION OF REMEDIES.

45 M. L. J. 516.

—Grantor—Not permitted to derogate from his grant—Applicability of the principle.

The rule that a person cannot be permitted to derogate from his own grant, is not of universal application and certainly cannot apply to the case of a landlord where, by a *bona fide* surrender by the tenant, he acquires statutory right of re-entry into the land which was originally dismissed in favour of the tenant. (*Jwala Prasad and Ross, JJ.*) *RAM ORAON v. DOMAN KALAL.* 2 Pat. 898 : 4 Pat. L. T. 562 : 75 I. C. 209.

—Incomplete engagement—Power to rescind—Part performance doctrine.

Though a party has complete power to rescind from an incomplete engagement, such a power will be denied when the actings and conduct of the parties have carried the incompletely executed engagement into effect. The doctrine of part

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performance does not apply to a case where a Hindu widow even though purporting to relinquish her estate remains in possession thereof (*Das and Kulwant Sahay, JJ.*) **RAO BAHADUR MAM SINGH v MAHARANI NAWALAKHBATI.**

2 Pat. 607 : 4 Pat. L. T. 335 : 731. C. 822 : 1923 P. 492.

———Landlord and tenant—Admission into land on receiving fees—Effect—Absence of formal lease. See (1922) DIG. COL. 559. **RAJA DURGA NARAIN SINGH v. JODHA.**

90 & A. L. R. 57.

———Landlord and tenant—Relationship—Grant of receipts.

The granting of receipts in the ordinary course of business by a landlord to his tenant is not an admission of such a formal and deliberate character as to prevent the former from denying the relationship of tenancy. (*Fremantle, S. M. and Burn, J. M.*) **HABIB v. SALAMAT KHAN.**

L. R. 4 A. 174 (Rev.).

———Landlord and tenant—Rent decree—Purchase of property subject to second decree—Effect.

A decree-holder landlord who in execution of a rent decree purchases the holding subject to liability for a second rent decree is not estopped from proceeding against other properties in execution of the latter decree (*Mullick and Macpherson, JJ.*) **JUGAL KISHORE NARAYAN SINGH v. BHATU MULL.**

1 Pat. L. R. 311 : (1923) Pat. 205 : 4 Pat. L. T. 640 : 2 Pat. 729 : 1923 P. 517.

———Landlord and Tenant—Silence of landlord—Conduct of lessee.

Where the tenants knew perfectly well what their rights were and they were not deceived or encouraged in any way, the mere silence of the landlord or his inaction does not create an estoppel against him. Further to create an estoppel it must also be shown that he was aware of what his rights were and that he had the power to prevent tenants from building. (*Miller, C. J. and Mullick, J.*) **BUDHAN TELI v. MADANMOHAN LAL.**

1923 P. 111.

———Landlord and tenant—Standing by—What amounts to—Execution of buildings.

In order that a tenant may avail himself of a plea of acquiescence or estoppel against his landlord, he must show that in erecting buildings of a permanent nature, he acted in the bona fide belief he had a permanent right to the land and that the landlord knowing he was acting in that belief stood by and allowed him to go on. (*Ghose and Panton, JJ.*) **SYED ALI KAZEMINI v. MANIK CHANDRA PRAMANIK.**

27 C. W. N. 969.

———Lessor and lessee—Status of parties.

It is not open to the representatives of a lessor to prove that the status of the original lessee was other than what was described in the lease deed. (*Hookerjee and Rankin, JJ.*) **ISWAR CHANDRA NATH v. GOUR SUNDAR NATH.**

1923 Cal. 608.

———Minor — Fraudulent representation as to age—Equity. See MINOR

1923 Lah. 511.

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———Mis-statement of fact — Knowledge—Effect.

A mis-statement of fact which is false within the knowledge of both parties will not act as estoppel, so also a statement of surrender which is not acted upon. (*Fremantle, S. M. Burn, J. M.*) **TORIA v. KUNWAR OBAIDULAH KHAN.**

L. R. 4 A. 185 (Rev.) : 90 & A. L. R. 1011.

———Mortgagor and mortgagee—Mortgage of endowed property—Mortgagor if estopped from denying title.

Where the mortgage deed clearly purports to be executed by the mortgagor as the proprietor of the property in his own interest, he is estopped from denying the interest which he represented as his own proprietary right in the deed. He cannot set up against the mortgagee the paramount title of a third party even though the latter might eventually prove a right to recover the property. If the Hindu public or anybody else is interested as proprietor of the mortgaged property or has a paramount title adverse to that of the mortgagor, the decision in the mortgage suit will not be binding upon such a person and it is competent to such person to take proper steps at the proper time to protect his interests.

The mortgagor's plea that the mortgaged property is held in trust for the Hindu public is clearly outside the scope of the mortgage suit, so far as it asserts a third person's title. (*Dawson Miller, C. J. and Foster, J.*) **BABU BRIJ RATAN DAS v. RAGHUNANDAN GIR.**

(1923) Pat. 49 : 71 I. C. 944 : 1923 P. 203.

———Mortgage—Denial of title—Decree. See (1922) DIG. COL. 1090. **BHOLANATH SEN v. BALARAM DAS.**

27 C. W. N. 607 : 18 L. W. 48 : (1923) M. W. N. 525 : 70 I. C. 932 (P. C.).

———Nature of—When not allowed.

Estoppel is an equitable relief and a party who has cheated another of his rightful claims cannot be allowed to raise an estoppel to deprive him further of his rights. (*Ayling and Odgers, JJ.*) **KOKUMANU KOTAYYA v. PEDDI VEERAYYA.**

(1923) M. W. N. 679.

———Party to fraud or wrong doing—Debarred from setting up his own wrong. See HINDU LAW—ADOPTION. 32 M. L. T. 349 (H. C.).

———Pre-emption suit.

In order to maintain a plea of estoppel in a pre-emption suit, it must be proved that the plaintiff believed the representation made and brought his suit on the basis of it. (*Daniels, A. J. C.*) **BANKE BEHARI LAL v. MANNA LAL.**

90 & A. L. R. 79 : 73 I. C. 372.

———Question of law.

A representation as to a question of law cannot give rise to an estoppel. (*Ayling and Odgers, JJ.*) **RAJAMBAL AMMAL v. SHANMUGA.**

70 I. C. 653 : 1923 Mad. 11.

———Representation—Necessity for—Suit in ejectment by landlord against tenant. See (1922) DIG. COL. 561. **DAMODAR NARAYAN CHOWDHURY v. S. A. MILLER.**

27 C. W. N. 461 :

4 Pat. L. T. 199 : 21 A. L. J. 365 :

44 M. L. J. 723 (P. C.).



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— Truth known to parties—Effect  
 No estoppel can arise where truth is known to both parties. (*Das and Kulwant Sahay, JJ*)  
*JAGDIP PRASAD SAHAI v. MR. RAM KIER.*  
 2 Pat 585 (1923) Pat 177 4 Pat. L. T. 531.  
 1923 P. 464.

**EVIDENCE**—Account books—Items entered by *Mumim* before whom money was not paid  
 The noting of the items in an account book kept regularly by *Mumim* in whose presence the money was not paid is not evidence. (*Mahitamm, J.*)  
*FIRM OF GOKUL MAL RAM CHAND v. FIRM OF NATHMAL*  
 1923 Lah 431 (1)

— Admissibility — Ejectment suit—Compromise — Terms outside scope of suit—Non-registration—Effect. See REGISTRATION ACT S 49.  
 L. R. 4 A 1 421 (Rev.).

— Admissibility — Judgment of probate Court.  
 A judgment of the probate court is inadmissible in evidence in a proceeding under S 193 of the Indian Penal Code for perjury committed in the testamentary suit. (*Ghose and Cumming, JJ.*)  
*OFARIS v. EMPEROR.*  
 38 C. L. J. 163.

— Admissibility—Objection raised but not pressed in courts below—Effect. See PRACTICE.  
 1923 Lah 21.

— Admissibility—No objection taken in the court of first instance—If can be raised for the first time in appeal. See APPELLATE COURT  
 69 I. C. 331.

— Admissibility — Objections to—Waiver — Objection on appeal.

The question of the mode of proof is a question of procedure and is capable of being waived by a party. Where the question of the admissibility of a document was not raised before the Court below by the defendants, the appellate Court would take it they waived their objection to the mode of proof adopted by the plaintiff. It is not open to the defendants on appeal to raise the question of the proper proof of these documents. (*Das and Adams JJ*)  
*MR BIBI KANIZ ZAINAB v. SYED MOBARAK HOSSAIN*  
 72 I. C. 748.

— Admissibility—Power of court to refer to documentary evidence not exhibited—Opportunity to parties.

No court has a right to look at any document or any papers other than those on the record unless he gives to the parties to the suit an opportunity of being heard and making their submissions with regard to what is contained in documents outside the record to which the judge desires to refer. (*Greaves and Panton, JJ*)  
*ALTAP ALI CHOUDHURY v. SRIMATI JARINA BIBI.*  
 1923 Cal. 194.

— Admissibility—Redemption suit—Validity of mortgage deed—Previous pre-emption suit—Judgment—How far—Conclusive. See MORTGAGE — REDEMPTION.

21 A. L. J. 793.

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— Admissibility—Report of Chemical Examiner—Not tendered in the Trial Court—Appellate Court sentencing for it and not recording grounds under S. 428, Cr. P. C. See CR. P. CODE, S. 428.  
 21 A. L. J. 869.

— Admissibility — Weight — Distinction—between—Absence of entry in a document—Relevancy of.

The absence of entry in a document in which one would expect an entry is relevant, though the weight due to such fact is one to be determined in the light of the general evidence in the case. 45 C. 878 Rel. The question whether a document is admissible in evidence as a public document is distinct from the question whether the contents are binding on persons not parties to it. (*Mookerjee and Chotzner, JJ.*)  
*TARA KUMAR GHOSE v. KUMAR ARUN CHANDRA.*

74 I. C. 383 : 1923 Cal. 261.

— Agreement to pay dower.

The materiality of evidence regarding social position and customary dower if an agreement about dower is clearly proved, is not obvious, but it affords some test of the reliability of the witnesses of the party alleging agreement if the conclusion on the agreement was unfavourable to her. In the case of an agreement entered into 37 years back the oral evidence of the agreement must be clear and convincing in order to establish a claim against the estate of the man who is said to have been a party to it. (*Lord Salveson*)  
*(MT.) HAFIZAN BIBI v. MT. SUBA BIBI.*

44 M. L. J. 714 : 37 C. L. J. 461 :

27 C. W. N. 854 : 18 L. W. 670 :

L. R. 4 P. C. 95 : (1923) P. C. 29 (P. C.).

— Appreciation of—Falsity in portions—Credibility of the rest of the evidence.

The maxim *falsus in uno falsus in omnibus* is a maxim of ancient origin which is not now implicitly followed by courts in the appreciation of evidence. It is the duty of the court to sift the evidence and separate the truth from the falsehood if it can. (*Maung Kin, J.*)  
*MAUNG PO GYAW v. MAUNG SO.*

70 I. C. 902 :  
 1923 Rang. 30.

— Appreciation

Where a witness states that he could see and did see, in apparently very short time, that a certain quantity of land had not been cleared, the statement can be disbelieved as being improbable only if cross examination is directed to the impracticability of forming a judgment by mere inspection even with the aid of glasses, as to the proportion cleared. (*Viscount Haldane*)  
*NABAKUMAR DAS v. RUDRA NARAYAN JANA.*

45 M. L. J. 438 : 33 M. L. T. 309 (P. C.) :  
 (1923) M. W. N. 622 : (1923) P. C. 95.

— Batwara papers—Writs of attachment — Admissibility.

Writs of attachment issued in 1792 and 1797 and prepared when the collector took possession of a Zemindari for non-payment of revenue and Batwara papers are admissible in evidence to show the non-existence of tenures. (*Mookerjee and Chotzner, JJ.*)  
*TARA KUMAR GHOSE v. KUMAR ARUN CHANDRA SINGH.*

74 I. C. 383 :  
 1923 Cal. 261.

## EVIDENCE.

## —Competence of witness—Objection—When to be raised.

The proper time to object to the competence of a witness is when he is tendered for examination. But this does not mean objection cannot be raised during the course of the defence argument. (*Mears, C. J. and Piggott, J.*) *EMPEROR v. HAR PRASAD BHARGAVA.* 45 A. 226 : 21 A. L. J. 42 L. R. 4 A. 19 (Cr.) : 1923 A. 91.

## —Conjectures.

The mere fact that the promissory note is stamped with a King Edward stamp does not prove that the note was executed in 1911 and not in 1915, in the absence of any evidence that there were no King Edward stamps in existence in 1915 (*Moti Sagur, J.*) *MT. CHANDU v. SIRI RAM.* 1923 Lah. 607

## —Credibility—Plaintiff contradicted by his own witnesses.

Where plaintiff's evidence as to a transaction is contradicted by his own witness—a scribe who was put forward as having written the instrument—a decree cannot be passed on his evidence (*Dalal, J. C.*) *DAYAL v. BHIMMA.* 9 O. & A. L. R. 1045.

## —Credibility—Trial judge's opinion of witness when open to criticism in appeal.

Where the trial judge, who has seen and heard the witnesses come to the conclusion that they are credible and are uttering the truth, it requires circumstances of exceptional character to justify a court of appeal in coming to a different conclusion. (*Lord Parmoor*) *MA THAN THAN v. MA PWA THIT.* 33 M. L. T. 361 (P. C.) : 2 Bur. L. J. 260 : 1923 P. C. 156 (P. C.)

## —Criminal case—Deposition of witnesses taken in a previous trial—Admissibility—Conviction.

The accused and his father were placed together on trial but after the trial proceeded to sometime, it was decided to hold two separate trials and the judge then began the trial of the accused and exhibited the evidence already given at the joint trial. Then that judge ceased to hold office and his successors decided to hold trial *de novo* but exhibited the depositions of witnesses in the previous trial without examining them *de novo*. Held that in doing so there was an irregularity in the procedure which would vitiate the proceedings and that the consent of the accused would not cure such irregularity. 12 C. W. N. 140 foll. In such a case the appellate court has not plenary discretion to decide whether the accused has been prejudiced by the irregularity. 39 M. 449 Ref. (*Oldfield and Ramesam, J.*) *KOTTAMMAL K. UMMAR HAJEE In re.* 46 Mad. 117 : 1923 Mad. 32 : 69 I. C. 636 : 23 Cr. L. J. 748.

## —Decree in favour of co-sharer—Partition between co-sharers and opponent.

Where there was a decree in favour of a co-sharer against Government followed by a partition in accordance with the decree between the co-sharers and Government. Held, the decree being followed by partition, is relevant and is an important piece of evidence. (*Lord Phillimore*)

## EVIDENCE.

NARESH NARAYAN ROY v. SECY. OF STATE FOR INDIA. 50 Cal. 446 : 45 M. L. J. 444 :

(1923) M. W. N. 511 : 50 I. A. 131 :

32 M. L. T. (P. C.) 162 : (1923) P. C. 1.

## —Deposition—Value of.

A few (say two) casual and somewhat ambiguous phrases in a deposition cannot destroy the very clear effect of the whole deposition (*Batten, J. C. and Halifax A. J. C.*) *MT. KUSHIBAI v. MANRAKHAN* 1923 Nag. 265.

## —Document—Not acted upon—Admissibility

A document is obviously inadmissible, if it is not given effect to and the object for which it was executed, namely, the proposed compromise in a suit, fell through, as then the document has not the force of a decree (*Jwala Prasad and Adami, JJ.*) *SITA RAM TEWARI v. GAYA PRASAD.* 1923 P. 37.

## —Finger prints—Value of—Duty of Court.

There is nothing in the so-called science of finger prints or the qualification of an expert in it which prevents the court from applying its own eyes and mind to the evidence and verifying the results submitted to it by experts. The argument in finger print cases rests on a simple deduction from a number of observations of the similarities and differences between the finger prints in question. 27 I. C. 900 Ref. (*Oldfield and Ramesam, JJ.*) *PUBLIC PROSECUTOR v. VIRANNA* 69 I. C. 374 : 23 Cr. L. J. 694 : 1923 Mad. 178.

## —English and vernacular—Record—Depositions—Weight.

In cases where evidence is given by a witness in his own language, the vernacular record is always treated as more reliable and entitled to greater weight but this maxim could not always be safely applied in cases where a Magistrate who is taking down the evidence simultaneously in English understands the language as well as his reader. (*Abdul Qadir, J.*) *SADHU SINGH v. THE CROWN* 73 I. C. 513 : 24 Cr. L. J. 625 : 1923 Lah. 167.

## —Entry in the account book of co-accused—Admissibility.

In the case of several accused persons, an entry in the account book of one that he paid rent on behalf of another, is not evidence against that other. (*Krishnan, J.*) *In re SAMACHARI.* 45 M. L. J. 728 : 18 L. W. 743 :

33 M. L. T. 182 (H. C.)

—Hearsay evidence—Statement of kanungo. See (1922) DIG. COL. 564. *HUKUM CHAND v. BALWANT SINGH.* 9 O. & A. L. R. 25.

## —Inadmissible evidence—Consent of parties.

Statements which are not admissible in evidence cannot be rendered admissible by consent of parties. (*Martineau and Zafar Ali, JJ.*) *SUNDER SINGH v. SHAM SINGH* 1923 Lah. 630.

## EVIDENCE.

———*Judgment—Admissibility of—Extent of*

The production of judgment in a previous case merely established the fact that there has been a judgment but it does not prove the correctness of the previous decision. (*Mookerjee and Cuming, JJ.*) BAIDYA NATH DUTT v. ALEF JAN BIBI, 70 I. C. 194 : 1923 Cal. 240

———*Judgment—Recitals.*

Where a judgment is admitted in evidence to prove that there was litigation which terminated in a certain way, all the recitals in the judgment do not form part of the evidence. (*Mookerjee and Rankin, JJ.*) ABDUL LATIF KAZI v. ABDUL HUQ KAZI, 28 C. W. N. 62.

———*Maps—Thak and Survey maps—Admissibility in evidence.*

Thak and survey maps are not conclusive as to whether lands which formed part of the bed of the river were included in the permanent settlement of 1793. It is not permissible for a court to act on the assumption that in 1793 a state of things existed different from what appeared from any evidence before the Court. 2 C. 91 Rel. (*Mookerjee and Cuming, JJ.*) SECRETARY OF STATE FOR INDIA v. UPENDRA NARAIN ROY, 71 I. C. 649 : 1923 Cal. 247.

———*Patwari's record—Value of.*

Patwari's papers though not conclusive, are good evidence of the matters contained therein and the onus is on the party who disputes them to prove the same. (*Fremantle, S. M.*) SARJI TEWARI v. HIRA LAL, L. B. 4 All. 414 (Rev.)

———*Pleadings—Substance in judgment.*

The substance of the pleadings narrated in the judgment furnishes evidence of the allegations made by the parties on that occasion. (*Mookerjee and Cuming, JJ.*) KAILASH CHANDRA NAG v. BEJOY CHANDRA NAG, 72 I. C. 680 : 1923 Cal. 18.

———*Pleadings—Substance of reproduced in judgment.*

The substance of the pleadings narrated in the judgments may furnish evidence of the allegations made by the parties on that occasion. 9 C. 586, 3 C. L. J. 521; 15 M. 19; 15 M. 378; 18 M. 73 Rel. (*Mookerjee and Cuming, JJ.*) KAILASH CHANDRA NAG v. BUJAY CHANDRA NAG, 72 I. C. 680 : 1923 Cal. 18.

———*Police diaries—Right of accused to inspect.*

An investigating officer examined as a witness for the prosecution was asked about a certain date and the names of certain persons. There upon the Court directed him to give out the particulars from a reference to his diary. Held that the accused was entitled to an inspection of that portion of the diary from which the witness refreshed his memory and not of the rest of the document. (*Coutts and Das, JJ.*) LACHMI SINGH v. EMPEROR, 2 Pat. 74

———*Prior deposition of witness—Admissibility.*

Former statement of witness can be used in certain circumstances to contradict or corroborate them; they cannot be used as substantive evidence (*Ghose and Cuming, JJ.*) OATES v. EMPEROR, 38 C. L. J. 163.

## EVIDENCE.

———*Recitals in will—Value of.* (1922) D.I.G. COL. 565. PROMOTHA NATH MULLICK v. PRODYMANO KUMAR MULLICK, 69 I. C. 900

———*Rejection of—Power of court—Refusal to examine witness.*

Any particular answer given by a witness, may after it is given, be ruled out as irrelevant but no court can say beforehand that all the evidence not yet taken is going to be irrelevant and the court's belief that the evidence is biased is not a valid ground for refusing to record it. (*Balkin, J. C. and Hallifax, A. J. C.*) BHAGCHAND v. MUSAJI, 1923 Nag 58.

———*Relevancy.*

A Kabuliati executed by the plaintiff's tenure holder in favour of superior landlord was used as evidence in the case against the defendants. Held whatever might be the effect of the kabuliati as regards the relation of the plaintiffs to their own landlord it cannot have the effect of affecting the defendants' state in any way which existed before the date of the Kabuliati. (*Walmsley and Ghose, JJ.*) BHAIJAN SHEIKH v. BALAI SARKAR, 1923 Cal 375

———*Reliability of witness.*

*Prima facie* lambardars are reliable witnesses, where the only ground which the lower Court has given for disbelieving them was that they were Brahmins, and that the deceased was a woman and that the witnesses did not consider the death of a mere woman of any importance compared with the lives of some Brahmins who were accused of her murder. Held the mere fact that they were Brahmins was not sufficient reason for rejecting the evidence of witnesses who are *prima facie* reliable. (*Scott Smith and Molisagar, JJ.*) SHEO RAM v. EMPEROR, 1923 Lah. 436

———*Suspicion—Not a ground for judicial decision.*

A Court should not rest its decision merely on suspicion unsupported by legal testimony. 25 C. W. N. 409, (*Mookerjee and Chotzner, JJ.*) PROMODE KUMAR ROY v. KALI MOHAN SAHA, 27 C. W. N. 305 : 70 I. C. 555 : 1923 Cal. 220.

———*Thak maps—Value of—Revenue register—Possession—Evidence of.*

Thak Maps are good evidence of possession at the time they were made, but they are no evidence of title acquired by prescription or adverse possession. The object of the Thakbust Survey, which preceded the Revenue Survey, was to ascertain the position of the boundaries and area of estates and villages and it was no part of the duty of the Revenue Officers conducting the Thakbust operations to record the prescriptive rights. (*Das and Kulwant Sahay, C JJ.*) CHATRAPAT PRATAP BAHADUR SAHI v. G LEE, 4 Pat. L. T. 487 : 1923 P. 558 : 1 Pat. L. B. 322 : 72 I. C. 648

———*Thumb impression—Value of—Forgery.*

A court should exercise great caution in arriving at a conclusion by a comparison of thumb impressions. The positive evidence of witnesses who were undoubtedly present and eye witnesses to the transaction should not be lightly brushed

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aside. 1 C. W. N. 330 Ref. *Mookerjee and Cuming, JJ*) BAIDYA NATH DUTT v. ALEF JAN BIBI. 70 I. C. 194 : 1923 Cal. 240

—Weight due to Evidence of party—Question of onus.

The weight to be attached to the evidence of a party is not governed by any such consideration as that of the burden of proof but depends entirely on the intrinsic evidence. (*Kotwal, A. J. C.*) GOVARDHANDAS v. HARLAL RAMSUKH. 69 I. C. 541 : 1923 Nag. 62.

—Witness—Reliability.

Where a witness keeps quiet for many days after the occurrence and comes forward after the police had made a discovery he is not reliable. (*Shadi Lal, C. J. and Zafar Ali, J.*) RULLIA RAM v. EMPEROR 5 Lah. L. J. 325 : 1923 Lah. 438 (2).

EVIDENCE ACT (I OF 1872), Ss. 9, 11, 21—Scope of—If controlled by the Cr. P. Code.

Ss. 9 and 11 read along with S. 21 of the Evidence Act amply justify a court in admitting into evidence all previous statements made by the accused which have a bearing on the question of his guilt and whether the previous statement is made to a police officer or to an officer or to a third party is immaterial if the statement is relevant to the fact in issue. These sections are not controlled by the Cr. P. Code. (*Mullick and Thornhill, JJ.*) MADAN GURU v. EMPEROR. 4 Pat. L. T. 381 : 73 I. C. 963. 24 Cr. L. J. 723.

—S. 10—Forgery—Letter written by a third party to a stranger—Admissibility against accused—Proof of conspiracy.

The accused was tried on a charge of forgery of a will and the prosecution tendered in evidence a letter purporting to be written by a person who had no hand in the forgery to his brother. The writer of the letter was not examined but the letter was admitted in evidence. Held that the letter was not admissible in evidence in the absence of proof that its writer was a party to a conspiracy to forge the will. (*Scott, C. J. and Shah, J.*) EMPEROR v. KESHAV NARAYAN. 25 Bom. L. R. 248.

—Ss. 11, 13, and 32 (2)—Deed—Recitals as to boundaries—Admissibility of—Persons parties to deed living.

Documents between strangers containing recitals as to the boundaries and throwing light on the ownership of the property in dispute are not admissible under S. 11 or 13 but are admissible under S. 32 (2) of that Act. 5 C. L. J. 55 : 14 C. L. J. 167 (1910) M. W. 664; 19 C. W. 468 Ref. (*Prideaux, A. J. C.*) TRIMBAK v. GANESH. 1923 Nag. 22.

—Ss. 11, 13 and 32 (3)—Documents not inter partes—Recital of boundaries—Admissibility in evidence.

Recitals of boundaries in documents between third parties are not admissible in evidence under Ss. 11 and 13 of the Evidence Act but they might be admitted under S. 32 (3) when they are the statements made by persons of the character described in the opening words of that section;

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## EVIDENCE ACT (I OF 1872), S. 13.

that is to say, persons who are dead or who cannot be found or for other reasons there stated cannot be examined as witnesses. 35 C. L. J. 19 : 14 C. L. J. 457 : 15 C. L. J. 7 Ref. (*Newbould J.*) ABDUL RAHIM KAYI v. JONABALI SIKDAR. 1923 Cal. 299.

—Ss. 11 and 41—Judgment—Recitals—Admissibility of—Family custom.

Though the recitals in a judgment cannot be used as evidence, still the judgment is evidence as a relevant fact in issue or as a transaction. Evidence adduced to prove the custom prevailing in connected families may be admissible to prove the custom in the family in question in a suit 29 C. 343 referred to. (*Mookerjee and Cuming, JJ.*) SARADA PRASANNA ROY v. UMA KANTA HAZARI. 50 Cal. 370 : 37 C. L. J. 233 : 1923 Cal. 485.

—Ss. 11 and 13—Landlord and tenant—Evidence of relationship—Ex parte decrees.

Ex parte decrees for rent obtained by a landlord against the heirs of a tenant and satisfied by the latter are evidence of the existence of the tenancy at the date of those decrees. (*Greaves and Panton, JJ.*) ANUKUL CHANDRA DIAR v. KAMALA KANTA ROY. 1923 Cal. 270.

—Ss. 11 (2) 21 (3) and 32 (5)—Date of death—Document by son after father's death.

Where the question to be decided was as to when A died, a mortgage executed by his son in which the father is described as dead is admissible. (*Mookerjee and Rankin, JJ.*) SAYERUDDIN AKONDA v. SAMIRUDDIN AKONDA. 72 I. C. 985 : 1923 Cal. 378.

—S. 13—Document not inter partes—Admission of plff's rights—Admissibility, See (1922) DIG. COL. 567, SABRAN SHEIKH v. ODGY MAHTO. 1923 Pat. 125 : 70 I. C. 18.

—S. 11—Evidence of transaction—Admission of document—Recitals if admissible.

Where a document has been admitted in evidence as evidence of a transaction the parties are often apt to refer to the recitals therein as relevant evidence, but the recitals are not evidence especially if they are mere assertions by a person who is alive and who might have been brought before the court as a witness. (*Mookerjee and Chotzner, JJ.*) NIHAIR BEWA v. KADER BAKSH. 1923 Cal. 290.

—Ss. 13 and 50—Mutation application—Legitimacy.

When the question is whether a certain person is a legitimately born son application for mutation with regard to revenue paying properties would be admissible under Ss. 13 and 50, Evidence Act, as assertions of his right as a legitimate son. So also a judgment relating to a transaction in which he set up a claim as legitimate son would be relevant under S. 13 (*Simpson, J. C. and Dalal, A. J. C.*) GALSTAUN v. MIRZA ABID HUSSAIN. 10 O. L. J. 263 : 73 I. C. 428 : 9 O. & A. L. R. 282 : 1924 Oudh 19.

—Ss. 13 and 32 (7)—Right to property—Assertion of title in a mortgage deed—If relevant as evidence of title of mortgagor—Recitals. See (1922) DIG. COL. 530. NALLASIVA MUDALIAR v. RAVAN BIBI. 70 I. C. 389.

## EVIDENCE ACT (I OF 1872), S. 14.

—Ss. 14 and 15—*Murder—Evidence of other acts.*

In a case of murder by administering sweetmeats, the fact that the accused offered sweetmeats to boys and thus poisoned one of them is not evidence under S. 14 Evidence Act, but it would be relevant under S. 15 to show that the administration was intentional and not accidental. *Batten, J. C. and Halifax, A. J. C.* KASHIRAM v. EMPEROR. 6 N. L. J. 144 : 73 I. C. 262 : 24 Cr. L. J. 566 : 1923 Nag. 248.

—Ss. 14, 25 and 54—*Offences under Ss. 400 and 401. Penal Code—Evidence of previous offences—Self exculpatory statements—Admissibility of*

In the case of a person accused under S. 400 I. P. C. a previous conviction of dacoity is admissible under S. 14 of the Evidence Act. A previous conviction of theft or a order to give security on the ground of being an habitual thief, is admissible against him in a case where he is charged under S. 401, I. P. C. i. e., belonging to a gang of persons associated for the purpose of habitually committing theft or robbery. In these two cases such evidence clearly falls under S. 14 of the Evidence Act as showing a disposition on the part of accused towards the particular conduct alleged against him in the charge, namely, a habit of committing dacoity and theft. But it is in order to establish a habit of committing dacoity the prosecution rely on evidence that the accused had previously committed thefts, they no doubt produce evidence which may show a disposition towards conduct of a similar description to that in question, but not of the exact description in issue. It is little if anything, more than evidence of bad character which is excluded by S. 54 of the Act. In a case where the accused are tried for being members of a gang of dacoits and simple theft or bad livelihood in which the order for giving security is based on evidence merely that the accused habitually commits theft (as opposed to dacoity and possibly robbery) it is not evidence indicating an intention to commit the particular crime of which the accused is charged. It at the most merely indicates a disposition to commit crimes of a similar class. A statement of a self-exculpatory kind, which, if true, is in favour of the accused, is admissible, in spite of the fact that, if it is shown to be false, it raises an inference of guilt; and distinction must be made between such statements and statements which, although intended to be made in self exculpation and not as a confession, nevertheless contain an admission of an incriminating circumstance on which the prosecution relies. The mere fact that the accused in making the statements may have intended them to be self exculpatory is insufficient. The real test is what is its effect. 19 Bom. L. R. 363 : 34 Cal. 46 followed. (*Fawcett, J.*) EMPEROR v. HAJI SHER MUHOMED. 25 Bom. L. R. 214 : 75 I. C. 67 : 24 Cr. L. J. 867 and 75 I. C. 70 : 24 Cr. L. J. 870 : (1923) Bom. 65 and (1923) Bom. 71.

—S. 15—*Motive or preparation—Dacoity Previous armed raids.*

Where the accused who were charged under S. 389 I. P. C. plead that their presence in company

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and armed at a spot was accidental and innocent, it is open to the prosecution to rebut this theory, and to produce evidence that in the same locality raids have taken place in which one of the gang had been concerned. In the case of actual dacoity the prosecution is bound to prove the accused's commission of all the acts which constitute the offence. S. 15 of the Evidence Act admits the production of any evidence which would determine the construction to be placed upon acts which in themselves might or might not be the preparation for dacoity and evidence that one or more members of the gang had been concerned in previous and similar offences committed at the same place is admissible in evidence for the purpose. (*Pipon, J.*) KHWAJA HASSAN v. EMPEROR. 71, I. C. 360 : 24 Cr. L. J. 136.

—S. 17—*Erroneous admission.*

An erroneous admission does not bind the person making such admission. (*Banerji and Gokal Prasad, JJ.*) MANGRU RAI v. SHIVANAND LAL. 1923 A. 575.

—S. 18—*Admission.*

Statements made by persons from whom the parties to a suit have derived their interest are admissible as admissions only when the admissions are of a date prior to the date of their deriving interest. Statements made by persons in possession of property and qualifying or affecting their title thereto are receivable against the party claiming through them by title subsequent to the admission. (*Simpson, J. C. and Dalal, A. J. C.*) GALSTAUN v. MIRZA ABID HUSSAIN. 10 O. L. J. 263 : 73 I. C. 428 : 9 O. & A. L. R. 282 : 1924 Oudh 19.

—S. 18—*Admissions—Co-defendants—Admission by some when binding on others.*

Where there are several defendants jointly interested in a particular matter, an admission by some of them is relevant against all the defendants. 44 C. 133 ; 45 C. 159 Ref. (*Le Rossignol and Martineau, JJ.*) BHICA MAL v. PURAN MAL. 1923 Lah. 123.

—S. 18—*Admission by Mukhtear.*

A party is not bound by the statement or admission made by his *Mukhtear Aam* unless it is shown to have been made within the scope of the authority conferred by the *Mukhtearnamah*. (*Jwala Prasad and Adami, JJ.*) SITA RAM TEWARI v. GAYA PRASAD. 1923 P. 37.

—S. 18—*Admission in a previous suit by a not-party to present suit.*

An admission in a previous suit in favour of plaintiff-pre-emptor by another pre-emptor not party to present suit is not admissible in a suit between plaintiff and the present vendee. (*Campbell J.*) AHMAD KHAN v. JAWAHAR SINGH. 1923 Lah. 16.

—S. 18—*Customary easement—Gramanatham—Rights in—If can be acquired by user on the part of villagers. See ADVERSE POSSESSION.* 45 M. L. J. 333.

—S. 21—*Admission—Evidentiary value.*

In 1903 the plaintiff's predecessors-in-title made an admission in a case brought by them

**EVIDENCE ACT (I OF 1872), S. 24.**

against their step-mother to the effect that a door existed at A in the court-yard now in dispute and that it had been opened by the father of the present defendant. *Held* that this admission alone was not sufficient to prove that the door was opened by defendant's father at any time prior to 1903 (*Moti Sagar, J.*) **HIRA NANDU v. AHMAD YAR.**

1923 Lah. 608 (1).

**—S. 24—"Appears"—Meaning of.**

It is not possible for a Court to say that the making of the confession "appears" to it to have been caused by any inducement, threat, or promise except upon evidence which is before the Court. The inference may be suggested by the confession itself, or by the evidence of the prosecution, or by the evidence adduced by the accused person, or by surrounding circumstances which the Court is always bound to take into consideration: but the conclusion cannot be reached on surmise or conjecture. (*Das and Adam, JJ.*) **EMPEROR v. DEWANKAHAR.**

4 Pat. L. T. 186 : 72 I. C. 961 : 24 Cr. L. J. 497 : 1923 P. 13.

**—Ss. 24 and 30—Confession—Co-accused—Inducement of pardon—Admissibility against Co-accused.**

In three cases, each of them involving a large number of alleged dacoities, the accused were tried together for participation in three separate dacoities, committed at different times, and at different places, but round about the same season and round about the same neighbourhood. One of the accused was informed by the magistrate that if he made a voluntary confession which was found to be full and true, his prayer for being made an approver would receive due consideration and eventually he made an elaborate statement amounting to a confession under S. 164 Cr. P. Code. He was subsequently tried and convicted and his confession was used not only against himself but against the other accused. *Held* that the confession was inadmissible under S. 24 of the Evidence Act and as it formed the main reason for the conviction of the other accused, their conviction could not stand. (*Walsh and Kanhaya Lal, JJ.*) **TARA v. EMPEROR.**

45 A. 633 : 21 A. L. J. 585.

74 I. C. 529 : 24 Cr. L. J. 785 : 1924 A. 72.

**—S. 24—Confession to panchayatdars—Admissibility.**

A confession made to *panchayatdars* is admissible, as they are not persons in authority within the meaning of S. 24, Evidence Act. (*Krishnan and Wallace, JJ.*) **MULIMAYANDI THEVANJ In re**

45 M. L. J. 845 : 18 L. W. 886.

**—Ss. 24 and 28—Confession—Persons in authority—Panchayat—Improper inducement—Confession to Magistrate—Inadmissible.**

There is no definition in the Evidence Act of a person in authority. These words have been construed in England and the test which has been applied is this: had the persons authority to interfere in the matter. The mere fact that the accused thought that the persons whom he addressed were persons in authority would not be sufficient to justify the Court in holding that they were persons in authority within the meaning of S. 24 of the Act.

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A collecting panchayat and an assistant panchayat who have taken part in holding the enquiry into the circumstances under which the offences has been committed constitute "persons in authority" within the meaning of S. 24 of the Evidence Act. Where in answer to a question to the accused whether he would be saved from the consequence of his act if he confessed the assistant panchayat gave him an assurance that he would be let off if he disclose everything and the confession by the accused was made as a result of such assurance the confession is inadmissible in evidence. The accused in this case made a confession to the assistant panchayat before his arrest, on first January 1922. The accused was thereupon kept in custody till the next day when the Police formally arrested him and sent him before a Magistrate. The Magistrate recorded his confession on the 4th of January. *Held* that the improper influence of the assistant panchayat continued up to the time when the confession was made and it was consequently inadmissible in evidence. (*Sanderson, C. J. and Panton, J.*) **EMPEROR v. GANESH CHANDRA GODAR.**

50 C. 127 : 74 I. C. 264 : 24 Cr. L. J. 760 : 1923 Cal. 458.

**—S. 24—Confession to Police—Admission—False defence.**

*Held* the fact that the accused did not claim a piece of cloth as his own before the Police but admitted at that time that it belonged to the deceased might have been due to this that the defence is not always stated during the Police enquiry and any statement made to the Police to the effect that an article produced by suspected men really belonged to the deceased would amount not to a confession but to an admission. (*Chevis and Abdul Qadir, JJ.*) **SHUA DIN v. EMPEROR.**

5 Lal. L. J. 128.

**—S. 25—Confession to police can be used to contradict judicial confession.**

All that S. 25 lays down is that a confession to the police shall not be used as against a person making it. It does not lay down that such a confession shall be inadmissible for all purposes. The confession to the police may be used for the purpose or arriving at a conclusion as to whether a subsequent judicial confession should be believed or not. (*Scott-Smith and Zafar Ali, JJ.*) **GULAB v. EMPEROR.**

75 I. C. 693 : 1923 Lah. 315.

**—S. 24—Confession—Retracted—Confession—Value of, as evidence.**

It cannot be laid down as an inflexible rule that a confession made by a prisoner cannot be accepted as evidence of his guilt without independent corroborative evidence. The weight to be given to such a confession must depend on the circumstances under which the confession was originally given and the circumstances under which it was retracted including the reasons given by the prisoner for its retraction. It is unsafe for a court to rely on and act on a confession which has been retracted unless after a consideration of the whole of the evidence in the case the court is in a position to come to the unhesitating conclusion that the confession is true, that is to say, usually unless the confession is corroborated by credible independent evidence. A retracted confession

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should carry practically no weight as against a person other than its maker. (*Newbold and Pearson, JJ.*) EMPEROR *v.* BISEWAR DEY.

71 I. C. 497 : 24 Cr. L. J. 145 : 1923 Cal. 217

## —S. 24—Confession retracted—Proof of.

Where a confession is retracted both before the committing magistrate and at the sessions trial, it cannot be used unless the court is otherwise satisfied of its truth and voluntary character (*Krishnan and Wallace, JJ.*) BASIREDDI NARIAPPA *v.* EMPEROR.

45 M. L. J. 613 : 18 L. W. 607 : 33 M. L. T. (H. C.) 77 : 33 M. L. T. (H. C.) 156 : (1923) M. W. N. 697.

## —S. 24—Confession—What is—Accused on trial—Evidence of identification.

A confession made voluntarily in the sense that it was made spontaneously and without any inducement is admissible in evidence under S. 24 of the Evidence Act. Since an accused person cannot give evidence while on his trial secondary evidence of identification by him is inadmissible. (*Walsh, J.*) KHETAL *v.* EMPEROR.

45 A. 300 : 21 A. L. J. 143 : 73 I. C. 62 : 24 Cr. L. J. 526 : 1923 A. 352.

## —S. 24, 30—Retracted confession—Weight of

It cannot be laid down as an absolute rule of law that a confession made and subsequently retracted by an accused cannot be accepted as evidence of guilt without independent corroborative evidence. In every case the credibility of a confession is a matter to be decided by the Court in the circumstances of each particular case.

A confession can be used against co-accused, but by itself it is not sufficient evidence for a conviction. (*Wazir Hasan, A. J. C.*) MANNA LAL *v.* EMPEROR.

90 & A. L. R. 947.

## —Ss. 25 and 26—Police Officer—Frontier Constabulary—Confession.

For the purpose of Ss. 25 and 26 of the Evidence Act a member of the Frontier Constabulary is a police officer and confession made to him while the accused was in his custody and not in the presence of a Magistrate is inadmissible. The term Police officer in this respect must be construed not in any strict technical sense but according to its most comprehensive and popular meaning. The mere fact that the powers of the police officers have not been actually conferred on certain members of the frontier constabulary does not make them any the less police officers. (*Pipon, J. C.*) KHAWAJA HASSAN *v.* EMPEROR.

71 I. C. 360 : 24 Cr. L. J. 136.

## —S. 25—Scope.

An incriminating statement was made to a witness in the absence of the police and subsequently repeated before him and the police officer. Held the confession is undoubtedly admissible but the weight to be given to it is a matter for consideration. (*Broadway, J.*) WADHAWA SINGH *v.* EMPEROR.

1923 Lah. 389 (2).

## —Ss. 26, 74, and 80—Confession recorded by Magistrate outside Br. India—Admissibility.

The word Magistrate, in S. 26 of the Evidence Act includes Magistrates in Native State and a con-

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fession made before such a Magistrate is admissible in evidence certainly under S. 74 as against the persons by whom they were made. (*Hallifax and McNair, A. J. C.*) GOVINDA *v.* EMPEROR.

69 I. C. 257 : 23 Cr. L. J. 673.

## —S. 27—Confession to Police—Use of.

The use that can legitimately be made of a confession to Police is that when direct evidence is given against the accused at the trial it is open to the defence to check such evidence e. g. the consistency of an approver's story. It is of course information which leads to the discovery of the accused. (*Walsh, J.*) SUBEDAR *v.* EMPEROR.

L. R. 4 A. 210 (Cr.)

## —S. 27—Confession—Statement that articles were stolen—If admissible.

A confession which led to the discovery of the articles is admissible under S. 27 but a statement that they were stolen articles does not lead to discovery of the articles and hence is inadmissible. (*Wazir Hasan, A. J. C.*) MANNA LAL *v.* EMPEROR.

90 & A. L. R. 947.

## —S. 27—Information by accused—Discovery—Arms Act, S. 20.

Petitioner was neither accused nor in custody when he gave information which led to the discovery of a rifle. One of the prosecution witnesses deposed that the petitioner said where the rifle had been buried the other deposed that he said "I buried it."

Held, in the absence of any other evidence of possession by the petitioner it cannot be presumed that because he knew where the rifle was he had concealed it himself. (*Campbell, J.*) KHUDA BAKHS *v.* EMPEROR.

1923 Lah. 238 (2).

## —S. 27—Scope.

If arms are recovered in consequence of information supplied by the accused, the statements made by them are, admissible under section 27 of the Indian Evidence Act. (*Moti Sagar, J.*) ALI AHMED *v.* EMPEROR.

1923 Lah. 434.

—S. 27—Statement of accused in the presence of police leading to discovery of material fact. See (1923) DIG. COL. 533 NAINAMALAI KONAN *In re*.

69 I. C. 377 : 23 Cr. L. J. 697.

## —S. 30—Confession—Co-accused—Admissibility of statement.

In a criminal trial it is the duty of the prosecution to prove all relevant facts essential to establish the guilt of an accused person. A statement made under S. 364, Cr. P. C. by a thief in his own defence is not admissible against another person charged with being the receiver of stolen property. The expression "proving a confession" is inapplicable to the questions and answers under S. 364, Cr. P. Code. (*Walsh, J.*) MAHADEO PRASAD *v.* EMPEROR.

45 A. 323 : 21 A. L. J. 179 : L. R. 4 A. 57 (Cr.) : 1923 A. 322.

## —S. 30—Confession—Co-accused—Confession when admissible.

It is not the law that unless a confessing prisoner implicates himself as fully as his co-accused the statement will not be admissible, the principle being there is no guarantee that th

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maker of the confession is speaking the truth. All that is required is that the confession shall substantially implicate its maker in regard to the crime with which he and his co-accused are charged. It is not necessary that there should be an admission of actual guilt. The admission may establish constructive guilt. S. 30 of the Evidence Act applies to confessions made to the residents of the same village as the accused. (*Mullick and Bucknill JJ.*) *SUKA RAUT v. EMPEROR.*

4 Pat. L. T. 505.

—S. 30—Confession of co-accused—When can be used against others—Joint trial—Confession by one accused—Confession of the offence charged if essential—Retracted confession—Corroboration. See (1922) DIG. COL. 535. *MANICKA PADAYACHI In re.*

72 I. C. 497.

24 Cr. L. J. 385.

—S. 30—Confession implicating self only in respect of robbery.

A confession by each of co-accused implicating self and co-accused as regards robbery but throwing entire burden for murder on the other is admissible as regards former and but inadmissible as regards the latter. (*Scott Smith and Harrison, JJ.*) *MIAN KHAN v. EMPEROR.*

1923 Lah. 293.

—S. 30—Confession made before magistrate in Native State—If can be used against co-accused.

Confessions recorded in the manner provided by the Cr. P. Code, even though made to magistrates outside Br. India if proved against the persons who made them, may be taken into consideration against others who are being tried jointly for the same offence. (*Hallifax and Macnair, A. J. C.*) *GOVINDA v. EMPEROR.*

69 I. C. 257; 23 Cr. L. J. 673.

—S. 30—Confession—Value of—Corroboration—Motive if amounts to.

If confession of a co-accused must be of the same crime of which the accused are being tried unsupported by other testimony its evidentiary value is very weak. The motive for the crime will not be corroborative evidence of the confession. (*Dalal, J. C. and Cuming, A. J. C.*) *SHWO AMBAR v. EMPEROR.*

9 O. &amp; A. L. R. 836.

—S. 32—Certificate of guardianship—Age of minor—Dispute as to—Recital as to date of birth.

A certificate of guardianship is neither a book nor a register nor a record kept by an officer in accordance with any law but is a certificate as it professes to be, of which there is only one record and which is not a public record or register of any kind but is a document issued to a particular person, giving to that particular person and only to him, a kind of particular authority. On these grounds the certificate could not be regarded as evidence of minority under S. 35 of the Evidence Act. 17 C. 849; 18 A. 478 referred to. Orders for the appointment and discharge of a guardian could not be received in evidence to prove the date of the birth of the defendant from the recitals contained therein. (*Mookerjee and Chatterjee, JJ.*) *HARA KUMAR DE v. JOGENDRA KRISHNA ROY.*

38 C. L. J. 186; 71 I. C. 336.

## EVIDENCE ACT (I OF 1872), S. 32.

—S. 32—Deposition in prior case—Witnesses dead

*Quære* whether depositions of witnesses who are dead in an old case bearing on a question of custom are admissible in a later case (*Abdul Raof and Campbell, JJ.*) *RAM NARAIN v. MT. HAR NARINJAN KUAR.*

4 Lah. 297.

—S. 32—Dying declaration—Proof by a witness present. See (1922) DIG. COL. 572. *EMPEROR v. BALARAM DAS.*

71 I. C. 685.

24 Cr. L. J. 221.

—Ss. 32, 159 and 160—Horoscope—Evidence of age—Date of birth—Proof of horoscope.

Under Ss. 159 and 160 of the Evidence Act a horoscope can be used to prove the date of birth stated in it if the person who wrote it or who read it soon after it was written is examined as a witness. S. 32 of the Evidence Act does not make relevant the statements of date obtained in a document like a deed of adoption or initiation of a chela. (*Hallifax, A. J. C.*) *SHANKERGIR v. CHINNUJI.*

6 N. L. J. 1; 71 I. C. 140; 1923 Nag. 164.

—S. 32—Gestures of wounded person—Admissibility—Interpretation. See (1922) DIG. COL. S. 573 *CHANDRIKA RAM KAHAR v. EMPEROR.*

(1923) Pat. 26; 1 Pat. L. R. (Cr.) 77;

71 I. C. 353; 24 Cr. L. J. 129.

—S. 32 (1)—Dying declaration—What is—Statements prior to occurrence causing death—Admissibility.

Dying declarations are statements made by a dying person as to the injuries which have brought him to that condition or the circumstances under which the injuries were inflicted. Statements made by a deceased long prior to the occurrence resulting in death are not dying declarations and not admissible under the Evidence Act. (*Broadway and Fjorde, JJ.*) *AUTAR SINGH v. EMPEROR.*

4 Lah. 451.

—S. 32, Cl. 3—Statement by co-accused—Death of maker of the statement—Admissibility in evidence.

On a trial for forgery one of the accused who had made a statement before the enquiring Magistrate died before the commencement of the trial. The statement was admitted by the Sessions Judge under S. 32, Cl. (1) of the Evidence Act. Held that the statement was inadmissible since its maker had already rendered himself liable to Criminal prosecution at the time it was made. (*Scott, C. J. and Shah, J.*) *EMPEROR v. KESHAV NARAYAN.*

25 Bom. L. R. 248.

—S. 32 (5)—Pedigree—Admissibility.

Before a pedigree is admitted in evidence, it must be shown they were made by a person who had special means of knowledge of the relationship. Where it purports to be based on an old genealogical tree which no longer exists, the person who was responsible for the old document must be indicated. (*Das and Macpherson, JJ.*) *JHOBALI RAI v. SAKHI RAI.*

(1923) Pat. 266;

1923 P. 585.

—S. 32 (5)—Pedigree filed in Court—Proof of—Knowledge of relationship. See (1922) DIG. COL. 574 *BHIMMA SINGH v. MT. SUNDAR.*

26 O. C. 109; 69 I. C. 421.



## EVIDENCE ACT (I OF 1872), S. 32.

—Ss. 32 (5) and 155—*Recitals in guardianship petition—When admissible in evidence.*

A recital as to the date of birth in a guardianship application is not by itself admissible in evidence but if the person who made the statement is dead, or cannot be found or had special means of knowledge it will be admissible—If he is examined as a witness his credit may be impeached by producing the same. (*Mookerjee and Rankin, JJ.*) *PROHLAD CHANDRA CHOWDHURY v. RAMSARAN CHOWDHURY.* 38 C. L. J. 213.

—S. 33—*Conditions before admitting evidence*

*Per May Oung, J.* The power given by S. 33, Evidence Act, requires to be exercised with great care and the Court must insist on strict proof before holding that the requisite conditions have been satisfied. The Court must also in the judgment or preferably in a separate order, record the reasons for doing so.

*Per Lentaigne, J.*—It is a far preferable and safer precaution that the Court should record its reasons for holding that the necessary conditions of S. 33 have been complied with, prior to admitting such deposition into evidence. The section pre-supposes a consideration of the grounds prior to the admission of the evidence and if the reasons too are recorded prior to the admission, the order would constitute a more convincing proof of the considered adequacy of the grounds than a passage in the judgment subsequently written which may easily assume the appearance of a subsequent statement of excuses for a previous ill-considered action. (*May Oung and Lentaigne, JJ.*) *NGA NYO v. EMPEROR.*

1 Rang. 512 : 2 Bur. L. J. 205.

—S. 33—Criminal trial—Evidence in another case, if can be imported. See (1923) DIG. COL. 574. *DWARKA SINGH v. EMPEROR.*

24 Cr. L. J. 828 : 74 I. C. 860

—S. 34—*Entries—Past transactions.*

In a suit for recovery of water cess, *balis* entries showing that in previous years the defendant has been paying cess at the rate demanded, are admissible in evidence. (*Moti Sagor, J.*) *PRABHU DIYAL v. RAM CHANDER.* 1923 Lah. 595 (1).

—S. 35—Assessment rolls—Entries in—Relevancy of. See (1922) DIG. COL. 574. *ABDUL HAQ v. FIRM OF SHIVJI RAM KHEM CHAND.*

71 I. C. 259.

—S. 345—*Assessment rolls—Entries in—Relevancy of.*

Entries in assessment rolls are relevant evidence. (*Duckworth and Pratt, JJ.*) *MG. PO. LUN v. MA E. MAI.*

74 I. C. 47 : 1923 Rang. 57.

—Ss. 35, 13—*Balwara Khasra—If a record—Admissibility.*

A *balwara Khasra* is not a record within the meaning of S. 35 and an entry made there in the name of a tenant in possession is not admissible in evidence under S. 35 of the Evidence Act, but under S. 13 it can be put in to show the history of the plot in question before the creation of the tenancy. (*Adami, J.*) *SADHU SARAN v. AMBIKA LAL.* 1923 P. 163

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—Ss. 35 and 14—Confession—Record of, by Magistrate—Voluntary nature of confession. See (19. 2) DIG. COL. 575 *NAR SINGH v. EMPEROR.* 73 I. C. 257 : 24 Cr. L. J. 561.

—S. 35—*Partition papers—Admissibility of.*

Much weight cannot be attached to a partition paper in the absence of detailed information as to the history of the document, when it was prepared, by whom, in whose presence and for what purpose. (*Mookerjee and Chotwani, JJ.*) *TARA KUMAR GHOSH v. KUMAR ARUN CHANDRA SINGH.* 74 I. C. 383 : 1923 Cal. 261.

—S. 35—*Record of admission made before a court.*

The statement of a Court that a person admitted the claim of another person in a case pending before it is relevant under S. 35 of the Evidence Act as the statement forms part of the record. (*Ashworth and Simpson, A. J. C.*) *THAKUR RUDRA PRATAP NARAIN SINGH v. THAKUR NIRMAL PRASAD NARAIN SINGH.* 74 I. C. 225 : 1923 Oudh 61.

—S. 35—*Report made by Tahsildar to Collector in land Acquisition case—Admissibility.*

A report made after local enquiry by a Tahsildar under the orders of the Collector in a land acquisition case is admissible in evidence under S. 35 of the Evidence Act. (*Krishnan and Ramesam, JJ.*) *RATHANAMASARI v. SECRETARY OF STATE FOR INDIA.* 44 M. L. J. 132 : 17 L. W. 415 : 32 M. L. T. (H. C.) 279 : 72 I. C. 214 : 1923 Mad. 332.

—S. 35—*Revenue registers—Extracts from Admissibility.*

Extracts from Revenue registers Nos. 1 and 5 and a map showing the party in possession as mortgagees and the claimant as mortgagor, though relevant, are not sufficient by themselves to prove the existence of a mortgage. (*May Oung and Duckworth, JJ.*) *KO PO MAUNG v. MA MEIN GALE.* I. R. 562.

—S. 35—*Revenue register No. VII, entry in—Relevancy—Presumption.*

Under S. 35 of the Evidence Act, the entry in a Revenue Register No. VII is a relevant fact. Although such entry in the register recording on the alienation does not prove the alienation or the ownership of alienor at the time it was made, yet it does create a presumption that a report of the alienation in the terms recorded was made by the parties to the alienation. (*Pratt, J.*) *MAUNG HLAING v. MAUNG CHIT SU.* 1 Rang. 135 : 1923 Rang. 196.

—S. 35—*School Register.*

Certain entries from a school register at Bikaner which were not proved, are not sufficient to show that the defendant was actually at Bikaner at the time of the entries. (*Motisar, J.*) *MR. CHANDO v. SRI RAM.* 1923 Lah. 607.

—S. 35—*Thakbast khasra—Preliminary to survey—Entries by Amin—Evidentiary value of.* See (1922) DIG. COL. 576. *JAGDEO NARAIN SINGH v. BALDEO SINGH.* 2 Pat. 38 : 45 M. L. J. 460 : 27 C. W. N. 925 : (1923) M. W. N. 361 : 32 M. L. T. (P. C.) 1 : 71 I. C. 984 (P. C.).

## EVIDENCE ACT (I OF 1872), S. 36.

—S. 36—Document referred to in a statement—Documents not produced—Admissibility of the statement.

Where a certain map was referred to in the report of the Commissioner but the map was not produced, their Lordships of the Privy Council received the report of the Commissioner as admissible inasmuch as no objection was taken to the report and the Commissioner himself was neither examined nor cross-examined. (*Lord Phillimore*) NARESH NARAYAN ROY v. SECRETARY OF STATE FOR INDIA.

45 M. L. J. 444 : 50 Cal. 446 :  
(1923) M. W. N. 511 : 50 I. A. 121 :  
32 M. L. T. (P. C.) 162 : (1923) P. C. 1.

—S. 36—Entry in—Thakbast map—Presumption of correctness.

Entries in a *thakbast* map are not sufficient to enable a court of fact to hold that disputed lands were really included in an estate at the time of the Permanent Settlement. They may be good evidence as to what the boundary of a particular plot was at the time of the permanent Settlement.

No general rule can be laid down as to the weight to be assigned to a survey map as a piece of evidence. It is good evidence of possession according to the boundary demarcated thereon and may be taken to have been admitted by those concerned and in each case it must be decided upon the circumstances if it raises a reasonable presumption of title. Revenue survey maps are not conclusive and may be shown to be wrong. (*Jwala Prasad and Ross, JJ.*) RAMNANDAN SAHAY v. JAIGOVIND PANDEY. 2 Pat. 839.

—Ss 42 and 41—Remarks without a finding not admissible.

Remarks made incidentally about another plot which was not then in suit are not admissible. The proper way to prove it is to produce the witness who stated this. (*Campbell, J.*) BANWARI LAL v. SHEO CHAND. 1923 Lah. 384.

—S. 44—Fraudulent decree.

Under Section 44 when a decree which has been obtained by fraud is sought to be used against a person, he is entitled to show the true nature of the decree, not withstanding the fact that he has not previously taken steps for cancellation of the decree. But he cannot be permitted to challenge the decree unless he sets out specifically the circumstances which constituted the alleged fraud on him and on the Court. (*Mookerjee and Chotzner, JJ.*) PULIN BEHARI DEY v. SATYA CHARAN. 70 I. C. 548 : 1923 Cal. 79.

—S. 44—Judgment—Decree—Avoidance of—Fraud—Gross negligence

Gross negligence on the part of the next friend or guardian ad litem of a minor party to a suit stands on the same footing as fraud or collusion and it is open to a defendant to impeach a prior judgment on the ground of gross negligence of his then guardian. 27 C. 11 : 16 I. C. 543 Ref. Where the plea of gross negligence as avoiding a prior judgment was not taken specifically and in distinct language but the issues framed by the court were wide enough to cover such a plea, and the parties adduced evidence on it, it is not open to the Court thereafter to refuse to consider the

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plca. (*Oldfield and Venkatasubbu Rao, JJ.*) KARRI BAPANNA v. SUNKARI YERRAMMA.

33 M. L. T. 46 (H. C.) : 18 L. W. 49 :  
(1923) M. W. N. 452 : 74 I. C. 218 :  
1923 Mad. 718.

—S. 44—Judgment—Validity of adoption—Evidence of.

Where a Civil Court has decided about the truth and validity of an adoption, the judgment of the Civil Court is not admissible in a subsequent suit between third parties in proof of the adoption. The judgment is neither a judgment in rem nor does it constitute *res judicata* (*Miller, C. J. and Mullick J.*) GURU MAHADEO ASRAM PRASAD SAHI v. JAGATRAJ KUER. 71 I. C. 929.

—S. 45—Handwriting expert—Value of report—Sanction to prosecute.

The report of the Government expert, who never came into the witness-box and whose report is not supported even by an affidavit is inadmissible in evidence and should not form the basis of the order directing the prosecution on a charge of forgery. A sanction, based on a piece of evidence that can in no circumstances be called legal evidence and especially when there is positive legal evidence against it is illegal. (*Rafique, J.*) PEARY LAL v. KIDARNATH. 1923 A. 601.

—S. 45—Opinion of experts—Medical examination and report—Report when admissible.

Where in a criminal case the prosecution tenders in evidence a certificate granted by the Professor of Anatomy in a Medical College as regards the bones submitted to him for examination, the certificate by itself is not admissible in evidence. It must be proved by the person who gave it as a witness in the case. (*Marten and Crump, JJ.*) EMPEROR v. AHILYA MANAJI. 47 Bom. 74 : 1923 Bom. 183.

—Ss 56 and 68—Gift deed—Proof of attestation—Admission of execution—Effect of.

It is open to a party to waive formal proof of a document even when it is required to be proved in a certain way. But although proof of the document may be waived, this does not affect the validity or legal character of the document as a gift or mortgage. (*Miller, C. J. and Mullick, J.*) BAJNATH SINGH v. MT. BIRAJ KUER. 2 Pat. 52 : 4 Pat. L. T. 239.

—S. 57—Signature of judicial or executive officer—Proof of—Judicial notice. See CR. P. CODE, S. 196. 44 M. L. J. 557.

—Ss. 58 and 70—Admission of execution—Proof of attestation.

Under S. 70 of the Evidence Act, the admission of execution of a mortgage document is sufficient proof as against the executant himself, but there is not authority for the proposition that the document is for that reason binding upon the other defendants who were not parties to it. As against the latter the document must be proved according to law unless S. 58 of the Evidence Act applies to the case and relieves the plaintiffs from the burden of proving attestation in respect of any of the defendants who have admitted the fact of the

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attestation. (*Mullik and Ross, JJ.*) ARJUN SAHU  
v. KELAI RATH. 2 Pat. 317 -  
74 I. C. 150. 1923 P. 438

## S. 58—Copy admitted without objection in lower Court.

A certified copy of a written statement was put in the lower Court in the presence of plaintiff's counsel and without objection by him.

Held, he cannot be permitted in the High Court to object that only the original could have been received as proof. (*Martineau and Campbell, JJ.*) THE FIRM OF DURGA DAT JAGAN NATH OF DELHI v. THE FIRM OF RAM PARTAB SUKH DAYAL OF DELHI 1923 Lah. 138.

Ss. 58, 63 and 65—Copy of document—Admission without objection—Secondary evidence—Powers of appellate court. See (1922) Dig. Col. 577. RAM LOCHAN MISRA v. PANDIT HARINATH. MISRA. 1 Pat. 606.

## Ss. 58, 91 and 92—Partition admitted—Unregistered deeds—If admissible.

Where the fact of a prior partition having taken place is admitted by both parties, the same need not be proved and the fact that the instrument in writing is not registered will not make the instrument inadmissible for a collateral purpose. (*Heald and Lentaigne, JJ.*) MAUNG PO KIN v. MAUNG SIWE BYA. 1 Rang. 405.

## S. 59—Mortgage—Attestation—Proof of—Attesting witnesses—Examination—Presumption.

In the absence or death of witnesses *prima facie* the presumption is that the testator signed in the joint presence of the two persons and that they subscribed in his presence.

Where there was the affirmative testimony of one attesting witness that he was present, saw the execution and became an attesting witness, the testimony of another witness that at the request of the mortgagor, he became an attesting witness, and the further fact that, on the same day, when the document was later on presented for registration, this second witness identified the executant, who in his presence, admitted execution before the registering officer, and at that time the signature of these witnesses appeared as those of attesting witnesses on the face of the document presented for registration Held in these circumstances, the Court legitimately drew the inference that the requirements of the law were fulfilled. (*Mookerjee and Rankin, JJ.*) BENOY BHUSHAN RAY v. DHIRENDRA NATH DEY. 38 C. L. J. 114 : 74 I. C. 178

## S. 59—Mortgage—Want of proper attestation—Effect of.

A mortgage bond is not duly executed and cannot operate as a mortgage unless it is in fact signed by the mortgagor in the presence of at least two witnesses who sign the document as attesting witnesses : (*Mookerjee and Rankin, JJ.*) BENOY BHUSHAN RAY v. DHIRENDRA NATH DEY. 38 C. L. J. 114 : 74 I. C. 178

S. 63—Secondary evidence—Kinds of—Transaction of document in judgment not interpreted. See (1922) Dig. Col. 577 JAGANNADHA NAIDU v. SECRETARY OF STATE. 70 I. C. 107.

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S. 63 (5)—Secondary evidence—Oral evidence of contents of document.

Under S. 63 Sub-S. (5) of the Evidence Act only a witness who has seen the document and who could have read the document in its original state is entitled to give oral evidence of it. (*Daniels, J.*) RAMJI DAS v. MIHIN LAL. 71 I. C. 654  
1923 A. 441.

## S. 63 (5)—"Seen"—Meaning of—Illiterate witness.

As regards the letting in of secondary evidence the word "seen" in S. 63 (5) includes also "read over" in the case of a witness who is illiterate and as such cannot himself read it. If it is read over to him it will satisfy the requirements of the section. (*Walsh, J.*) PUDAI SINGH v. BRIJ MANGAL. 73 I. C. 654 : 1923 A. 612.

## S. 65—Loss of document—Secondary evidence.

If it is found that a document has been lost secondary evidence may be given and whether proof is sufficient in a case is a question of fact. (*Burn, J. M.*) BIBI SUGHRA BEGAM v. ANGAD GIR. L. R. 4 A. 201 (Rev.).

## S. 65—Oral evidence—Entry in Settlement—Original or certified copy.

An entry in a public document such as a settlement record can be proved only by the original or by a certified copy. A finding on a statement which is not admissible to prove the entries can be contested in second appeal. (*Martineau, J.*) RAM v. MALIK GHANSHAM DAS. 71 I. C. 825 : 1923 Lah. 150 (1).

## S. 65—Oral evidence of persons who heard, judgment pronounced—Admissibility.

Statements of persons who merely heard judgment pronounced are not admissible in evidence. What is required is an oral account of the contents of the judgment or decree by some one who had read the one or the other. (*Maccoll, A. J. C.*) MAUNG CHIT v. MAUNG THA KU. 1923 Rang. 113.

## Ss. 65 and 74—Public documents—Canal parchas—Evidentiary value of.

Canal parchas issued to tenants giving the name of the tenant in connection with his holding come under the definition of public document and can be proved by production in original. They are of course not conclusive evidence of the facts which they record nor is there necessarily a presumption that they are correct. (*Burn, J. M.*) CHATTARPAL v. LACHMI DHAR. L. R. 4 A. 152 (Rev.).

## S. 65—Secondary evidence—When admissible—Discretion of trial Court.

Secondary evidence of a document may be given when the party offering that evidence cannot, for any reason not arising from his own default or neglect produce the original in reasonable time. The question of allowing secondary evidence depends upon the discretion of the Court and where it has been decided by the Judge of First Instance his conclusion should not be over-ruled except in a clear case of miscarriage of justice—Production of secondary

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evidence does not dispense with proof of the execution of the original document. (*Sir Shadi Lal, C. J. and Fforde, J.*) *CHUHA MAL v. RAHIM BASHK.* 71 I. C. 568.

—S. 65—Suit on lost bali—Loss of bali how proved—Police report. See (1922) DIG. COL. *BARU v. SUKHA SINGH.* 69 I. C. 1008.

—Ss. 67 and 68—Attestation—Proof of—Attestors dead—Effect of See (1922) DIG. COL. 552. *NAMBERUMAL CHETTIAR v. RAGHAVACHARIAR.* 71 I. C. 391 (2).

—Ss. 68 and 69—Mortgage deed—Attestation—Proof of—Attestor admitting attestation by him but not by another—Onus. See (1921) DIG. COL. 514. *THANNERU GANGAYYA v. BOMMADEVARA SUBBAMMA.* 69 I. C. 284.

—Ss. 68 and 70—Mortgage—Execution—Attestation—Proof—Admission of execution—Denial of proper attestation—Procedure.

Where a mortgagor admits having signed the mortgage sought to be enforced but couples it with a denial of the presence of the attestor at the time of signing the mortgage must prove the execution of the mortgage by calling at least one attesting witness to prove the attestation. The admission, qualified as it was, did not entitle the mortgagee to the benefit of S. 70 of the Evidence Act.

No admission of execution is effectual under S. 70 of the Evidence Act unless it amounts to an acknowledgment of the formal validity of the instrument. The execution of a document means something more than the mere signing by the party. It includes delivery and signing in the presence of witnesses where witnesses are necessary. Where the admission of execution is unqualified it may well be an admission of due execution or a waiver of proof of due execution within the meaning of S. 70 of the Evidence Act. (*Richardson and Suhrawardy, JJ.*) *ARJUN CHANDRA BHADRA v. KAILAS CHANDRA DAS.* 27 C. W. N. 263 : 70 I. C. 532 : 1923 Cal. 149 (2).

—S. 68—One of the two witnesses not called, no presumption against mortgagee.

The production of one attesting witness satisfies the requirements of S. 68 of the Evidence Act, and from a mere failure to do more than is required of the mortgagee and to produce both the witnesses even if he knows where the other is, it cannot be inferred that the mortgagee is intentionally keeping back the other and that therefore his evidence would damage the plaintiffs case. (*Batten J. C. and Hallifax, A. J. C.*) *LACHMINARAYAN v. MOULVI ZAHIRUL SAID ALVI.* 1923 Nag. 322.

—S. 68—Proof of execution.

Where there is no proof of execution of a will the identification of the handwriting of the attestors does not prove execution by the testator. (*Broadway and Campbell, JJ.*) *KAHAN CHAND v. M. JAYARAM.* 1923 Lah. 174.

—S. 70—Admission of mortgage—Proof of attestation—Legal representatives.

Section 70 provides that the admission of a party to an attested document, of its execution, by

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himself, shall be sufficient proof of its execution as against him, though it be a document required by law to be attested. The section speaks of an admission by a party to an attested document of its execution by himself; that is, of its execution by the party concerned. An admission by the representative of a party to an attested document of its execution by the party cannot be treated as an admission of the party to an attested document of its execution by himself. Where a person admitted execution of the mortgage but specifically denied that the bond had been duly attested as required by law, in such circumstances it is incumbent upon the party who relies upon the mortgage instrument, to establish that the document was attested as required by law. (*Mookerjee and Rankin, JJ.*) *BENGY BHUSHAN RAY v. DHIRENDRA NATH DEV.* 38 C. L. J. 114 : 74 I. C. 178.

—S. 70—Document required by law to be attested—Admission of execution—Proof of attestation.

Where a party to a document has admitted execution, it is sufficient proof, even though it be a document required by law to be attested. If the admission of the executant has not the effect of dispensing with proof of attestation, there is no necessity for the enactment of S. 70 at all, as recourse may be had to the general provisions of the Act relating to admissions, if the admission of execution is to be used only in the sense of an admission of signing only. The executant's admission may be made antecedent to the institution of legal proceedings. (*Duckworth, J.*) *AUNG RHI v. MA AUNG KRWA PRU.* 1 Rang. 557.

—Ss. 70 and 69—Mortgage—Attestation—Proof of—Admission in pleadings—Execution if includes attestation.

A mortgage could not be held to be invalid for absence of proof of attestation where there is nothing in the pleadings to show that the plaintiff was put to the proof of attestation 44 B. 405 Ref. The admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, though it be a document required by law to be attested.

Per *Crump, J.*—The word "execution" in S. 70 of the Evidence Act means that the party by affixing his signature or mark has signified his assent to the contents of the document, and if a party admits that he has done this, he admits execution. The admission of execution cannot be taken to mean an admission not only of the signature or mark in token of assent by him, but also that all the legal formalities connected with the document have been complied with. There is no reason for holding that where a party admits execution within the meaning of S. 70 he must necessarily be taken to admit that the document has been attested as required by S. 59 of the T. P. Act. (*Shah, A. C. J. and Crump, J.*) *JAGANATH NARSINGDAS v. RAVI TULSIRAM.* 47 Bom. 137 : 1923 Bom. 89.

—S. 71—Attestation denied—What is to be proved.

Where an attestor denies attestation and the other attestors are dead, what is required under S. 71 Evidence Act is only proof of execution and

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not execution in the presence of the attesting witnesses. (*Ryves and Daniels, JJ.*) LALTA PRASAD v. DARSHAN SINGH. 74 I. C. 839.

—S. 71—*Attestors dead or proving hostile—Proof of document.*

If the attestors of a document are dead or prove hostile S. 71 requires evidence to prove the execution of the document, it is not necessary to prove execution in the presence of attesting witnesses. (*Ryves and Daniels, JJ.*) PALESHWARI PRASAD v. SHANKAR DAYAL. 74 I. C. 969.

—S. 71—Mortgage—Proof of execution. See (1922) DIG. COL. 580. LAKSHMAN SAHU v. GOKHAL MAHARANA. 70 I. C. 298.

—S. 73—Finger impression—Power of Court to direct accused to give—Admissibility.

A court has power to direct an accused person to make a finger impression and the same is admissible in evidence. So also is the evidence of an expert concerning the finger impression. (*Young, O. C. J. Heald and May Oung, JJ.*) EMPEROR v. NGA TUN HLAING. 2 Bur. L. J. 270.

—S. 74—Confession made before a magistrate outside Br. India—Admissibility See EVIDENCE ACT, Ss. 26, 74 AND 80. 69 I. C. 257.

—S. 74—Registers under the Land Registration Act—Admissibility.

Registers proposed and kept under Land Registration Acts are public documents and admissible in evidence. (*Jwala Prasad and Ross, JJ.*) RAMNANDEN SAHAY v. JAIGOVIND PANDEY. 2 Pat. 839.

—Ss. 76 and 77—Public documents—Canal Jamabandis—Admissibility of See (1922) DIG. COL. 580. UMRAO SINGH v. RAM SINGH. 90 & A. L. R. 184

—S. 79—Certificate of registration—Presumption of genuineness.

The registering officer's evidence is not necessary to prove the certificate of registration the genuineness of which is to be presumed under S. 79 of Evidence Act. (*Martineau, J.*) MUHAMMAD HASSAN v. SOHARA. 71 I. C. 805.

—S. 80—Confession made before a magistrate in a Native State—Admissibility. See EVIDENCE ACT, Ss. 26, 74 AND 80. 69 I. C. 257.

—S. 90—Ancient document—Presumption—Period how counted.

The period of 30 years mentioned in S. 90 Evidence Act is to be reckoned from the date when its genuineness is put in controversy and not from the date when it was exhibited in court. (*Martineau and Zafar Ali, JJ.*) LADHA SINGH v. MT. HUKAM DEVI. 4 Lah. 233 : 75 I. C. 57

—S. 90—Copy of document—Presumption if applicable to.

Where there is no evidence at all as to the making of a private copy of a document more than 30 years old proof would be necessary that it was compared with the original before it would be

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admitted in evidence (*Phillips and Devadoss, JJ.*) HOTA VEERA BADRAYYA v. VENKATA KRISHNA RAO. (1923) M. W. N. 454 : 18 L. W. 404 : 73 I. C. 66 : 1923 Mad. 674.

—S. 90—Copies—Presumption as to—Document more than 30 years old.

The presumption as to genuineness of documents more than 30 years old also applies to copies coming from proper custody. (*Spencer and Devadoss, JJ.*) JAKKAM REDDI SESHADRI REDDI v. SIR S. SUBRAMANIA AIYAR. 32 M. L. T. (H. C.) 89 : 74 I. C. 35 : 1923 Mad. 163.

—S. 90—Document more than thirty years old—Execution by a person professing to be agent of another proof of authority—Presumption.

Where a document more than thirty years old purports to be signed by A as agent of B, all that S. 90 of the Evidence Act does is to raise a presumption that the document was signed by A. The fact that A had authority to sign the document as agent of B could not be presumed under the terms of the section. The authority must be proved by the person relying upon it. (*Walmsley and B. B. Ghose, JJ.*) RAMANI KANTA RAY v. BHIMNANDAN SINGH. 50 Cal. 526 : 1924 Cal. 82

—S. 90—Document over thirty years old—Genuineness—Presumption—Discretion—Interference on appeal. See (1921) DIG. COL. 546. VAIDYANATHASWAMI IYER v. NATESA MALAVARAYAN. 69 I. C. 289.

—S. 90—Execution suspicious—Deliberate delay.

A will purported to be executed in 1887 was brought to light for the first time in 1907 when it was produced in a Court, of Law In 1910 an application for probate in respect of it was made but it was ultimately withdrawn. At that time only one of the attesting witnesses was said to have been alive. Yet no further attempt was made to bring the will into Court till some ten years later when even that witness was dead. There was no reasonable explanation about the delay after 1910 in making the application for probate. There was no evidence as to the custody of the will before 1907, held that the applicant cannot get the benefit of S. 90, Evidence Act. (*Prideaux and Kotwal, A. J. C.*) CHANNULAL v. MT. PUNA 75 I. C. 660 : 1923 Nag. 169.

—S. 90—Kajja receipt—40 years old.

From Kajja receipts, the Court is entitled to presume that the person named therein as purchaser had obtained possession through the Court. When that document was over 40 years old, although it is possible that physical possession of the land may not have been given to the purchaser, there is no reason why the Court should presume that no possession was given. (*Macleod, C. J. and Crump, J.*) PANDURANG WASUDEV v. BASAPPA BIN SHIDDAPPA. 1923 Bom. 364.

—S. 90—Old document—Conduct of parties.

Assuming that a document which is produced apparently from proper custody, was executed,

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still if, there are circumstances which show that it was not acted upon as one would have expected a document of that nature to be acted upon, the presumption as to the title created by such document falls down. (*MacLeod, C. J. and Crump, J.*) MAHA DEO RAMCHANDRA PATKAR v RAGHOJI JUYAJI.

1923 Bom. 293.

## S. 90—Presumption under—Copies of document.

The presumption under S 90 of the Evidence Act applies to ancient documents, if it is proved that the copy is a true copy. (*Sir Walter Schwabe, C. J., Oldfield and Counts Trotter, JJ.*) SUBRAMANYA SOMAYAJULU v. SEETHAYYA.

46 Mad. 92 : 70 I. C. 729 : 1923 Mad. 1.

## S. 90—Presumption under—Executant illiterate—Registration—Effect.

In the case of a document more than 30 years old executed by an illiterate person but registered, there is from these two circumstances a presumption of its being genuine. (*Dalal, J. C.*) BHIM SHANKAR DATT v. MANI RAM.

9 O. & A. L. R. 893.

## S. 90—Presumption—Extent of.

The presumption that arises under S 90 of the Evidence Act only extends to the genuineness of old documents coming from proper custody, it does not further go to the extent of holding that the documents were in fact executed by persons possessed of the requisite authority. (*Mookerjee and Rankin, JJ.*) TARAKESWAR PAL v. SRISH CHANDRA GHOSH MANDAL.

27 C. W. N. 964.

## S. 90—Presumption—Scribe signing for the executants.

Although in the case of sale deeds more than 50 years old the presumption of law was that they were executed by the persons who purported to execute them, there was no presumption that the scribe who signed these documents for the executants had authority from the executants to do it. 15 A. L. J. 121 and 60 I. C. 90 Foll. (*Gokul Prasad, J.*) HAJI SHAIKH BOODHA v. SUKHRAM SINGH, 1923 A. 420 (2) : 73 I. C. 989.

## S. 91—Deposition—Not read out or explained to witness—Admissibility.

Even if S. 91 of the Evidence Act be construed so as to apply to the deposition of a witness, it merely excludes oral evidence of its contents and does not make the document itself inadmissible nor prevent its being otherwise proved. 45 C. 325 referred 42 M. 561 dissented. (*Daniels, A. J. C.*) MT. FERROZA JAN v. MIRZA AMIR ALI.

9 O. L. J. 593 : 9 O. & A. L. R. 103 :

74 I. C. 445 : 24 Cr. L. J. 781 : 1923 Oudh 119.

## S. 91—Lease deed—Admission of other evidence to prove tenancy.

Where a tenant as a defence to a suit in ejectment by the landlord sets up a permanent tenancy but does not produce the settlement and bandobast papers, the onus is on the tenant to prove the permanent character of the lease and in view of S. 91 of the Evidence Act, no evidence other than the Settlement papers was admissible to prove the character and terms of the lease. (*Miller, C. J. and Mullick, J.*) BUDHAN TALI v. MADANMOHAN LAL.

1923 P. 111.

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## S. 91—Oral evidence.

The rule with regard to writings is that oral proof cannot be substituted for the written evidence of a contract which the parties have put into writing. And the reason is that the writing is tacitly considered by the parties themselves as the only repository and the appropriate evidence of their agreement. (*Lord Carson*) SUBRAMANIAN v. M. L. R. M. LUTCHMAN.

50 Cal. 338 : 38 C. L. J. 41 : 44 M. L. J. 602 : 18 L. W. 446 : (1923) M. W. N. 762 : 28 C. W. N. 1 : 1 Rang. 66 : 50 I. A. 77 : 2 Bur. L. J. 25 : 32 M. L. T. (P. C.) 184 : 25 Bom. L. R. 582 : 71 I. C. 650 (P. C.) : (1923) P. C. 50.

## S. 91—Partition—Absence of registration—Oral evidence—Part performance—Effect.

Where a document of partition is unregistered, it is inadmissible in evidence, nor can oral evidence be let in to prove the partition. But if the arrangement has been acted upon and there is part performance by the party seeking relief and he could maintain a suit for specific performance, proof of the arrangement can be let in. (*Das and Macpherson, JJ.*) NAND LAL MAHTON v. DHANUKDHARI MAHTON.

4 Pat. L. T. 657.

## S. 91—Partition—Unregistered deed—Oral evidence—Scope of section.

A partition can be effected orally, but if the parties put it into writing but do not register it even though the properties are worth more than Rs 100, it is wholly inoperative. S. 91 of the Evidence Act precludes oral evidence being given in such a case. It is true that relationship such as partnership, landlord and tenant, etc. may be proved apart from documents embodying such relationship, but not so the facts and terms of a partition deed. (*Duckworth and Pyatt, JJ.*) MG. PO. LUN v. MA E MAI.

74 I. C. 47 :

1923 Rang. 57.

## S. 91—Pre-existing debt—Promissory note—Suit on original consideration.

If a creditor has a cause of action for the recovery of money for which his debtor has executed a promissory note, separate from and independent of the note he can recover upon such cause in case the note for any reason as for want of being properly stamped cannot be put in evidence 34 A. 158 foll. (*Ryves and Daniels JJ.*) KASHI PRASAD v. PANNA LAL.

L. R. 4 A. 377 :

74 I. C. 359 : 1923 A. 529 (2).

## S. 91—Scope.—Proof of fact of partition.

S. 91 excludes any evidence other than the inadmissible document of the terms of the disposition of property made by the parties on the occasion to which the document relates but oral evidence is admissible to prove the fact of the separation 41 Bom. 466 foll. (*Campbell, J.*) NARSINGH DAS v. UTTAM CHAND.

1923 Lah. 392.

S 91—Unregistered lease—Admissibility in evidence—Collateral purpose. See (1922) Dig. Col 583. JASOAD NANDAN v MT RAM KUAR.

9 O. & A. L. R. 41.

## S. 91—Unregistered lease—Oral evidence—Inadmissible.

An unregistered lease is inadmissible in evidence in proof of the tenancy and its existence

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precludes the parties from giving other oral evidence of its terms. Nor could it be relied upon to support a claim for specific performance. (*Hallifax, A. J. C.*) CHAGAN LAL v. KASHI RAM.

71 I. C. 33 : 1923 Nag. 76.

—Ss. 91 and 92—Unstamped receipt—Proof of payment by other evidence.

The mere existence of an unstamped receipt which is inadmissible in evidence does not prevent other evidence being given, to prove discharge by payment. (*Hallifax, A. J. C.*) RAM PRASAD v. NATHU RAM.

1923 Nag. 32.

—S. 92—Acknowledgment in writing but unstamped—Parol evidence.

Parol evidence is admissible to prove a debt, acknowledged in writing by the debtors, when such acknowledgment being unstamped is inadmissible in evidence. (*Le Rossignol, J.*) TIKHAN RAM v. LAL, 74 I. C. 939 (1) : 1923 Lah. 301 (1)

—S. 92—Agreement complete in itself.

A contract for sale of land was entered into by means of a writing appearing in the books of one of the parties. It was signed by both parties and witnessed. The defendant said that the agreement appearing in the book did not contain the whole of the agreement arrived at between the parties but there was an oral agreement that if any body else per chance offered more than Rs. 500 to the 1st defendant above the agreed amount before the expiry of the period in the agreement, the agreement with the plaintiff was to be treated as null and void. Held the evidence about the oral agreement was not admissible. It may very well be that a writing may be an imperfect agreement of which a Court cannot decree specific performance, but if on the face of it, it contains all the terms which would entitle it to be considered as a perfect agreement which could be enforced, then undoubtedly no parol evidence could be adduced so as to alter or add to its terms unless they came within one of the provisos of section 92. (*Macleod C. J. and Crump, J.*) TUKARAM MAHADAPPA v. JAGANNATH.

1923 Bom. 236

—S. 92—Bond in writing—Oral evidence to vary terms—Executant claiming to be surety.

Where a person has executed a bond as the principal debtor he cannot adduce oral evidence to prove that he was merely a guarantor. (*Maung Kyu, J.*) MAUNG KYA v. PERIA KURPAN CHETTY.

1 Bur. L. J. 157 : 70 I. C. 872 (1) : 1923 Rang. 15 (2)

—S. 92—Conduct of parties to show contract was not intended to be acted upon—if admissible.

Evidence of acts and conduct of parties to show that certain terms of a contract were never intended to be acted upon from their beginning is not precluded by S. 92 of the Evidence Act. (*Chatteerjee and Pantou, JJ.*) NARENDRA LAL KHAN v. BHOLA NATH.

27 C. W. N. 336 : 1923 Cal. 417.

—S. 92—Deed unregistered and unstamped—Oral evidence—Admissibility. See (1922, Dig. Col. 583, JAI RAM DAS v. RAJ NARAIN.

45 A. 21 : 9 O. & A. L. R. 5 : 70 I. C. 963 (2).

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—S. 92—Evidence of Act and conduct of parties Admissibility. See DEED CONSTRUCTION. 71 I. C. 1030.

—S. 92—Evidence of subsequent conduct to prove contemporaneous agreement not admitted.

In order to prove evidence of contemporaneous oral agreement, oral evidence of subsequent conduct can under no circumstances be admitted.

(*Broadway and Harrison, JJ.*) FITZTHOLMS v. THE BANK OF UPPER INDIA LTD.

4 Lah. 258 : 1923 Lah. 548.

—Ss. 92 and 93—Extrinsic evidence—

Tenancy—Lease—Existence of—Identification of property Where there is dispute as regards the identity and extent of the land leased, the court can look at the correspondence that preceded the lease (*Rafique and Stuart, JJ.*) SITAL PRASAD v. BADRI PRASAD.

69 I. C. 647 : 1923 A. 53.

—S. 92—Lease—Mistake in period—Oral evidence to prove intention.

Where by mistake of parties the duration of a lease was wrongly entered in the written instrument evidence can be let in to prove the real intention of the parties. (*Fremanile, S.M. and Burn J.M.*) DURGA PRASAD PANDAY v. HUSAIN MUSALMAN.

L. R. 4 All. 302 (Rev).

—S. 92—Oral agreement—Admissibility.

If a document is formally drawn up, it would not be open to the parties to adduce in proof of a contemporaneous oral agreement. 18 C. W. N. 1261 and 9 C. L. R. 501 Ref. (*Cuming, J.*) MOTI BISWAS v. HARIPADA PAL.

1923 Cal. 402 : 70 I. C. 790.

—S. 92—Oral evidence—Admissibility—sale—Mortgage—Agreement that *ex facie* sale is to be treated as mortgage.

Where there is an out and out sale under a duly registered document, evidence of a contemporaneous oral agreement to the effect that the parties agreed to treat it as a mortgage is admissible. 44 236 dist. (*Macleod, C. J. and Crump, J.*) TALAKCHAND BHERAJI v. ATMARAM KESHAV.

25 Bom. L. R. 818 : 1924 Bom. 58.

—S. 92—Oral evidence regarding what took place at the time of deed.

Where the plaintiff contended that the two documents which formed the foundation of the suit, formed a completed contract; whilst the defendant vendor urged that it was only a provisional arrangement conditional to the preparation by a vakil of a formal document evidencing the contract, held, oral evidence to show what actually took place on the occasion when the parties entered into the agreement relied upon by the plaintiff is irrelevant and inadmissible. (*Mr. Amcer Ali.*) HARICHAND MANCHARAM v. GOVIND LUXMAN GOKHALE.

44 M. L. J. 608 :

47 Bom. 335 : 28 C. W. N. 73 :

50 I. A. 25 : 17 L. W. 572 :

32 M. L. T. (P. C.) 175 : L. R. 4 P. C. 84 :

37 C. L. J. 440 : 25 Bom. L. R. 531 :

71 I. C. 763 : (1923) P. C. 47 (P. C.).

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—S. 92—*Recitals in documents—Oral evidence to contradict—Admissibility.*

Where there is a duly signed receipt for the payment of rent oral evidence could not be admitted in supersession of the recitals in the receipts. But if the case is that false entries were made in the receipts there is a question of fraud and oral evidence is admissible under S. 92 proviso (1) of the Evidence Act. (*Wazir Hasan, J.*) KUNWAR BEHARI LAL v. KALKA. 1923 Oudh 45.

—S. 92—*Sale deed—Consideration—Variation of terms.*

Though want of consideration or failure of consideration or difference in the kind of consideration may be proved evidence to vary the amount of consideration in a registered sale deed is inadmissible. If such a course were permissible the protection intended by the Legislature to be afforded by the adoption of the rule embodied in S. 92 of the Evidence Act would be completely nullified. (*Mookerjee and Chotener, JJ.*) ANNADA CHARAN SIL v. HARGOBINDA SIL. 27 C. W. N. 496 : 37 C. L. J. 552 : 75 I. C. 557 : 1923 Cal. 570.

—S. 92—*Sale or Mortgage—Deed apparently a sale deed—Evidence to show that it was a mortgage admissible.*

Evidence is admissible to show that a sale deed is not in fact a sale deed but only a mortgage deed. S. 92 prohibits only parties. 44 I. A. 236. Foll. (*Macleod, C. J. and Crump, J.*) HIRAJI v. VISHNU. 1923 Bom. 429.

—S. 92—*Sale—proof that the consideration was less than that recited in the deed*

Evidence to show that the price for a sale of property is less than the amount recited in the sale deed is inadmissible. 38 M. 514. followed. (*Walsh, J.*) LALA SINGH v. BASDEO. 71 I. C. 768 : 1923 A. 429 (2).

—S. 92—*Suit for pre-emption—Vendee if can prove document was not a sale.*

In a suit for pre-emption on the ground the defendant had taken a deed of sale from the owner the vendee can adduce oral evidence to show the document was not a sale. S. 92, Evidence Act does not apply as the pre-emptor is not a party to the written instrument or the representative of either of the parties to it. (*Lindsay and Sulaiman, JJ.*) BHULLAN SINGH v. KHUSHI RAM. 21 A. L. J. 932.

—S. 92 proviso (2)—*Scope of.*

Where the plaintiff's evidence proved that the written agreement about supply of consignments by defendant was incomplete and that there was a supplementary oral agreement.

Held, it would not be inconsistent with the terms of the document that there should have been an agreement that the consignments should be sent when the plaintiff ordered or requested that they should be sent and that the defendant was not bound to despatch consignments without definite orders. (*Batten, J. C.*) SETH LAXMICHAND v. SHAIKH SHAHABUDDIN. 70 I. C. 844 : 1923 Nag. 46.

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—S. 92—*Proviso (3)—Oral agreement—Condition precedent to the attaching of any obligation.*

An attempt to show that the agreement reduced to writing is not what it purported to be but something different is opposed to S. 92 (3) of the Evidence Act but oral evidence of an agreement constituting a condition precedent to the attaching of an obligation under the instrument could be proved. (*Batten, J. C.*) TATIA v. SAWANIA. 71 I. C. 477 : 6 N. L. J. 21 : 1923 Nag. 135.

—S. 92 (Proviso 3)—*Promissory note—Indemnity—Proof.*

In a suit on a promissory note the defence was that the promissory note in the suit was passed to secure the plaintiff-mortgagees against any claim that might be made by their prior mortgagees who had been paid off and from whom the defendant has not obtained a reconveyance. Held that this alleged agreement amounted to a suspension of the obligation attaching under the note until the necessity for enforcing the indemnity arises. It was not an agreement to postpone payment of an existing liability but one by which the note is to have no legal effect until the eventuality to guard against which it was passed arises. Under the circumstances the alleged agreement may be proved under proviso (3) to S. 92 of the Indian Evidence Act. (*Shah, A. C. J. and Kemp, J.*) AHMED SAHEB BAPU v. UBHAIYA HARS. 25 Bom. L. R. 867 : 1924 Bom. 44.

—S. 92—*Proviso 3—Promissory note—Suit based on—Admission of execution—Plea of want of consideration.*

It is open to a person who admits the execution of a promissory note to plead want of consideration therefor. (*Ryves, J.*) LALLU MAL v. REOTI RAM. 45 A. 679 : 21 A. L. J. 669 : 9 O. & A. L. R. 674 : 74 I. C. 353 (1) : 1924 A. 70.

—S. 92—*Prov. 3—Scope of—Condition precedent—Proof of—Rate of interest—Evidence as to.* See (1922) DIG. COL. 585 HABIB ALI KHAN v. LALA RAM NARAYAN. 26 O. C. 36.

—S. 92 (4)—*Mortgage—Oral agreement as to terms of redemption—Admissibility.*

Where the parties enter into a contract, they can substitute another in its place and the substituted contract is the one to be looked to, not the one which was first entered into. If the law requires that the substituted contract shall be made only in a certain way and in compliance with certain formalities such as writing and registration then unless it is so made, it cannot take effect and the old contract subsists. (*Maung Kim, J.*) U. KYO v. MG. PAN, YO. 74 I. C. 154 : 1923 Rang. 102 (1).

—S. 92 (6)—*Promissory note—Interest—Rate not specified—Evidence—Admissibility.*

Where a promissory note recited that interest at the rate of 1½ p. c. was payable but it was not mentioned there as to whether the rate of interest aforesaid will be per mensem or per annum. Held, the document was therefore, ambiguous and under clause 6 of Section 92 of the Evidence Act.



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no evidence could be given to clear up that ambiguity (*Jwala Prasad and Ross JJ.*) SARJU SAHU v. SUKHI LAL. 4 Pat. L. T. 577.

—S. 95—*Latent ambiguity removeable.*

When a description is partly correct and partly incorrect and the former part is sufficient to identify the subject matter intended while the latter does not apply to any subject, the erroneous part will be rejected on the maxim that a false description will not hurt when it can exist with the subject itself. (*Raymond and Madgavkar, A. J. C.*) NARAIN DAS v. TEKCHAND. 1923 S. 42.

—Ss. 95, 96, 97—*Mortgagee—Erroneous description of the property—Rectification of mistake.*

Where a mortgage deed by a mistake described the mortgaged property as bearing Tauzi No 6607 but it was found that the mortgagor owned Tauzi No 9307, held that it was open to the mortgagee to prove by evidence what the property actually mortgaged was and that the mortgagor could not claim any exoneration on the ground of misdescription of the property. (*Jwala Prasad and Ross, JJ.*) MT. WAJIBUNNISA BEGAM v. VALMIKI SAHAY. 1 Pat. L. R. 80 : 71 I. C. 589.

—S. 96—*Latent ambiguity—Admissibility of evidence.*

When an instrument appears on its face to be free from ambiguity, but upon the endeavour being made to apply it to the persons or things indicated, it transpires that the words are equally applicable to two or more persons or to two or more things, this is called a latent ambiguity. In such a case extrinsic evidence is admissible to resolve it. The principle that when an instrument contains an ambiguity, evidence of user under it may be given in order to show the sense in which the parties employed the language used applies to a modern as well as an ancient instrument. (1919) A. C. 533 ; 1906 A. C. 92 ; 7 H. L. C. 650 Ref. (*Mookerjee and Chotzner, JJ.*) THE CHAIRMAN SERAIGUNJ MUNICIPALITY v. THE CHITTAGONG CO. LTD. 72 I. C. 696 : 1923 Cal. 32.

—S. 101—*Burden of proof immaterial when evidence adduced.*

Where the defendants led evidence on the issue as to notice they cannot be said to have held back their evidence because of the imposition of the onus on the other side 46 I. C. 659, 1 L. R. 29 All. 184. Fol 25 I. C. 648 Fol (*Campbell, J.*) LADHA RAM v. JINDA RAM. 1923 Lah. 339.

—S. 101—*Consideration—Registered deed—Proof of consideration not received by him.*

Where plaintiff recited and admitted the receipt of a sum in the registered document the burden of proof to show that he did not receive it is on him. (*Le Rossignol and Harrison, JJ.*) MANGALI v. BIDHA LAL. 1923 Lah. 404.

—S. 101—*Execution—Onus of proof.*

It is for the decree holder to clearly establish that the property belongs to his judgment-debtor only and is liable to be sold in execution of the decree. (*Broadway and Moti Sagar, JJ.*) ISHAR DAS v. FAZAL ILAHI. 1923 Lah. 522.

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—S. 101—*Scope*

Where the accused gave the deceased a beating the previous day and were seen by various persons on the occasion, it was highly improbable that they would murder the person next day. (*Scott Smith and Moti Sagar, JJ.*) SHEO RAM v. EMPEROR. 1923 Lah. 436.

—S. 101—*Some defendants not admitting execution.*

Where a document was couched in the following terms

"Undersigned promise to pay to A the sum of Rs 1,000 payable during the period of one year without interest." Held that the burden of proof was on the executee to prove consideration, where executant admitted only execution while the other members of the family of the executant denied both execution and consideration. 100 P. R. 1915 Dist. (*Abdul Raoof, and Moti Sagar, JJ.*) RAGHU NANDAN v. BUDHU MAL. 1923 Lah. 346.

—S. 105—*Exception—Prosecution for an offence—Burden of proof.*

The incidence of the burden of proof means that the person on whom it lies must prove that fact. But the meaning of the expression "proved" as defined in S. 3 of the Evidence Act, is in no way affected by the incidence of the burden of proof. When evidence has been given by the defence to support the defence of an exception, the burden of proof is discharged if the evidence is believed and the jury have their ordinary duty of deciding a question of fact on the evidence before them. (*Newbould and Suhrawardy, JJ.*) MAHOMED YUNUS v. EMPEROR. 50 Cal. 318 : 1923 Cal. 517.

—S. 105—*Exemptions—Presumption—Burden of proof.*

The law requires that the onus of proving circumstances which give the benefit of the general exceptions in the Penal Code to an accused person lies on him, and in the absence of evidence the presumption is against the accused. But this does not mean that the accused must lead evidence. If it is apparent from the evidence on the record whether produced by the prosecution or the defence, that the general exception would apply, then the presumption is removed and it is open to the Court to consider whether the evidence proves to the satisfaction of the Court that the accused comes within the exception. (*Walsh and Ryves, JJ.*) MT. ANANDI v. EMPEROR. 45 A. 329 : 74 I. C. 689 : 24 Cr. L. J. 225 : 1923 A. 327 (2).

—Ss. 107 and 108—*Construction—Presumption under.*

Ss. 107 and 108 only relate to the date when the suit was brought, that is to say, as to whether a man is alive or dead as the case may be at the date of the suit, and not at some particular period anterior to the suit. The decisions also establish that there is no presumption as to whether a particular person was dead at any time within the period in the question. (*Marten and Fawcett, JJ.*) RAMACHANDRA SADASHIV v. KESHO DHONPU. 1923 Bom. 208.

## EVIDENCE ACT (I OF 1872), S. 107.

—Ss. 107 and 108—Presumption—Death—Person not heard of for more than seven years—Time of death. *See* (1921) DIG. COL. 553. *BAL NAICKEN v. ACHAMA NAICKEN*. 69 I. C. 835.

## —S. 108—Evidence of relatives

Where the near relatives deposed that they had not heard of the persons in question for seven years. *Held*, the presumption under S. 108 of Indian Evidence Act should be drawn. (*Broadway and Campbell, JJ.*) *KHAN CHAND v. MT. JAWANDI*. 1923 Lah. 174.

## —S. 108—Fact of death—Presumption as to.

What the court may presume under S. 108 of the Evidence Act is confined to the factum of death. It cannot presume that because a person has not been heard of, he died at any particular moment or in any particular way, or from any particular cause 34 A. 36 Ref. (*Walsh and Ryves, JJ.*) *REKHAB DAS v. MT. SHEOBAL*.

45 A. 466 : 21 A. L. J. 393.  
L. R. 4 A. 532 : 74 I. C. 656  
1923 A. 495.

## —S. 108—Presumption as to death—Suit by Hindu claiming as heir of a deceased person—Father of plaintiff unheard for 10 years before suit—Hindu Law rule—Applicability of.

In a suit by plaintiffs for the recovery of the properties of one T, as the persons entitled to them as his heirs or nearest reversioners, they alleged that their father K. had not been heard of for nearly 10 years before suit and that they were thus the nearest reversioners. *Held* that the rule of Hindu Law that at least 12 years should elapse before a man unheard of should be treated as dead was inapplicable to the case but that the 7 years' rule under S. 108 of the Evidence Act applied and that as he had not been heard of for 10 years before suit he must be presumed to have died on the date of suit. The rule of Hindu Law referred to is only a rule of evidence and is not applicable after the passing of the Evidence Act. (*Krishnan and Venkatasubba Rao, JJ.*) *PONDURI ADEYYA v. JALADI BUREYYA*.

32 M. L. T. (H. C.) 6 : (1923) M. W. N. 49 :  
71 I. C. 305 : 1923 M. 182.

## —S. 108—Presumption of death—Person not heard of for seven years.

S. 108 of the Evidence Act has no reference whatever to the date of death of a person who has not been heard of for 7 years. The date of death must be proved by the party who is interested in establishing that a person died on or before a particular date. (*Shah, A. J. C. and Crump, J.*) *GOPAL BHIMJI AVTE v. MANAJI GANUJI*.

47 Bom. 451 : 25 Bom. L. R. 134 : 1923 Bom. 163.

## —S. 110—Converse if true

The presumption that plaintiff having the title also has possession can properly be made, in the case of jungle or waste land where there is no proof or very little proof of acts of ownership having been exercised on either side, or where the evidence as to such act or such ownership is very nearly equal. Though S. 110 of the Evidence Act recognises a presumption that the person in

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possession also has a good title there is no corresponding section saying that the person with the title should be presumed to be in possession. This presumption is one that can only come under S. 114 of the Evidence Act which allows the court to presume the existence of any fact which it thinks likely to have happened regard being had to the common course of natural events &c., (*Marten and Fawcett, JJ.*) *KASHI NATH v. GANESH*. 1923 Bom. 361.

## —S. 110—Possession—Title—Evidence evenly balanced.

Where there is strong evidence of possession on the part of A opposed by evidence apparently strong also on the part of his opponent B, in estimating the weight due to the evidence on both sides, the presumption may well be regarded that possession went with title. (*Mookerjee and Chotner, JJ.*) *PROMODE KUMAR ROY v. KALI MOHAN LAHA*. 27 C. W. N. 305 : 70 I. C. 555 : 1923 Cal. 228.

## —S. 112—Legitimacy—Presumption.

Before a presumption of legitimacy can arise under S. 112 of the Evidence Act, all the facts specified in the section must be proved, (*Hallifax, A. J. C.*) *MAROTI v. BHAGI*. 1923 Nag. 43.

—S. 112—Legitimacy—Presumption—Rule as to, if supersedes the Muhammadan Law on the subject. *See* MAHOMEDAN LAW—LEGITIMACY.

73 I. C. 983.

## —S. 114—Co-owner waiving claim—Presumption.

By taking over the sale and paying the full price a co-owner waived his own claim to sue. *Held* such action on the part of the co-owner is presumptive evidence that the sale by another co-owner was not bad for want of necessity. (*Scott-Smith and Fforde JJ.*) *MT. BASANTI v. CHANDA SINGH*.

1923 Lah. 502 (2)

## —S. 114—Corroboration

Without material corroboration there should be no conviction, when accused can explain the presence of the articles found with them. (*Broadway, J.*) *SULEMAN v. EMPEROR*.

1923 Lah. 385.

## —S. 114—Deed in possession of mortgagor—Presumption.

The mere fact that the deeds are in the possession of the mortgagor does not itself prove that the mortgagee was a mere benamidar for the mortgagor. (*Macleod, C. J. and Crump, J.*) *HIRAJI v. VISHNU*. 1923 Bom. 429.

—S. 114—Document creating obligation produced by obligor—Onus of proof—Shifting of. *See* (1922) DIG. COL. 582 *RAM NATH v. RAGHA SAH*. 10 O. L. J. 159.

## —S. 114—Entry in revenue records as to joint property.

An entry in Revenue records raised a presumption as to joint family estate. (*Moti Sager, J.*) *BALBIR SINGH v. GOBIND*. 1923 Lah. 532

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—S. 114—Exercise of powers of revision by Board of Revenue—Reasons not given—Presumption of lawful exercise of powers. See MADRAS BOARD'S STANDING ORDER O. 15.

18 L. W. 523.

—S. 114—Illustration—Scope of.

The illustrations appended to S. 114 of the Evidence Act are not statements of the law qualified only by particular exceptions. They are merely what they call themselves, illustrations or instances of the application of certain maxims out of many possible instances. (*Hallifax and Maonair, A. J. C.*) GOVINDA v. EMPEROR.

69 I. C. 257 : 23 Cr. L. J. 673.

—S. 114—Non-production of account books—Presumption.

Where the plaintiffs case was that a partnership had been dissolved, but he failed to produce the account books which would have clearly shown the same, the presumption can be drawn that if produced they would have gone against the plaintiff. (*Moti Sagar, J.*) THE FIRM JOWALA DAS, PARMANAND v. UTTAM CHAND.

1923 Lah 585.

—S. 114—Official acts—Presumption—Objection to jurisdiction.

The presumption is that official acts are legally performed and where the jurisdiction of a settlement officer has not been questioned in the trial court, it must be presumed that he acted regularly and within his jurisdiction. (*Conits and Ross, JJ.*) BABU BALGOBIND v. RAI BEHARI LAL.

1923 P. 96 (2).

—S. 114—Pedigree table—Presumption from.

The mere mention of a common ancestor in a pedigree table is not of itself sufficient to prove that all the land in the possession of his descendants descended from that common ancestor. 41 P. R. 1914 Diss. (*Scott-Smith, and Moti Sagar, JJ.*) KARTAR SINGH v. LABH SINGH.

5 Lah. L. J. 190 :

74 I. C. 685 : 1923 Lah. 355.

—S. 114—Presumption of accuracy of survey records.

The presumption in favour of survey records of rights cannot be displaced by Batwara or irrigation maps. (*Jwala Prasad and Adami, JJ.*) SITA RAM TEWARI v. GAYA PRASAD.

1923 P. 37.

—S. 114—Presumption—Continuance of existing state of things.

Proof of the existence at a particular time of a fact of a continuous nature gives rise to a rebuttable presumption within local limits that it existed at a subsequent time or has previously existed. The limits of time within which the inference of continuance possesses sufficient probative force to be relevant must obviously vary with each case—always strongest in the beginning the inference steadily diminishes in force with the lapse of time at a rate proportionate to the quality of permanence belonging to the fact in question, until it ceases or perhaps is supplanted by a directly opposite inference. To put the

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matter shortly, it will be inferred that a given set of facts or set of facts whose existence at a particular time is once established in evidence, continues to exist as long as such facts usually exist. The inference of continuance, whether backwards or forwards, whether upwards or downwards, is an inference of fact and may therefore be rebutted. (*Mookerjee and Cumming, JJ.*) SECRETARY OF STATE FOR INDIA v. UPENDRA NARAIN ROY.

71 I. C. 849 : 1923 Cal. 247.

—S. 114—Presumption from non-production of document—Old document—Probability of loss.

Where a document is a very old one the possibility of its having been lost and being no longer in existence is naturally much brighter than in the case of a document of recent date. Consequently the presumption arising from the non-production of the document is not quite a strong one in the case of an old document as in the case of a recent one. (*Daniels, J.*) RAMJI DAS v. MIHIN LAL.

71 I. C. 654 : 1923 A. 441.

—S. 114—Presumption as to ordinary course of business.

Where sums are paid before the presiding officer of the Court at the time when a receipt was given for them, the presumption under S. 114 of the Indian Evidence Act is that the ordinary course of business was followed in the case in question. The mere statement by appellant's Counsel that these sums are not always paid at the time when the receipts are given was sufficient to throw the onus on the prosecution of proving that the plea was wrong. (P. 567, C. 2) (*Scott-Smith and Fforde, JJ.*) EMPEROR v. AMED SHAH.

1923 Lah. 586.

—S. 114—Statement after suit—Value.

The making of a statement in the document after the suit had been launched and was pending is very different from stating on oath in the witness box and the Court will not attach much weight to the statement even if it is admissible. (*Krishnan and Ramesam, JJ.*) TADEPALLI LAKSHMI NARASIMHAM v. RUKMANIAMMA.

1923 Mad. 225.

—S. 114 (Illus) (a)—Possession of stolen articles—Presumption.

If the possession of a stolen article is proved the court may presume that the person in possession soon after the theft is either guilty of theft or of receiving the goods knowing them to be stolen, unless he can account for his possession (*Sulaiman, J.*) BHAROS v. EMPEROR.

21 A. L. J. 836 : L. R. 4 A. 245 (Cr.).

—S. 114 (a)—Presumption—Possession of stolen article—Murder See (1922) DIG. COL. 554 NAINAMALAI KONAN *In re*.

69 I. C. 377 :

23 Cr. L. J. 697.

—S. 114 (Ill. a)—Presumption under—When arises.

The presumption under Ill. (a) of S. 114 Evidence Act does not arise until it is clearly proved that the article belongs to the complainant and that it was stolen. (*May Oung, J.*) MAUNG E GYI v. EMPEROR.

1 Rang. 520.

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## —S. 114 (b)—Corroboration

The accused was charged with dacoity. The approver himself at first stated most definitely that he did not recognise the accused as being one of the party concerned in the dacoity. He subsequently retracted from this statement and declared that he did recognize him; but that was only after he had been pressed by the prosecution. *Held* the statement first made should be accepted.

Where the only corroboration was the recovery of certain articles, alleged to be some of the articles stolen and subsequently produced from the house of the accused, his house was searched in his absence and he was given no opportunity of checking the results of the search or giving any explanation as to how the articles came into that house, and there was no evidence as to where the respective ornaments were found, nor was any thing said as to who produced them: *Held* that there was no sufficient corroboration. (*Fforde, J.*) SAUDAGAR SINGH v. EMPEROR. 1923 Lah. 683.

—S. 114 Illn (b)—Testimony of accomplice—Corroboration—Necessity for—English and Indian Law. See (1922) DIG COL. 590 KISHAN v. EMPEROR. 6 N. L. J. 52.

## —S. 114 Illn (e)—Judgment silent on point raised in the memo of appeal—Presumption.

Where an appellate judgment is silent on a point which is specifically mentioned in the grounds of appeal, inference can be drawn that it was given up. To hold otherwise would be to contravene S. 114. and to presume that the court failed to do its duty. (*Abdul Raoof and Harrison, JJ.*) ABDUL KARIM v. THAKUR RAM JAGGU RAM. 1923 Lah. 124.

## —S. 114 Illn. (e)—Presumption—Regularity of judicial and official acts—Sheristadar of Court signing process by order.

Where the sheristadar of a Court signed a warrant of attachment of moveable property in execution of a decree and the sheristadar signed "by order" of the court. *Held*, that the presumption in S. 114 Illn. (e) of the Evidence Act applied to the case and that, in the absence of anything to the contrary, it could be presumed that he was the officer to sign the warrant as required by O. 21, R. 24 (2) C. P. Code. (*Newbould and Sukrawardy, JJ.*) GIRDHAR SARKAR v. HARISH CHANDRA CHOWDHURY. 37 C. L. J. 331.

27 C. W. N. 1042 : 73 I. C. 328 (2) : 24 Cr. L. J. 584 : 1923 Cal. 584.

## —S. 114 (f)—Posting of letter—Presumption of reaching addressee.

The posting of a letter, if proved and if the same is not returned by the Dead Letter Office, raises the presumption that it must have reached the addressee. (*Schwabe, C. J. and Krishnan J.*) ABURUBAMMAL v. OFFICIAL ASSIGNEE, MADRAS.

45 M. L. J. 817 : 19 L. W. 54 : 33 M. L. T. (H. C.) 217.

## —S. 114 Illn. (h)—Crown—Non-production of material evidence.

Where the Crown withholds relevant documents in its possession, the Court will draw an

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inference adverse to it. 40 M. 402 Ref. (*Mookerjee and Chozner, JJ.*) RAJA SREENATH ROY v. SECRETARY OF STATE FOR INDIA. 50 Cal. 276 : 70 I. C. 510 : 1923 Cal. 233

## —S. 115—Acquiescence.

Where a person objected to another putting up a structure on his land and objected before the Municipal authority who however refused to go into a question of title, he cannot in any sense be held to have acquiesced in the act. 21 All. 496 (P. C.) fold. (*Gokul Prasad, J.*) MT KORLA KUMAR v. KALIAN MAL. 1923 All. 452

## —S. 115—Adoption—Representation.

Representation on a matter of law, i. e., as to the validity of an adoption creates no estoppel. (*Ayling and Odgers, JJ.*) RAJAMBAL AMMA v. SHANMUGA MUDALIAR. 70 I. C. 653 : 1923 Mad. 11.

## —S. 115—Attestation if consent.

The mere fact of attestation does not raise any presumption that the attesting witnesses were aware of the contents of the document, and hence a plea of estoppel cannot be founded on the fact alone. (*Stuart and Sulaiman, JJ.*) UDAI BHAN SINGH v. GAJENDRA SINGH. 70 I. C. 815 : 1923 A. 28.

## —S. 115—Decree obtained in a previous suit as son of a particular man—No objection by co-plaintiff as to paternity—Effect.

Where plaintiffs allowed one S. to join with them in a suit against another person and to obtain a decree as the son of a particular man without objecting that he was the son of the man and had no right to sue, they should be estopped from disputing his property in a suit by them for possession against paternity. (*Martineau, J.*) ZAFAR ALI, JJ.) SUNDAR SINGH v. SHAM SINGH. 1923 Lah. 630

## —S. 115—Equitable estoppel—Implied consent.

In a suit for demolition of certain constructions erected on the plaintiff's land, it was found that the plaintiffs tried to prevent the defendants from erecting them, and that the defendants had no reasonable belief that they were the owners of the disputed land on which the constructions were made. *Held*, that it is impossible to bring the case within the principle of equitable estoppel laid down in 21 All. 490 (P. C.) (*Daniels, J.*) MAOLA v. BAHORU. 1923 A. 567.

## —S. 115—Estoppel—Building on land—Silence—Duty to speak—Negligent omission.

The acquiescence or estoppel which will deprive a man of legal rights must amount to fraud. A man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights. The element or the requisites necessary to constitute fraud of that description are these:—In the first place, the plaintiff must have made a mistake as to his legal rights. Secondly the plaintiff must have expended some money or must have done some act (not necessarily upon the defendant's land) on the faith of the mistaken belief. Thirdly the defendant, the possessor of the legal right, must know of the existence of his own right

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which is inconsistent with the right claimed by the plaintiff. If he does not know of it he is in the same position as the plaintiff and the doctrine of acquiescence is founded upon conduct with a knowledge of your legal rights. Fourthly, the defendant, the possessor of the legal right must know of the plaintiff's mistaken belief of his rights. If he does not, there is nothing which it calls upon him to assert his own rights. Lastly, the defendant, the possessor of the legal right, must have encouraged the plaintiff in his expenditure of money or in the other acts which he has done either directly or by abstaining from asserting his legal right. Where all these elements exist, there is fraud of such a nature as will entitle the Court to restrain the possessor of the legal right from exercising it but nothing short of this will do. Where the defendants as in the present case were under no mistake about their rights, they were perfectly aware that the land belonged to the plaintiff and they wrote a letter to the plaintiff asking for permission to construct an over bridge, there is no room for any estoppel. (*Chatterjee and Cumming, JJ.*) *HEMANGINI DEVI v. RAJA BEJOY SINGH DUDHURIA*, 73 I. C. 223.

**—S. 115—Estoppel by conduct.**

In a suit for rent, defendant objected to the non-inclusion of certain plots whereupon plaintiff included the same reserving right to sue upon title afterwards. He then brought a suit in ejectment based on title. *Held* there was no estoppel by conduct (*Das and Adams, JJ.*) *CHOWDHURI RAM PRASAD SINGH v. RAM CHANDRA RAI*

4 Pat. L. T. 730.

**—S. 115—Estoppel by conduct—Building on land of another—Standing by.**

If a stranger, builds on the land of another, although believing it to be his own, the owner is entitled to recover the land with the building on it, unless there are special circumstances amounting to a standing by so as to induce the belief that the owner intended to forgo his right or to an acquiescence in his building on the land. It has to be decided in each case whether the special circumstances of that case do or do not amount to such a standing. (*Halifax, A. J. C.*) *RAMRATAN v. SHIODATTARAI*, 73 I. C. 137.

**—S. 115—Estoppel by conduct—Building on land—Knowledge—Improvements—Silence by landlord. See (1922) Dig. Col. 592. RALLI v. FORBES.**

1 Pat. 717.

**—S. 115—Estoppel—By conduct—Judicial order—Party taking benefit of, estopped from impeaching it.**

Where a party has adopted an order of the Court, and acted under it he cannot after he has enjoyed a benefit under the order, contend that it is valid for one purpose and invalid for another. The plaintiff appealed against the decree in so far as it disallowed compound interest. After the appeal had been filed, against that part of the decree which disallowed compound interest he accepted the costs (deposited by the respondent) and which was decreed by the lower Court on the basis of simple interest as to which there was no dispute and which the plaintiff

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would have got in any event whether the appeal succeeded or failed. *Held* in these circumstances the principle of estoppel did not apply to the present case and the plff. could prosecute the appeal. (*Chatterji and Cumming, JJ.*) *JOGENDRA NATH BANERJI v. KHODA BUKSHA BISWAS*.

72 I. C. 554.

**—S. 115—Estoppel by conduct—Statement before revenue officer in mutation proceedings—Effect of.**

A statement in the Court of an Assistant Collector during the mutation proceedings to the effect that the plaintiff and two others were in possession of the property in equal shares and that mutation of names may be made accordingly, does not prevent the plaintiff from asserting his right to the entire property in a civil court subsequently. (*Dalal, A.J.C.*) *RAM RATAN v. BINDA*.

9 O. &amp; A. L. E. 20 : 72 I. C. 832.

**—S. 115—Estoppel—Minor—Execution of pronote representing himself to be major—Suit on pronote.**

If it is proved that the defendant represented to the plaintiff that he was a major, and the plaintiff acting on that representation lent money on the promissory note, then the Court is entitled to consider the question whether in a suit on the promissory note the defendant is estopped from pleading his minority. That, of course, would depend upon the evidence and facts of the case (*Macleod, C. J. and Shah, J.*) *JASRAJ BASTIMAL v. SADASHIV MAHADEY WALEKAR*. 1923 Bom 169.

**—S. 115—Estoppel—None where truth is known to both parties.**

A person who knows the truth can hardly be allowed to rely upon an estoppel arising from a false representation. No estoppel can arise where the truth is known to the party who claims the estoppel 30 I. A. 114 foll (*Krishnan and Ramesam, JJ.*) *VENKATACHALA PILLAI v. ARUNTHAVATHACHI*. (1923) M. W. N 225

17 L. W. 755 : 72 I. C. 548 : 1923 Mad. 568

**—S. 115—Estoppel—Person claiming title under another—Representation of fact—Knowledge. See (1922) Dig Col 593. SARODA PROSAD BANERJEE v GOSTO BEHARI HAZRA**

27 C. W. N. 943 : 70 I. C. 385.

**—Ss. 115 and 91 to 94—Estoppel—Scope of the sections.**

Section 115 of the Evidence Act may no doubt override sections 91 to 94 because the law of estoppel is one which must prevail against a rule of procedure only. If a person has by his act permitted the other party to believe that the agreement was other than that embodied in the document and has caused him to act upon that belief he cannot fall back upon the provisions of section 92 and thereby escape from the consequences of his own actions. But this is a different thing from holding that when such conduct does not amount to an estoppel it may be proved in evidence or in order to show that the intention of the parties was something other than that expressed by them in the written document. If the written document is perfectly clear in its terms and applies to existing facts, evidence to

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show that it was not meant to apply to such facts is distinctly excluded by section 94 of the Evidence Act. (*Pipon. J. C.*) DHANNA RAM v. CHHABIL DAS. 72 I. C. 931.

—S. 115—*Facts known to parties—Effect—Act upon such belief—Meaning of.*

Where all the facts are within the knowledge of both parties there is no scope for the doctrine of estoppel. The language of the section extends to the encouragement of an erroneous belief as in *Ramsden v Dyson*.

The phrase "act on such belief" means that the party must have altered his position with reference to the subject matter of the representation. (*Praet. J.*) WILLIAM JACKS & Co v. JOOSAB MAHOMED. 25 Bom. L. R. 1170.

—S. 115 — *Land—User of — Conversion—Equitable estoppel.*

The defendants, having been granted a user of certain lands for certain purposes, used it for purposes other than the purpose for which it had been granted, by digging a *baoli* which was used by the public. Held there was no question of the owner standing by watching the construction of the *baoli* being made by a person who was under a mistaken belief that the land was his own property, in order to gain an advantage. The defendants could not have believed that the land was their own property and there was nothing to show that the plaintiffs had any sinister motive in abstaining at the time from protest. (*Stuart, J.*) MAULVI MAHOMED v. MAHABIR DAS. 70 I. C. 886 (1) : 1923 A. 11 (1).

—S. 115—*Minor—Contract—Estoppel.*

A minor is not estopped from setting up his minority. As judicially interpreted the Contract Act makes Contract entered into by a minor void and the court should not be compelled to pronounce them valid by the provisions contained in the Evidence Act. It is not apparently the case that the word 'person' in the section does not include a minor or certified lunatic other person under a disability to contract owing to imbecility of judgment. But it might be held that such a person could not be held to have intentionally caused anything. When the law of the contract declared that an infant would not be liable upon a contract or in the statute of fraud in connection with a contract, he cannot be made liable upon the same contract, by means of an estoppel; in other words there can be no doubt about the general law that the principal of estoppel which is provision of adjective law cannot be invoked to defeat the plain provision of a statute.

Per *Raimond, A. J. C.*—There is no distinction in principle between a minor plaintiff and minor defendant and if in the case of a contract entered into by a minor the principle of estoppel is to be applied to him whether he is the plaintiff or defendant it would be tantamount to binding him by an agreement which the legislature has declared to be void and hence unenforceable. (*Kennedy, J. C., Raimond and Kemp, A. J. C.*) MT. HURI v. ROSHAN KHUDABUX. 1923 Sind 5 : 16 S. L. R. 112 : 71 I. C. 161.

## EVIDENCE ACT (I OF 1872), S. 116.

—S. 115—*Minor—Misrepresentation as to age—Contract void—No duty to restore benefit* See CONTRACT ACT, S. 11. 69 I. C. 543.

—S. 115 — *Monopoly — Validity — Prior holder if can question.*

In a suit for damages by the holder of a monopoly for a certain year against the prior holder for infringement of his rights, the latter is not estopped from contending that the monopoly itself is invalid. (*Martineau, J.*) RAMJI DAS v. JAI GOPAL. 69 I. C. 431. 1923 Lah. 244.

—Ss 115 and 116—*Mortgagor and mortgagee—Estoppel—Denial of title.*

Even where the mortgagors are trustees acting in a public capacity and not for their own benefit they are estopped from denying their title and cannot set up as a defence against the mortgagee that the property so mortgaged is trust property which the mortgagors had no right to mortgage. (*Miller, C. J. and Foster, J.*) BRIJ RATAN DAS v. RAGHUNAND GIR. 1 Pat. L. R. 225 : 4 Pat. L. T. 457.

—S. 115—*Representation—Recognition of occupancy tenancy—Misdescription of tenant's status.*

The mere fact that a tenant's status is incorrectly described in rent receipts issued by the Zemindar does not estop him from denying the tenant's status. An occupancy tenant against whom there was a decree for rent died and the Zemindar applied for execution against the daughter's son of the tenant who was an infant at the time and the agent of the Zemindar stated that if half the arrears were paid, the daughter's son would not be ejected. Held, that the statement did not estop the Zemindar from asserting that he had no occupancy rights. (*Burn, J. M.*) PARTAB SINGH v. RAJA DURGA NARAIN SINGH. L. R. 4 A. 8 (Rev.).

—S. 115—*Unnecessary pleas raised and decided—No estoppel.*

A plea unnecessarily raised by a party and decided by the Court also equally unnecessarily does not estop the party from putting the same in a later suit. (*Campbell, J.*) SOHAN SINGH v. JAWALA SINGH. 73 I. C. 854 : 1923 Lah. 248.

—S. 116—*At the beginning of the tenancy*

The words in S. 116 "at the beginning of the tenancy" only apply to cases in which tenants are put into possession of tenancy by the person to whom they have attorned and not to cases in which the tenants have previously been in possession. Where there was no proof of any rent ever having been paid or that the defendant was inducted as a tenant by the plaintiff and the parties were brothers and admittedly the house was once joint property. Held in these circumstances the defendant was not estopped from denying that he was the plaintiffs tenant. (*Campbell, J.*) RISHI KESH v. MELA RAM. 73 I. C. 450 : 1923 Lah. 483.

—S. 116—*Denial of landlord's title—*

A tenant is estopped from denying the title of his landlord, however defective it may be, so long

## EVIDENCE ACT (I OF 1872), S. 116.

as he has not surrendered possession to him.  
(*Wazir Hasan, A. J. C.*) SHAMSHUDDIN KHAN v  
AGHA SYED FATEH SHAH.

9 O. & A. L. R. 1041.

—S. 116—*Estoppel—Landlord and tenant—Execution of lease*

Whatever may have been the nature of a person's possession prior to a lease, once he takes a lease-deed in respect of the land from another, he is thereafter estopped from denying the title of his lessor. (*Rafiq and Stuart, JJ.*) SITAL PRASAD v. BADRI PRASAD.

69 I. C. 647 :  
1923 A. 53.

—S. 116—*Estoppel—Tenant.*

A tenant cannot deny the right of the person from whom he took the tenancy. (*Fremantle S. M. and Burn, J. M.*) JANKI v. RAM SAHAI.  
L. R. 4 All. 398 (Rev.).

—S. 116—*Landlord and tenant—Estoppel—Denial of title—Admission through mistake or ignorance.*

Though, under section 116 of the Evidence Act no tenant can deny his landlord's title existing at the commencement of the lease, the rule only applies where the tenant has been let into possession by such landlord. If through ignorance or mistake a tenant has executed a rent-note and has not been put in possession by the lessor it seems that he can dispute the lessor's title. (*Prideaux, A. J. C.*) MR. LAMMIBAI v. DEVI. 72 I. C. 855.

—S. 116—*Landlord and tenant—Kabuliyat—Possession taken under—Denial of title of Landlord—Estoppel.*

Where the defendant has executed a Kabuliyat in favour of the plaintiff and obtained possession of certain lands as tenant on the strength of that document, he is estopped from denying the title or possession of his grantor in a suit for rent and from setting up that the plaintiff is merely a benamidar for some other person. (*C. C. Ghose and Panton, JJ.*) PRABHAT CHANDRA CHATTERJI v. BIJOY CHAND MAHATAP.

50 C. 572 :  
75 I. C. 89.

—S. 118—*Examination of witness of tender years—Procedure.*

It is of very great importance that when the evidence of a child of tender years is adduced, the Judicial Officer should, for the sake of precaution, ascertain as a preliminary measure, by means of a few simple questions, whether the intelligence of the child is such that (whether sworn or not) it is capable of giving testimony which is patent of credit; and it is desirable that something should, at the commencement of the record of the evidence of the witness of this character be entered to show that such a test has been in fact made. It may turn out in the course of the examination at the trial that the test has been a fallacious one and that the evidence which the child gives is not intelligible and in such a case, it is always open to the Judicial Officer to say that he cannot accept the evidence which the child is giving. On the other hand there is no obligation imposed by law upon a judge definitely to make on the record any endorsement of his own as to a child's capacity, and when he has

## EVIDENCE ACT (I OF 1872), S. 133.

clearly relied upon the evidence given, it is idle to suggest that he could have been other than thoroughly satisfied as to the capacity of the child to give intelligible testimony. (*Bucknill, J.*) PANCHU CHOUDHRY v. EMPEROR

1923 P. 91.

—S. 122—*Confession to husband—Penal Code, S. 302.*

No statement of an incriminating nature made by the appellant as to her guilt under S. 302 I. P. C. to her husband could be received in evidence. (*Broadway and Martineau, JJ.*) MT. IHSANAN v. EMPEROR.

1923 Lah. 40.

—S. 124—*Admissibility of documents—Objection—Privilege—Waiver.*

Where secondary evidence of certain documents had been admitted in the court below without any objection on the ground of privilege by the Government, it is not open to the Government to object to their admissibility in appeal under S. 124 of the Evidence Act. (*Krishan and Ramesam, JJ.*) RATHNAMASARI v. SECRETARY OF STATE FOR INDIA.

44 M. L. J. 132 :  
17 L. W. 415 : 32 M. L. T. (H. C.) 279 :  
72 I. C. 214. (1923) Mad. 332.

—S. 132—*Co-accused in another trial—If can be cited as witness.*

A person who is tried for an offence under S. 3 of the Gambling Act has every right to cite as his witness another person who is a co-accused with him for an offence under S. 4 in a separate trial—The co-accused's position is sufficiently protected by S. 132 Evidence Act. (*Zafar Ali J.*) RAJA RAM v. EMPEROR.

5 Lah. L. J. 429 :  
73 I. C. 521 : 24 Cr. L. J. 633.

—S. 133—*Accomplice—Testimony—Corroboration—Practice.*

Under S. 133, Evidence Act, the evidence of an accomplice by itself is enough for a conviction, but it is a rule of practice founded on experience that in every case where an accomplice has given evidence, the court must raise a presumption that he is unworthy of credit unless corroborated in material particulars. Failure to raise this presumption is an error of law, but in each case the weight to be attached must depend on the particular circumstances. (*Mullick and Thornhill, JJ.*) MADAN GURU v. EMPEROR

4 Pat. L. T. 381 :  
73 I. C. 965 : 24 Cr. L. J. 723.

—S. 133—*Approver—Corroboration*

The evidence of an approver, if believed, is sufficient foundation whereon to repose a conviction, but in practice, the Court *ex majori cautela* insists upon corroboration of the approver's statements in material particulars. (*Le Rossignol, J.*) TOTA SINGH v. EMPEROR.

69 I. C. 462 : 23 Cr. L. J. 734.

—S. 133—*Corroboration of accomplice—Extent of*

Where the only evidence against an accused person is that he has produced stolen property out of a place which is not in his own possession, that evidence is not sufficient to support a conviction for theft or for receiving stolen property. But the production of the property is clearly evidence against the person producing it and is

## EVIDENCE ACT (I OF 1872), S. 133.

material corroboration of the evidence of an accomplice who has deposed that that person joined him in committing a dacoity or a burglary or a theft. The discovery of stolen property out of a house jointly occupied by himself and his uncle, is corroboration of the approver's story against the accused. Such production might not be sufficient evidence of itself to support a conviction for being dishonestly in possession of stolen property but it certainly is evidence against the persons producing it. The value of the evidence is another matter. (*Scott Smith, J.*) KHUSHAL SINGH v. EMPEROR.

1923 Lah. 335.

## S. 133—Corroboration by an approver—Legal.

There is nothing in S. 133 to suggest that the statement of one approver cannot be regarded as corroborating that made by another approver. No doubt if it could be shown that the approvers had ample opportunity of consultation, this corroborative value would be greatly diminished (*Lumsden, J.*) EMPEROR v. DARYA SINGH.

1923 Lah. 666.

## S. 133—Corroboration not possible—Value of evidence.

The uncorroborated evidence of testimony cannot safely be the basis of a conviction. If in the nature of things corroboration is not possible in a particular case, then the accomplice's statement must be treated as unworthy of credit. His demeanour in the witness box cannot be a substitute for corroboration. (*Wazir Husan, A. J. C.*) MANNA LAL v. EMPEROR.

90 &amp; A. L. R. 947.

## S. 133—Evidence of approver—Corroboration—Criminal P. C. Ss. 395 and 396.

The approver referred to a story by one A who invited him along with appellants to join in the dacoity; the incident of the story told by the approver turned out to be true on police inquiry. Appellants were seen with the approver at Sukbo and arrested in his company at Mandra. The possession of the three tickets all from Chakala to Mandra and bearing consecutive numbers was strong corroboration of the approver's story as to the appellants having accompanied him to the scene of the occurrence.

Held, the guilt of the appellants had been established beyond reasonable doubt by the evidence of the approver which had been amply corroborated as against them. (*Broadway and Martineau, JJ.*) HAKIM v. EMPEROR.

1923 Lah. 153.

## S. 133—Who is an accomplice.

One who deposes that he only helped the accused in disposing of the body of the deceased after he was killed by the accused is no accomplice. (*Le Rossignol and Zafar Ali, JJ.*) JEHANA v. EMPEROR.

73 I. C. 506 : 24 Cr. L. J. 618 : 1923 Lah. 345.

## S. 136—Question of—Onus in appeal—Witness disbelieved on inadmissible evidence—Effect.

## EVIDENCE ACT (I OF 1872), S. 154.

In ordinary cases the question of onus is not of great importance in appeal where both parties have produced the whole of their evidence upon an issue. But where witnesses have been disbelieved on inadmissible evidence, e. g., certified copies of judgments put in without examining the witness under S. 136, the effect is that the decision is vitiated. (*Campbell, J.*) SOHAN SINGH v. SANTA SINGH.

1923 Lah. 491.

## S. 138—Scope of.

It is certainly implied by S. 138 of the Evidence Act that a party must have had an opportunity to cross-examine and does not mean that merely a right to cross-examine a witness without an opportunity being offered for cross-examination is sufficient compliance with the requirements of the law. (*Jwala Prasad and Coutts, JJ.*) MOTI SINGH v. DHANUKDHARI SINGH.

73 I. C. 339 :

24 Cr. L. J. 595 : (1923) Pat. 53.

S. 145—Absence of note about directing attention *See* (1922) Dig. Col. 1091. BAIKUNTHA NATH CHATTORAJ v. PRASANNAMOYI DABYA.

44 M. L. J. 699 : 27 C. W. N. 797 :

90 &amp; A. L. R. 501 : 72 I. C. 286.

## S. 145—Documents tendered after evidence.

A witness cannot be disbelieved without his attention being drawn to the documents inconsistent with his deposition even though the documents were produced after his examination. In such a case he should be recalled for further cross-examination. (*Viscount Haldane.*) NABA KUMAR DAS v. RUDRA NARAYAN JANA.

45 M. L. J. 438 :

33 M. L. T. 309 (P. C.) : (1923) M. W. N. 622 :

1923 P. C. 95.

## Ss. 146 and 148 to 152—Scandalous question—Relevancy.

During the examination of one of the defendants by plaintiff a question was put whether she was made pregnant by a certain person. The question was objected to but the plaintiff contended that it was relevant, his case being that the witness did not inherit the property by reason of her unchastity during the lifetime of her husband. If the plaintiff's case was that she did not inherit the property of her husband by reason of her unchastity during his lifetime, then the question would be relevant. If however, it was asked for impeaching her credit as a witness, the Court will have to consider the provisions of S. 146 and 148 to 152 of the Evidence Act. (*Chatterjee and Pearson, JJ.*) SUBALA DAS v. INDRA KUMAR HAZZRA.

1923 Cal. 315 (2).

## S. 154—Hostile witness—Cross-examination—Admissibility of evidence.

It is not open to the prosecution in a criminal trial to cross-examine their own witness unless the Court declares him to be a hostile witness, unless this is done the answer to questions would not be admissible in evidence and the Court should not allow such questions. (*Coutts and Das, JJ.*) JAGDEO SINGH v. EMPEROR.

1 Pat. 758 : 4 Pat. L. T. 232 :

24 Cr. L. J. 69 : 71 I. C. 117 : 1923 P. 63.



## EVIDENCE ACT (I OF 1872), S. 155.

—S. 155—Recital of age in guardianship petition—If admissible in evidence *See EVIDENCE ACT* Ss. 32 (5) AND 155 38 C. L. J. 213.

—S. 157—*Deposition before committing Magistrate—Corroboration—Statement before investigating officer—Admissibility—Cr. P. Code, S. 283.*

The effect of S. 288 Cr. P. Code is to place the deposition of a witness before the committing Magistrate exactly on the same footing as the deposition in the Sessions Court. It is "testimony" within the meaning of S. 157 of the Evidence Act and statements made by the witness before the investigating officer are admissible for the purpose of corroborating such "testimony". It is in the discretion of the Sessions Judge to believe and act upon the statements before the committing Magistrate in preference to contradictory statements made before himself on the ground that the former are corroborated by the statements made before the investigating officer. (*Ayling and Odgers, JJ.*) VELLIAH KONE *in re.* 72 I. C. 529 : 24 Cr. L. J. 417 : 1923 Mad. 20.

—S. 157—Petition—Contents of—Admissibility. *See* (1922) DIG. COL. 597. EMPEROR *v.* RAJANI KANTI BOSE. 71 I. C. 81 : 24 Cr. L. J. 33.

—S. 159—*Fact of death—Date of death—A reference to old document—Admissibility.*

The plaintiff in order to show that his father died before the property had been acquired, produced a mortgage bond which had been executed by him on the 28th October 1892 in which he was described as the son of Khan Mahomad Akonda deceased. Held the deed is admissible to refresh memory as to when the father died. (*Mookerjee and Rankin, JJ.*) SAYE- RUDDIN *v.* SAMIRUDDIN. 72 I. C. 985 : 1923 Cal. 378.

—S. 163—*Production of documents by a party—Inspection by plaintiff—Admission of documents and evidence.*

In a pending trial the defendant produced certain account books and gave inspection of the same to the plaintiff on his request. The plaintiff however did not admit the genuineness of those accounts. The Court admitted the documents in evidence without proof and asked the plaintiff to adduce rebutting evidence if any, held that the procedure of the lower Court was not justified by S. 163 of the Evidence Act. S. 163 does not render proof of the document to be executed unnecessary or alter the normal incidence of that burden. *Quaere.* Whether S. 163 of the Evidence Act is applicable to accounts produced under the procedure for discovery or only to accounts produced after the trial has begun. (*Oldfield and Venkatasubba Rao, JJ.*) RAJA-GOPALA AIYENGAR *v.* RAMANUJA AIYENGAR. (1923) M. W. N. 292 : 72 I. C. 459 : 18 L. W. 165 1923 Mad. 607.

—S. 164—*Hostile witness—Contradictory statements—Weight due to.*

The mere fact that at the trial before the Sessions Judge a prosecution witness tells a different story from that recorded by the Police after the occurrence does not necessarily make the witness

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a hostile witness. 13 C. 53 ; 24 C. W. N. 860 referred to. Where a witness called by a party is cross examined by him his evidence cannot be believed in part and disbelieved as to the rest but it must be rejected in toto. (*Walmesley and Pearson, JJ.*) EMPEROR *v.* SATYENDRA. 37 C. L. J. 173 : 71 I. C. 657 : 24 Cr. L. J. 193 : 1923 Cal. 463.

—S. 165—"Any witness"—*If includes court witness—Right of cross-examination.*

The words "any witness" in S. 165 Evidence Act include a court witness, *Quaere* how far the right to cross-examine such a witness is an absolute right or requires the leave of court. (*Simpson, A. J. C.*) MAKUND SINGH *v.* MT. GHAFUR-UN-NISSA 90 & A. L. B. 549 : 74 I. C. 108.

—S. 165—*Power of court to call for and admit evidence.*

Even though a document is not produced at the first hearing of a case the court can call for the document under S. 165 of the Evidence Act. (*Ashworth, A. J. C.*) SHANKAR LAL *v.* MAHBUB SHAH. 70 I. C. 278 : 1923 Oudh 59.

EXCESS PROFITS DUTY ACT, Ss. 6 and 15—Increase of capital—Exemption from tax. *See* (1921) DIG. COL. 565. DEPUTY COMMISSIONER AND SECRETARY TO THE CHIEF COMMISSIONER OF INCOME-TAX, MADRAS *v.* S. HAJEE ABDULLA SAHIB AND CO. 70 I. C. 30.

EXCESS PROFITS DUTY ACT (X OF 1919), S. 18—*Proceedings for the recovery of duty—Limitation Rules framed under the Act,—Rule 24.*

Rule 24 (1) describes how the Excess Profits duty is to be recovered when default has been made in payment. This is the only rule dealing with mode of recovery, and the subject of the rule is entered as "mode and time of recovery." Also Rules 23 and 24 of the rules made by the Govt. under S. 18 (1) and (2) of the Excess Profits Duty Act are classed under the heading "recovery of duty." whilst rule 13, which is the rule providing for a notice of demand being served on the person assessed, is put under the heading "demand." From this it is evident that the demand made on the assessee is treated in the rules as something quite distinct from the recovery of the duty, the proceedings for which begin when default has been made. The same distinction is made in the Income Tax Acts, VII of 1918 and XI of 1922, where the notice of demand is provided for in a chapter the subject of which is "Deductions and Assessment," whilst there is a separate chapter dealing with the subject of the recovery of the tax.

The words in sub-rule (3) of the rule 24 "proceedings for the recovery of any sums" mean the proceedings taken under sub-rule (1) of that rule after default has been made in the payment. (*Martineau, J.*) GIAN SINGH BAHADUR SINGH *v.* EMPEROR. 4 Lah. 165 : 73 I. C. 106 : 1924 Lah. 54.

EXCISE ACT (XII OF 1896) S. 60 (a)—*Possession of liquor—When an offence.*

Where the finding of the magistrate was that the accused had in their possession two bottles full of liquor, but there was no finding as regards the

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capacity of the bottles or the strength of the liquor a conviction under S. 60 (a) of the Excise Act is bad (*Dalai, A. J. C.*) *EMPEROR v. SARJU*.  
9 O. & A. L. R. 482.

**EXECUTING COURT—Decree—Validity of—When open to question in executing court—Remedy by suit.**

An executing court cannot go behind the decree or enquire into the jurisdiction of the court which passed the decree. 43 M. 675 foll. 44 C 627 not foll. Where after the preliminary decree is passed the mortgagor dies without bringing on record his legal representative a final decree is passed, the decree is a nullity and its validity can be impeached in a subsequent suit for declaration and injunction. 13 L. W. 290, 21 A 16, 4 Pat. L. J. 240. Ref. (*Ayling and Odgers, J.J.*) *SAMI MUDALIAR v. MUTHIAH CHETTY*.  
69 I C 465 : 1923 Mad. 212

———Powers of — Adjustment. See (1922) DIG. COL. 598 *SURADHANI DATTA v. SITOO SHEIKH*. 27 C. W. N. 280 : 38 G. L. J. 17.  
71 I. C. 378.

———Power to go into—Validity of decree. See (1922) DIG COL 599 *RAJAKOTI KUMAR MOOKERJI v. TINCOWRI CHAKRAVARTHI*.  
70 I C. 293 (2).

———Powers of — Mortgage decree—Death of party.

If a decree is passed against a dead person, the executing court can treat it as a nullity. Where a decree for sale is objected to in execution on the ground that it was based on a preliminary decree passed against a dead person, the executing court cannot treat the decree as a nullity, though it might be a good ground for setting aside the decree. (*Piggott and Walsh, J.J.*) *RAM SARUP v. NARAIN DAS*.  
45 A. 198 : 9 O. & A. L. R. 132 : 69 I. C. 944 : 1923 A. 141.

**EXECUTION—Concurrent execution—Legality of—Execution in several courts.**

Both under the Civil Procedure Code of 1908 and the previous C. P. Codes the legality of the concurrent execution has been recognised though in practice it is not generally carried out. On principle there is no difference between a concurrent execution after transfer in another court and a concurrent execution in the Court in which the decree was passed. That the present C. P. Code does not view with disfavour concurrent executions is, among other sections indicated by S. 46. Further separate and successive applications for execution giving reliefs of different character may always be made. 8 Cal. 687, 1 C. L. J. 315 ; 37 M. 232 ; 18 C. 515 ; 19 A. 98 referred to, (*Mullick and Kulwant Sahay, J.J.*) *RAM SUMRAN PRASAD v. BABU RAM BAHADUR*.  
4 Pat. L. T. 99 : (1923) Pat. 61 : 2 Pat. 328 : 71 I. C. 741 : 1923 P 224.

———Decree on award—Court-fees.

Where a proper complete decree had been drawn up on the award and the execution Court dismissed the application for execution on the ground that there was no decree as no necessary

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court fees had been paid *held*, the order dismissing the application for execution was wrong. (*Shah and Crump, J.J.*) *GANDHI VADILAL v. GANDI MANEKLAL*.  
1923 Bom. 41 (2).

———Decree—Contents of must be known before ordering—Decree—C. P. C. O. 21, R. 5.

It is necessary to prove the exact contents of the decree, which is alleged to have been passed, before ordering execution. (*Maccoll, A. J. C.*) *MAUNG CHIT v. MAUNG THA KU*.  
1923 Rang. 113

———Decree—Objection to legality of—If can be raised in execution. See C. P. CODE, O. 34. RR. 4 AND 5.  
4 Pat. L. T. 311,

———Decree for possession—Second application if lies.

Where an execution application for delivery of possession is ineffectual, a subsequent application for the same relief is maintainable (*Spencer and Venkatasubba Rao, J.J.*) *VENKATALAKSHMI AMMAL v. SADASIYA AIYAR*.  
18 L. W. 883.

———Decree—Power of Court to which decree has been transferred for execution.

The Court to which a decree is sent for execution retains its jurisdiction to execute the decree until the execution has been withdrawn from it or until it had fully executed the decree and had certified that fact to the court which sent the decree, or until it had failed to execute the decree and certified that fact to the Court which forwarded the decree. (*Macleod, C. J. and Crump, J.*) *VITHU DAULATA v. GANESH*.  
25 Bom. L. R. 453 : 74 I. C. 149 : 1923 Bom. 396.

———Instalments conditional on security Awarded.

Where by the award the judgment debtor was allowed to pay up the amount by instalments on giving security and if he failed to give the first instalment in time it was to be paid along with the second but he failed to give security and on his failure to pay first instalment but before the time of the second instalment decree-holder filed an application for execution for the first instalment : *Held* the payment of the first instalment along with the second was conditional on the execution of security and the application was proper. (*Marineau, J.*) *BHAGWAN DAS v. MUT. SADDI LAL*.  
1923 Lah. 445 (1).

———Maintenance decree—Charge on immoveable properties — Suit if necessary after exhausting hypotheca.

A decree for arrears of maintenance and for future maintenance was passed and the decree holder after the hypotheca was exhausted, proceeded against other properties belonging to her deceased husband in execution. *Held* she was entitled to do so, without the necessity of having recourse to a suit, as the decree was not a mortgage decree. The charge created was merely a lien not antecedent to the decree but created by it and it cannot be said there was a mortgage on the property. The procedure in execution is not limited to O. 34, C P. Code. (*Mullick and Buckmill, J.J.*) *SIASHACHARI PEARI v. RAM KISHORI KUER*.  
2 Pat. 796 : 74 I. C. 867.

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—Objection to attachment and sale—Declaration obtained that property belonged to debtor—Jurisdiction to sell under Bundelkhand Land Alienation Act. See ESTOPPEL. L. R. 4 All. 607.

—Payment order—Stay of—Jurisdiction.

When the money was received by the Lahore Branch of the Bank from the Kasauli Branch where it was attached by order of execution court of Lahore as the agent of the decree-holder Held the money when received by the Bank in Lahore belonged to the decree-holder and it is no longer within the jurisdiction of the execution court in Lahore to deal with it in any way, *e. g.* issuing prohibitory order for not paying to decree holders (Scott Smith, J.) FITZOLMES v. WARYAM SINGH. 75 I. C. 419 : 1923 Lah. 514.

—Right to apply—Beneficial owner of decree.

Where the beneficial owner of a decree applies to be made a party to a pending execution application presented by the nominal decree-holder, on the ground that his rights were not properly safeguarded, the Court is bound to implead him as a party. 26 C. 250 ; 44 M. 919 Ref. (Krishnan, J.) RUKMANIAMMAL v. RAMACHANDRA THON DAMAN SAHIB. 44 M. L. J. 122 : 17 L. W. 87 : 72 I. C. 874 : (1923) Mad. 317 (1).

—When ceases—Confirmation of sale

Though the decree-holder-purchaser is unable to obtain possession that would not entitle him to take out further execution for that portion of his purchase money which is represented by the property purchased by him. Execution comes to an end with the sale of the property and whether or not the auction purchaser obtains possession of the property sold is wholly immaterial for the purpose of the decree and it does not in any way affect it. (Das and Adami, JJ.) TRILOKE NATH JHA v. BANSMAN JHA. 1 Pat. L. R. 6 : 2 Pat. 249 : 72 I. C. 938 : 1923 P. 22.

—Order in—Notice to parties—Necessity for.

No order to the prejudice of a party can be passed without giving him an opportunity of being heard. (Jwala Prasad and Bucknill, JJ.) GOUR CHANDRA ROY v. JANARDHAN PRASAD THAKUR. 4 Pat. L. T. 204 : 1923 P. 180.

EXECUTION SALE—Adjournment—Damages if can be awarded—Order if executable.

On the application of the judgment debtors an execution sale was adjourned on terms and the order further provided that if any further adjournment was asked for the party would have to pay damages : Held the order was illegal as it awarded damages for an event which may or may not happen ; (2) that even if it was a valid order it was not by itself an executable order ; (3) even if executable, an application for execution made more than three years after the next adjournment was asked for would be barred. (Das and Kul-wani Sahay, JJ.) MAULVI JAMIL AHMAD v. BABU KESHO DAS. (1923) Pat. 202 : 72 I. C. 1035 : 1923 P. 407.

## EXECUTION SALE.

—Bona fide purchasers—Protection to.

Courts will as far as possible protect innocent purchasers from the consequences of irregularities and defects of procedure at such sale for the reason that strangers are to prescribe that proceedings are regular ; but such help cannot be extended to the overlooking of patent want of inherent jurisdiction on the part of the executing Court (Spencer and Devadoss, JJ.) MAHARAJA OF JEYPORE v. RAJA LAKSHMINARASIMMA GARU. 18 L. W. 747.

—Bundelkhand Land Alienation Act—Objection to sale—Sale held and confirmed—Effect of

In execution, an objection was raised that under the Bundelkhand Land Alienation Act properties could not be sold but this was dismissed for default and the sale took place and was confirmed. In appeal the order of dismissal was set aside and the matter remanded Held the effect was to revise the objection and if the same is upheld, the sale and confirmation would fall to the ground as being in contravention of the Act. (Sulaiman, J.) SATDHAR v. RAM CHANDRA. L. R. 4 All. 607 : 21 A. L. J. 917.

—Completion of—Bids—Knocking down of property—Acceptance of bid by Nazir—Resale of property—Order for—Propriety of.

An execution sale was held by a Court Nazir who accepted a bid and the deposit of 25 p. c. of the purchase money After the property had been knocked down another bidder applied to the court which ordered a resale. Held that the sale was not concluded when the property was knocked down and the deposit made and the court had a discretion to order a resale. (Newbould, J.) FAZIL MEAH v. PROSARNA KUMAR. 1923 Cal. 316 (1).

—Jurisdiction of court—Agency court if can sell property outside.

A court has no jurisdiction in execution of a decree to sell property over which it had no territorial jurisdiction at the time it passed the order of sale. Thus an Agency Court has no right to sell the right to collect *kattubadi* in villages situated beyond its territorial jurisdiction (Spencer and Devadoss, JJ.) MAHARAJA OF JEYPORE v. RAJA LAKSHMINARASIMMA GARU. 18 L. W. 747.

—Legality of—Major debt treated as minor—Knowledge of proceedings—Estoppel. See (1922) DIG. COL. 601. RADHAKRISHNASWAMI NAIDU v. ANNAMALAI CHETTIAR. 70 I. C. 365.

—Mortgage decree—Interest of purchaser.

The interest of a purchaser at a sale held in execution of a mortgage decree is certainly more than merely the interest of the judgment-debtor. (Ayling and Venkatasubba Rao, JJ.) TANJORE PALACE ESTATE BY ITS RECEIVER SUNDARAM IYER v. THIYAGARAJA PILLAI. (1923) Mad. 160 (2).

—Objection to—When to be taken.

The objection if any, should have been taken before the Court proceeded to sell the property

## EXECUTION SALE.

The property having been sold the execution case was at an end; and it cannot now be urged that the objection to the sale is a question that arises in execution. (*Das and Kulkarni Sahai, JJ.*)  
HIRJI JIVRAJ v. RAMJAS. 72 I. C. 670 (1)

———Purchaser—Title of—If subject to equities. See (1922) DIG. COL. 602 UDAI KUMAR DAS v. KATYANI DEBI. 49 Cal. 948.

———Rent decrees—Sale of property under earlier—Subsequent decree it can be executed personally. See (1922) DIG. COL. 600. RATAN LAL BISWAS v. NAFAR GHANDRA PAL. 70 I. C. 451.

———Rights of purchaser—Crops on the land—Delivery of possession.

The sale of a plot of land in execution of a decree would pass to the purchaser the crops growing on the land unless they had been exempted from the sale by notification. (*Ross, JJ.*)  
DHORI ROY v. MAHADEO SINGH.

4 Pat. L. T. 318 : 1 Pat. L. R. 269 :  
73 I. C. 451 1923 P. 355.

———Rights of purchaser—Property purchased subject to encumbrance—Effect of.

Where a purchaser at an execution sale buys the property subject to an encumbrance, he must be deemed to accept the burden of the encumbrance and cannot thereafter escape from it merely because his purchase has not been profitable. 31 M. 439 : 40 B. 646 ; referred to (*Hallifax, A. J. C.*) PANDURANG v. NARAYAN.

6 N. L. J. 78.

———Sale subject to incumbrances—Rights of purchaser.

On the sale of the property subject to encumbrances the vendor gets the price of his interest, whatever it may be whether the price settled by private bargain or determined by public competition together with an indemnity against the encumbrances affecting the land. The contract of indemnity may be express or implied. If the purchaser covenants with the vendor to pay the encumbrances it is still nothing more than a contract of indemnity. The purchaser takes the property subject to the burden attached to it. If the encumbrances turn out to be invalid, the vendor has nothing to complain of. He has got what he bargained for. His indemnity is complete. He cannot pick up the burthen of which the land is relieved and seize it as his own property. The notion that after the completion of the sale, the purchaser is in some way a trustee for the vendor of the amount by which the existence or supposed existence of encumbrances had led to a diminution of the price and liable therefore, to account to the vendor for anything that remains of that amount after the encumbrances are satisfied or disposed of, is without foundation. After the purchase is completed the judgment debtor has no claim to participate in any benefit which the purchaser may derive from his purchase by reason of the incumbrance being less onerous than it was stated to be (*Kotwal and Prideaux, A.J.C.*) MITSUI BUSAN KAISHA LTD. v. PADAMRAJ KULCHAND.

6 N. L. J. 217 : 72 I. C. 461 : 1923 Nag. 219.

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———Setting aside—Fraud—Plea of purchaser without notice—When a bar to application See C. P. Code, S. 47. 37 C. L. J. 145.

———Setting aside—Power of Court—Inherent power—Abuse of the process of Court—Suppression of facts—Leave to bid—Matters to be considered in granting leave.

The Court has inherent power to refuse to confirm an execution sale if it is satisfied that it was misled either in giving leave to bid or in fixing the real price. The Court will not however exercise the inherent power unless it has had all the facts fully before it and is satisfied that it has been misled. In order to show that the Court has been misled, it is necessary to show either actual misstatements to the Court or non-disclosure to the Court of relevant facts unknown to the Court and which there was a duty to bring before the Court. 23 Mad. 217 followed. On an application for leave to bid the main question for the Court to consider is whether it is to the advantage of every one concerned in order to obtain the highest price that the plaintiff should be allowed to bid or not. In this case their Lordships set aside an execution sale by reason of the deliberate suppression by the decree holder in his affidavit before the Registrar on the Original Side of the facts that the properties were put up to auction before and that the Court had fixed a very much higher reserve price and that a bid for a much larger amount was not accepted.

Per *Wallace, J.*—Order 21, R 92 of the Code of Civil Procedure does not oust the inherent power of a Court to interfere to cancel the sale even though no party has applied for cancellation when the Court discovers in the course of the proceedings, that the decree-holder auction-purchaser deliberately misled it and profited thereby to the disadvantage of the judgment-debtor or the judgment debtor's creditors. (*Schwabe, C. J. and Wallace, J.*) RAGHAVACHARIAR v. MURUGESA MUDALI. 46 Mad. 583 : 44 M. L. J. 680 : (1923) M. W. N. 323 : 32 M. L. T. (H. C.) 285 : 17 L. W. 750 : 72 I. C. 545 : 1923 Mad. 635.

———Setting aside—Sale in defiance of injunction—Effect of See (1922) DIG. COL. 602. MAHARAJ BAHADUR SINGH v. A. G. FORBES.

1 Pat. 662 : 70 I. C. 394.

———Setting aside—Suit against two sets of defendants.

Where the suit was brought against both sets of defendants if the plaintiff was wrongly given possession contrary to the decree, it was open to either of them to apply for restitution. (*Daniels J. C.*) DORI LAL v. MT. JAMAGA. 72 I. C. 879 : 1923 Oudh 16.

———Validity—Nullity and irregularity—Distinction—Test.

It cannot be maintained on principle that because a sale has been held in contravention of a statutory provision, it must necessarily be null and void. An irregularity is a deviation from a rule of law which does not take away the foundation or authority for the proceeding ; whereas a nullity is a proceeding that is taken without any

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foundation or is so essentially defective as to be of no avail or effect. One test is to see if the party can waive the objection. If he can, it amounts to an irregularity, if not, a nullity. A provision based on grounds of public policy cannot be waived; but it is for the benefit of the individual he can. (*Mookerjee and Chotzner, JJ.*) *RAJANI KANTA GHOSE v. SHEIKH RAHAMAN GAZI*, 27 C. W. N. 765 : 37 C. L. J. 447

—*Validity—Purchaser's rights—Property sold clearly identified but inaccurately described in documents relating to sale—Effect.*

A mortgage deed described the land comprised in it as "Nanja 55"; and the land was so described in the decree passed in a suit upon the mortgage, the notice of sale in execution of that decree and in the certificate of sale. The land was in fact punja and not nanja; but there was no other No. 55 in that village. *Held* that the word "Nanja" in the mortgage deed, in the decree and in the documents relating to the execution sale was merely an inaccurate description of the property described as No. 55 and thus identified, and that the execution sale was valid and conveyed a good title to the purchaser, (*Schwabe, C. J. and Wallace, J.*) *VENKATARAMA AIYAR v. ELUMALAI NAICKER*, 44 M. L. J. 357 : 17 L. W. 402 : (1923) M. W. N. 217 : 32 M. L. T. (H. C.) 246 : 72 I. C. 464 : 1923 Mad. 442 (2).

—*Validity—Sale held by Court without territorial jurisdiction—Sale invalid—Objection to defect of jurisdiction—Waiver.* See C. P. CODE Ss. 20 AND 21. 27 C. W. N. 542.

—*What passes at sale.*

Where the D Register could not be reconciled with the khatian and khewat and where the words "Panch gunda Minjumle das gunda Pokhta" were used in execution proceedings. *Held* : The auction purchaser would be entitled to five gundas share in the village. (*Coutts and Adams, JJ.*) *RASIK BEHARI PRASAD CHAUDHURI v. HIRDENARAIN CHAUDHURI*, 1923 P. 30

—*Execution sale—What passes test.*

The test is what the Court intends to sell and what the purchaser understands that he bought the question of what the Court could, or should have sold does not arise. 10 Mad. 241 (P. C.); 27 Mad. 131 Foll. (*Baker, O. J. C.*) *SAKHARAM v. GITABAI*, 1923 Nag. 333.

—*What passes under—House and site—Sale of house without site—Rights of purchaser.*

Where in execution of a money decree a house is sold without the site on which it stands, the purchaser cannot get possession of the house without also getting possession of the site. (*Batten, J. C.*) *RAMASA v. GAMBHIR CHANDSA*, 6 M. L. J. 25 : 69 I. C. 500 : (1923) Nag. 140.

—*What passes under—Joint Hindu family—Decree against father—son's interest when passed.*

In the absence of any objection by any member of the family when joint family property is put up for sale in execution of a decree against a manager it may be inferred that the intention

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was to pass the interest of all the members of the family in the property, though it may be open to other members of the family to dispute that intention and to satisfy the Court either that the alienation was not binding on them that the debt incurred by their father was not binding on them or on any other ground that their interest in the joint family property had not passed to the auction purchaser, 44 I. A. 1 Rel. (*Macleod C. J. and Crump J.*) *DADA JINAPPA v. YESU SAKHOBIA*, 25 Bom. L. R. 494 : 73 I. C. 402 : 1923 Bom. 450.

—*When complete—Order of Court necessary—Acceptance of deposit—Effect.* See C. P. CODE O. 21 R. 84.

(1923) Pat. 190.

**EXECUTOR—Liability to render accounts—Retention of assets—Debts—Onus.**

Where an executor is sued for accounts, the onus lies on him to prove that he was a creditor of the estate of the deceased testator at the time of his death and that he was consequently entitled to retain the assets of a portion of them towards the debt. (*Mookerjee and Chotzner, JJ.*) *PULIN BEHARI DEY v. SATYA CHARAN DEY*, 70 I. C. 548 : 1923 Cal. 79.

—*Minor legatee—Deposit of sum in Bank*

—*Breach of trust by executor—Liability of Bank—Limitation. Act, Arts 48, 60, 120.*

Where in pursuance of the directions of a will, the executors deposited a sum of money in a Bank to accumulate until the minor legatee attained majority, but some time before the event, drew out the amounts :

*Held* in a suit by the legatee against the Bank for the amounts thus drawn out, in the absence of notice, actual or constructive, that the depositors were acting as trustees in the matter, the Bank was not privy to any breach of trust, that the moneys were deposited as executors and as such the Bank was entitled to deal with them.

For purposes of limitation, the suit must be treated as one for conversion in which case Art. 48 would apply or for money had and received for plff's. use in which case Art. 62 would apply, but not Arts. 120 or 133. (*Macleod, C. J. and Shah, J.*) *BANK OF BOMBAY v. FAZULBHOY EBRAHIM*, 1923 Bom. 155.

**EX-PROPRIETARY RIGHTS—Loss of—Mortgage of proprietary rights.**

Where the proprietary rights are mortgaged the ex-proprietary rights are lost if not claimed within one year of the mortgage, and Act IV of 1921 does not keep them alive. (*Fremantle, S. M.*) *ABDUL MAJID KHAN v. SUNDAR LAL*, L. R. 4 A. 316 (Rev.) : 9 O. & A. L. R. 881.

**FAMILY ARRANGEMENT—Binding nature of—Principles applicable to**

A fair compromise of family disputes will be upheld by a Court though resting on grounds which as between strangers may not be satisfactory. The rights compromised should be of such a nature that they could at least have formed the subject matter of a claim, though a doubtful one when entered into by a limited owner, in order to bind reversioners, it must be a fair and honest one representing the estate and for its protection.

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The principle applies not only for preserving the peace but also for preserving the property. In the absence of proof of mistake, inequality of position, undue influence, fraud etc. a family arrangement made in settlement of a disputed or doubtful claim is valid and binding and cannot be set aside merely on the basis that one party got more or less than that he would have legally got.

When minors are sought to be bound, it must be shown it was for their benefit. (*Bucknill and Ross, JJ.*) *RAM BAHADUR SEN v. GANESH BHAGAT.* 2 Pat. 554 : 73 I. C. 542 : 1924 P. 49.

**FAMILY SETTLEMENT—Award—Whether enforceable as a family settlement.**

A family settlement implies a mutual settlement by certain contending parties belonging to the same family of some disputed claims and rights and an award of arbitrators is not a settlement of that character. It is the decision of a tribunal constituted by the contending parties for the settlement of their disputes and in so far as it is a valid and lawful award, it is binding on the parties to the arbitration proceedings and their successors. Whether such an award is binding on persons whose interests are analogous to those of the parties to the arbitration proceedings is a matter which is not capable of an inflexible answer. In each case it has to be determined whether the person who agreed to the reference to arbitration was seeking to assert a right common to himself and others and had acted fairly in representing those whose interest he had undertaken to protect. (*Kan Zaiya Lal and Dalal, A. J. C.*) *CHAUDHRAIN ZARIF UN-NISSA v. CHAUDHRI SHAFIQUZ ZAMAN.* 26 O. C. 133 : 75 I. C. 636 : 1923 Oudh 185.

**Setting aside.**

A bona fide settlement of a family dispute which has been fairly arrived at and acted upon cannot be set aside by a minor party unless vitiating circumstances are alleged and proved. (*Daniels, J.*) *RADHA KRISHAN SHUKUL v. NOKH LAL SHUKUL.* 21 A. L. J. 488 : L. R. 4 A. 481 : 74 I. C. 964 : 1923 A. 566.

**FATAL ACCIDENTS ACT (ACT XIII OF 1855), S. 1—Damages—Quantum—Basis of assessment.**

In a claim for damages under the Fatal Accidents Act the reasonable expectation of pecuniary advantage by the relatives remaining alive may be taken into account by a Jury and damages assessed as the probable pecuniary loss thereby occasioned.

The fact that the deceased in some way provoked the quarrel as a result of which he died, is immaterial so far as regards the claim for damages under S. 1 of the Act. (*Abdul Raouf and Abdul Quadir, JJ.*) *PIARA RAM v. BEHARI RAM.* 69 I. C. 354.

S. 1—Damages awarded—Courts' power to distribute. See (1922) DIG. COL. 905. *SYED SADAQ REZA v. KHOSH MOHINI DAS.* 71 I. C. 346.

**FOREIGN JUDGMENT—Sust on—Indian currency—Decree—Rate of exchange.**

Where a suit is brought in India on a foreign judgment awarding damages in sterling the rate

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of exchange to be adopted should be the rate prevailing at the date of the judgment of the English Court. (*Fawcett, J.*) *MADHAVJI VISRAM v. RAMNIKLAL.* 47 Bom. 487 : 25 Bom. L. R. 173 : 70 I. C. 474 : 1923 Bom. 437.

**FOREST ACT, Ss. 6, 7, and 9—Applicability.**

Where the land is part of a permanently settled estate it is a private property and not the Government property within the meaning of the Forest Act and therefore cannot legally be subject of reservation under Chap II of that act.

Ss 6, 7, and 9 equally refer to land which is of the description mentioned in S. 3, that is the proceeding taken in respect of such land. (*Woodroffe and Suhrawardy, JJ.*) *SECRETARY OF STATE v. ABDUL RAHAMAN.* 1923 Cal. 377.

**FRAUD—Collusion—Nature of—Proof necessary.**

Charges of fraud and collusion must, be proved by those who make them by established facts or inferences legitimately drawn from those facts taken together as a whole. Suspicious and surmises and conjecture are not permissible substitutes for those facts or those inferences, but that by no means requires that every puzzling artifice or contrivance resorted to by one accused of fraud must necessarily be completely be unravelled and cleared up and made plain before a verdict can be properly found against him. (*Lord Askinson.*) *SATISH CHANDRA CHATTERJEE v. KUMAR SATISH KANTA ROY.*

45 M. L. J. 383 : 33 M. L. T. 325 (P.C.) : 73 I. C. 391 : 1923 P. C. 73.

—Nature of—Setting aside decree—See DECREE—SETTING ASIDE. 1 Rang. 500.

—Setting aside decree—Non-service of Summons.

Where an ex parte decree is passed and a suit is brought to set it aside on the ground that the summons was deliberately suppressed with a view to prevent the party from defending the suit, there is a fraud committed and the court can set aside the decree (*Das and Macpherson, JJ.*) *MAHARANI JANKI KUER v. BABU THAKUR RAI.* (1923) Pat. 336 : 75 I. C. 343 (2).

—Setting aside decree—Suppression of Summons—Incomplete statement of law in plaint—If amounts to See. DECREE—SETTING ASIDE. 1923 Cal. 569.

—Setting aside decree—What is necessary for—Suppression of evidence—Effect. See DECREE—SETTING ASIDE. 1923 Bom. 379.

**FRONTIER CRIMES REGULATION (III OF 1901) Ss. 8 and 60—Pendency of suit—Proceedings under S. 8.**

A decree passed under section 8 of Regn. III of 1901 whether passed wrongly, or rightly is an actually subsisting decree and, under section 60 of the Frontier Crimes Regulation, it cannot be called in question or set aside by any Civil Court.

The decree certainly cannot be set aside by a Civil Court. Even if the finding of the Civil Court conflicts with that decree, the decree could not be finally extinguished unless and until the Chief Commissioner had set it aside in the exercise of the powers of the revision. This however,

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is not the same thing as holding that the civil court cannot proceed at all with a suit which is before it, simply because some illegal proceedings under S. 10 has been taken after the suit. What the Civil Court is entitled to do is not to call in question the proceedings or the validity of the decree, but simply to ignore them. It is perfectly clear, that S. 8 cannot, in any circumstances legally come into operation at all when a civil suit is already pending. The civil court has entertained the suit with jurisdiction, so far as this question is concerned, to entertain it, and no illegal proceedings by any outside authority in contravention of the provisions of law could possibly effect its jurisdiction to continue the hearing of the case.

An illegal proceeding under section 8, Frontier Crimes Regulation, cannot, in any circumstances, oust the jurisdiction of a civil court to continue the trial of a civil suit which has been legally instituted before it prior to any proceedings under section 8 Frontier Crimes Regulation, (*Pipon, J. C.*) *FIRM OF SHAM DAS BHIM SAIN v. FIRM OF KALU RAM BANHESHAR NATH.* 72 I. C. 927.

**GAMBLING ACT (III of 1867)—Discount on odds—If gaming—Implements not actually used—Presumption.**

A mere discount on odds does not come within the meaning of commission so as to make it an offence under the Gambling Act.

The presence of implements of gaming, which were not actually being used at the time, does not give rise to a presumption that the house was a common gaming house, (*Ryvis, J.*) *DURGA PRASAD v. EMPEROR.*

45 A. 258 : 21 A. L. J. 36 : 9 O. & A. L. R. 313 : 1923 A. 192.

—Ss. 3, 4 and 18—Ct. P. Code S. 562—Applicability of—Warrant of search and arrest not addressed to individual—Gambling in public place. See (1922) DIG. COL. 607. *EMPEROR v. SHANKAR DAYAL.* 9 O. L. J. 667 : 24 Cr. L. J. 14 : 71 I. C. 62.

**—S. 5—Money on the person of accused—Forfeiture.**

S. 5 of the Gambling Act authorises only the seizure of money found therein. Money found on search of persons is not authorised to be seized and cannot be forfeited. (*Kotwal, A. J. C.*) *CHATURBHUI v. EMPEROR.* 1923 Nag. 66.

**—S. 13—Public place—Blind alley removed from public road.**

Where a blind alley removed a considerable distance from a public road and approached only by a circuitous lane is not a public place within the meaning of the section and a conviction for gambling in a public place could not stand. (*Abdul Quadir, J.*) *MUHAMMED ALI v. EMPEROR.* 1923 Lah. 278 (2).

—S. 13—Public place—Meaning of—Situation and surroundings. See (1922) DIG. COL. 408. *EMPEROR v. BASHIR.* 26 O. C. 41.

**GENERAL CLAUSES ACT, S. 3 (20)—Good faith—Definition, if applies to Contract Act.**

Per *Richardson, J.*—The definition of "good faith" in S. 3 (20) of the General Clauses Act

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does not apply to the Contract Act which was enacted earlier. (*Sanderson, C. J and Richardson, J.*) *RASH BEHARI KARURI v. NARAIN DAS DORILAL.* 50 Cal. 399 : 27 G. W. N. 231 : 1923 Cal. 182.

—S. 3 (31) — Magistrate — Meaning of — Inapplicable to the interpretation of Martial Law Ordinance See MALABAR MARTIAL LAW ORDINANCE S. 4 (2) (b), 44 M. L. J. 428.

—S. 3 (39)— Person— Meaning of — Includes Corporation. See CR. P. CODE S. 250, 1923 Lah. 31 (1).

—S. 26 — Criminal trial—No two punishments for the same act.

Where either of the two offences under the two different Acts are constituted by the same acts, the offender cannot be punished for both. *Zafar Ali, J.* *HAKIM BAHADUR SINGH v. EMPEROR.* 1923 Lah. 342.

**GORAKHPUR GORALT ACT (I of 1919) S. 8—Resignation—Nomination of heir.**

Where Goralt on becoming too old for work was allowed to produce his grandson and get him appointed as his heir, it is a legitimate inference that he resigned his place in favour of the heir under S. 8 of the Act. (*Pearson, J. M.*) *KRISHNA KISHORE CHANDRA v. BHAGELU CHAMAR* L. R. 4 A. 40 (Rev.).

**GOVERNMENT OF INDIA ACT, S. 106, SUB. S. 2—Power of High Court to compel Revenue authority to do its duty.**

The order of a High Court to a revenue officer to do his statutory duty would not be the exercise of "original jurisdiction in any matter concerning the revenue" within the meaning of S. 106, Govt of India Act. (*Lord Phillimore*) *ALCOCK ASHDOWN AND CO. LTD. v. THE CHIEF REVENUE AUTHORITY OF BOMBAY.* 47 Bom. 742 :

45 M. L. J. 592 : 33 M. L. T. (P.C.) 267 : L. R. 4 P. C. 188 : 18 L. W. 918 : 75 I. C. 392 : 25 Bom. L. R. 920 : 21 A. L. J. 689 : (1923) M. W. N. 557 : 50 I. A. 227 : (1923) P. C. 138 (P.C.).

**—S. 107—Agency Court—Power of High Court to transfer case from Agency Court—Vizagapatam Agency Rules, R. 14**

Under S. 107 of the Government of India the High Court has power to transfer a case from the Court of an Agency Commissioner to an equal or superior court. The Court of the Agency Commissioner is subject to the Appellate jurisdiction of the High Court. The District Court is not a Court equal or superior to that of an Agency Commissioner and the transfer of a case from his file must be to the High Court. (*Oldfield and Venkatasubba Rao, JJ.*) *MAHARAJAH OF JEYPORE v. GANGA RAJU.* 46 Mad. 726 :

45 M. L. J. 8 : 17 L. W. 517 : (1923) M. W. N. 277 : 32 M. L. T. (H.C.) 269 : 72 I. C. 745 : 1923 Mad. 604

—S. 107—Order purported to be passed under S. 144, Cr. P. C.—Absolute want of jurisdiction—Powers of interference, See CR. P. CODE S. 144, 1 Pat. L. R. 223. (Cr.).

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## —S. 107—Powers of superintendence—High court—Grounds for interference.

Though the powers conferred on the High court under S. 107 of the Govt. of India Act are extensive enough to authorise the Court, in the exercise of its discretion, to send for the record of such a proceeding in a Subordinate Court, namely the record of an enquiry conducted by a District Judge with a view to drawing up a list of persons proved to be touts, and to examine such record and thereafter issue such orders or instructions to the District Judge as might appear to be proper, the High Court would not interfere in the exercise of its powers of superintendence, where the sole ground upon which interference was asked for was that the decision of the District Judge was against the weight of the evidence. (*Piggott, J.*) *KASHI NATH v. EMPEROR.*

45 A. 676 : L. R. 4 A. 317 : 21 A. L. J. 671 : 90. & A. L. R. 696 : 74 I. C. 11 : 1924 A. 69.

## —S. 107—Proceedings under S. 145 of the Criminal Procedure Code—Abuse of the process of Court—Revision—Interference.

Where proceedings are taken under S. 145 of the Code of Criminal Procedure which amount to an abuse of the process of Court and the object of which is to harass or annoy a successful party in prior possession proceedings, the High Court will interfere under S. 107 of the Govt. of India Act. (*Ghose and Chotzner, JJ.*) *ARAN SARDAR v. HARA SUNDAR MAJUMDAR.*

27 C. W. N. 171 : 37 C. L. J. 39 : 71 I. C. 225 : 24 Cr. L. J. 97 : 1923 Cal. 95.

## —S. 107—Rat cable distribution—Order defective—Interference.

Where an order under S. 73 C.P.C. is hopelessly inadequate and does not refer to the claims of parties, arguments advanced and reasons for the conclusions arrived at, the High Court can interfere under S. 107 G. I. Act. (*Mullick and Bucknill, JJ.*) *BABU BISHUN MOHON SAHAY v. NARAYAN PRASAD ASTHANA.*

74 I. C. 140.

## —S. 107—Rent Controller—If a court—Superintendence—Powers of—Calcutta Rent Act III of 1920.

The Court of the Rent Controller appointed under the Calcutta Rent Act is a court of civil jurisdiction subject to the powers of superintendence conferred by the High Court under S. 107 of the Govt. of India Act and the High Court can interfere in revision with its decision. (*Woodroffe and Ghose, JJ.*) *ADBUL HUQ v. MAHOMED DUN.*

1923 Cal. 311.

## —S. 107—Stay of criminal proceeding—Pending civil suit—Power of High Court.

The High Court is under S. 107 of the Government of India Act invested with powers of superintendence over all subordinate courts in the Presidency and this power includes a power to stay criminal proceedings in a Magistrate's Court till the decision of a Civil suit between the parties. Where however the decision of the Civil suit would not conclusively determine the question of possession of the property which was the only material point for the decision of the Criminal Court, the High Court refused to stay

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the trial of the Criminal Proceedings. (*Spencer, J.*) *NAMBIA PILLAI v. SUDALAI MUTHU NADAN.*

17 L. W. 570 : (1923) M. W. N. 276 : 44 M. L. J. 642 : 32 M. L. T. (H.C.) 191 : 1923 Mad 596.

## GRANT—Confiscation—Effect of—Regrant.

The true effect of an order for confiscation must depend on its terms. (*Mookerjee and Chotzner, JJ.*) *NURUL HUQ v. MAHARAJA BIRENDRA KISHORE MANIKYA BAHADUR.*

38 C. L. J. 121 : 72 I. C. 979

## —Construction—Authority to give—Burden of proof—Putra poutradi Krame Meaning of.

Rent free grants was made 70 years back to excavate tanks and to hold them *putra poutradi Krame*. In a suit to recover possession by the heirs of the grantor, the burden of proof is initially on the grantees' heirs to show the grantor authority to make but where the grant has been in operation for a long term, and the grantor or his heirs have never taken any steps in ejectment, the burden is shifted on the plaintiff to prove how they came to acquiesce in it. The court can in such a case draw the inference that the grantor had authority to do it. The use of the words "*putra poutradi Krame*" made it perpetual and hence transferable. (*Mookerjee and Rankin, JJ.*) *TARAKESWAR PAL v. SRISH CHANDRA GHOSH MANDAL.*

27 C. W. N. 964.

## —Construction—Jaghir—Life estate.

In the absence of words clearly indicating a contrary intention a jaghir is presumed to be the grant of an estate only for life. 3 Bom. 186, 46 C. 683, 1921 Pat. 369 referred to. (*Miller, C. J. and Mullick, J.*) *GURU MAHADEO ASRAM PRASAD SINGH v. JAGATRAJ KUER.*

71 I. C. 929.

—Construction—Jagir to person and his heirs—Nature of estate taken. See (1922) Dig. Col. 610. *GOLAM NABI v. CHOWDHURI BASUDEB DAS.*

69 I. C. 849.

## —Construction—Mode of user.

Where the terms of the original grant are ambiguous or where they cannot be proved by direct evidence a reference to the mode of user of the lands is legitimate. 16 C. L. J. 322, 40 C. 160 Ref. (*Mookerjee and Cumming, JJ.*) *RANI HEMANTA CUMARI DEBI v. THE MIDNAPORE ZEMIDARI CO.*

1923 Cal. 25.

## —Construction—Principles of.

The construction of a grant must depend upon the interpretation of all its terms and except in a case of ambiguity extrinsic evidence would not be admissible. (*Mookerjee and Chotzner, JJ.*) *MAHOMED JANU MIA v. MAJUB ALI CHOUDHURI.*

27 C. W. N. 328.

## —Construction.—Resumable grant—Charity—Service tenure.

Where a person alleged that a tenure is resumable the burden of proving the allegation is on him and not on the grantee. 28 B. 305 referred to. Under the terms of a grant it was specified that the grantee was to enjoy the lands conducting *vazhipadu* to the diety. Held that the grant was not a service grant and that the offering of *vazhipadu* simply meant the "offering of rice of



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which the greater part returned to the grantor." (*Ayling and Ramesam, JJ.*) *BAMASANI PATTAR v. LAKSHMI*.

17 L. W. 514 : 32 M. L. T. (H. C.) 399.  
(1923) M. W. N. 343 : 72 I. C. 627 :  
1923 Mad 572.

—Construction—Surrounding circumstances—Extrinsic evidence. See (1922) DIG. COL. 610. *ABINAS CHANDRA DAS v. MAJUB ALI CHOWDHURY*. 70 I. C. 273.

—Implied term—When presumed. See (1922) DIG. COL. 610. *TIRUNEELAKANTAM SERVAI v. RAJA OF RAMNAD*. 46 M. 177 : 70 I. C. 469.

—*Inam*—Charity *inam*—Share of the proceeds of the *inam* appropriated to the private use of the *inamdar*—Effect of.

The fact that a third share of the proceeds of an *inam* has been appropriated by the *inamdars* for their private uses does not make it the less a charity *inam* for the grant was only one and could not be split up into parts—a personal grant of one-third and a charity grant of two thirds of the *inam*. 40 M. 116 Kel. on. (*Ayling and Ramesam, JJ.*) *SUNDARARAJA CHARIAR v. ALI MAHOMED ETHIBAR KHAN SAIB*.

44 M. L. J. 649.  
72 I. C. 690 : 1923 Mad. 661.

—*Inam*—Construction—Proceedings of *Inam Commissioner*.

Where there is an *inam* grant, the Court must construe its terms for itself and the decision of the *Inam Commissioner* is not conclusive. It is not safe to interpret one document by reference to recitals in another document. It is only where the Court has given a definite meaning to certain expressions that that meaning should be applied to such expressions in other cases. In interpreting deeds and contracts great weight should be attached to the recitals in the documents themselves in gathering the intentions of the parties thereto. (*Phillips and Devadoss, JJ.*) *JAGGA RAO BAHADUR GARU v. GONNAR BIBI*. 17 L. W. 521.  
(1923) M. W. N. 347 : 72 I. C. 789 :  
1923 Mad. 545

—*Inam*—*Dharmadaya*—What is

Where a grant is made as *Inam Dharmadaya*, the significance is that it was made on grounds of religion and not on political grounds—The fact that it is referred to as *jagir* or *saranjam* i.e. political, does not derogate from the effect of the grant itself. The question whether the tenure is political is one which is for the determination of the Govt. (*Viscount Haldane*) *MAHARAJA OF KOLHAPUR v. BALA MAHARAJ*.

33 M. L. T. 378 (P. C.) : 50 I. A. 308 :  
(1923) M. W. N. 638 : 1923 P. C. 194, (P. C.).

—Enfranchisement—Karnam service—Title deed—Arrangements relating to—Effect. See (1922) DIG. COL. 681 *TADIKONDA LAKSHMI-NARASIMHAM v. VENKATARATNAMMA*.

70 I. C. 642

—Enfranchisement—Title deed issued to widow—Absolute estate—Rights of reversioners. See (1922) DIG. COL. 682. *ABDULKURI VENKATARAMADAS v. PACHIGOLLA GAVARAJU*.

70 I. C. 677.

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—Estates in Berar—Rules governing. See (1922) DIG. COL. 682. *KRISHNA RAO v. NILKANTH*. 69 I. C. 800.

—Inference from user—Absence of plea in plaint.

Where the plaint contained a plea of immemorial user the court can legitimately draw an inference of grant from such user. (*Khose, J.*) *AMRITANATH BISWAS v. JOGENDRA CHANDRA BHATTACHARJEE*. 69 I. C. 183 (2).

—Maintenance grant—Rights of grantee—Rent and profits of estate—Accretion.

Where a Hindu wife is given possession of certain villages under a lease by her husband subject to the payment of rent to him, she has no estate in the villages but only a maintenance grant; and the substance of the grant is that it is the rents, issues and profits that are alienated and not the immovable properties out of which such rents, issues and profits arise which remain the property of the grantor and annexed to his estate. The undisposed of accumulations of the wife cannot follow the 'estate' because the title to the estate was never in the wife but always in her husband the grantor. In order that there may be an accretion there must be an estate to which the accumulations may accrete (*Das and Adami, J.*) *RAMESHWAR NARAIN SINGH v. RIKNATH KOERI*. 1923 P. 165.

—Nature of—Rent free—Long possession.

Mere possession of land for a long series of years without payment of rent does not necessarily mean a rent free grant. (*Mookerjee and Beachcroft, JJ.*) *GIRIJA NATH ROY CHOWDHURY v. CHANDI CHARAN LAHA*. 38 C. L. J. 307.

—prior to 1802—Presumption.

Where lands were granted in *inam* prior to 1802, that fact is strong evidence to raise the presumption that they were excluded from the Permanent Settlement. (*Ayling and Odgers, JJ.*) *TOTA VARAHALIAH v. SREE VENKATA SURYA-NARAYANA*. 18 L. R. 324 : (1923) M. W. N. 732 : 75 I. C. 465.

—'Saranjam' grant—Presumption.

A grant of *Saranjam* may be either of the soil and the whole revenue derived from it, or a grant of the Royal share of the revenue only. There is no presumption that a grant of *Saranjam* is a grant of Royal revenue only. It must be determined in each case upon the facts what was the quality of the original grant although it may be that it is ordinarily a grant of the Royal revenue only.

It was plain that the original grant was made in respect of political services; but there was nothing in any of the documents produced which suggested that all that the grant was intended to give to the grantees was a lease from payment of the royal share of the Revenue. On the contrary in one of the early documents founded on the grant, mention was made expressly of the *Kasba Hebli* (subject of the grant) with its hamlets and *Watahoi*, with the *Mahal Jukath* and *Mokassa* "with the whole of the dues and cesses and hidden treasures, exclusive however of the dues of

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Hackdars and Inamdars" and the language of the other documents was in similar terms. It was significant also that in the deed of partition executed by the grand-father of the plaintiff in 1879 the property partitioned was described as the Jahagir villages of Kasbe Hebli and Majre Watanhal and the Mouza of Talvai and Kurdapur" obtained from the British Government." Through out the documents there was no suggestion that what was conveyed was merely the Royal share of the land revenue of the lands was conveyed to the grantees and the amount of the *nazarana* which had been levied from time to time appeared to have been based on the yearly revenue of the estate, "there being no suggestion that the revenue derived by the holder as occupant" was distinct from the Saranjamdar was not liable to *Nazarana*

*Held*: All these considerations are sufficient to justify the inference that the original grant was a grant of the soil (*Lord Salvesen*.) THE SECRETARY OF STATE FOR INDIA IN COUNCIL *v.* LAXMI BAI. 47 Bom. 327: 44 M. L. J. 471:

28 C. W. N. 49:  
17 L. W. 405. 32 M. L. T. (P. C.) 111:  
37 C. L. J. 464: 25 Bom. L. R. 527:  
72 I. C. 898 50 I. A. 49 (1923) P. C. 6.

Service Inam—Alienation—Attachment of property in execution and sale—Legality of. *See* (1922) DIG. COL. 683 NETI ANJANEYALU *v.* SRI VENUGOPAL RICE MILL LTD, TENALI

70 I. C. 466,

Service inam—Surplus income—Right to—Resumption on failure of service—Rights of Government—Powers of Court

Where there is an inam burdened with a trust, the surplus remaining after the expenses of the trust have been met belongs to the inamdar and he is not accountable therefor 30 M. L. T. 101, 15 L. W. 241 Ref. It is not for the Court to treat inams as resumed on the ground of the services having become unnecessary. The power of resumption rests only with the Government and the Govt alone can give directions for application of its income. (*Spencer and Devadoss, JJ.*) JAKKAM REDDI SESHADRI REDDI *v.* SIR S. SUBRAMANIA IYER, K. C. I. E.

32 M. L. T. (H. C.) 89: 74 I. C. 35:  
1923 Mad. 163.

Transferability—Resumable grant.

A grant which is resumable is not transferable. A *marwat* grant is not transferable although it is not resumable. (*Simpson, A.J.C.*) SIYA RAM *v.* SALIK.

10 O. L. J. 335.

GUARDIAN AND WARD—Admission of guardian—Nature of possession—How far binding.

Though a guardian cannot make admissions binding on wards, yet where the question that is being investigated is the nature of the possession of a guardian, and he admits he is holding with the consent of the trustees, that will be admissible to prove that it was not adverse. (*Schwabe, O. J. and Coutts Trotter, J.*) SHUNMUGAPPA *v.* SANGARAYA CHETTY.

18 L. W. 907:  
33 M. L. T. (H. C.) 225, 74 I. C. 120.

## GUARDIANS AND WARDS ACT, S. 7.

Arbitration on behalf of ward—Onerous terms in reference—Award if binding on ward—Legal misconduct Gross negligence. *See* ARBITRATION 44 M. L. J. 263.

Deed executed in personal capacity—Effect.

Where a person executes a document in his own name and there is no doubt as to his acting as the guardian of his ward, no question of ratification arises at all. The act must be taken as one which had no reference to the ward. (*Mookerjee and Walmsey, JJ.*) ANNADA KIMAR DAS *v.* DWARKA NATH MANDAL.

27 C. W. N. 1029.

How far minor bound by acts of Guardian.

A person under disability is no doubt bound by acts of his guardian, but such a person can reopen the proceedings after the disability ceases, if he satisfies the court that the act of the guardian has prejudiced him. (*Das and Kuttwant Sahay, JJ.*) RAO BAHADUR MAN SINGH *v.* MAHARANI NAWALAKHBATI. 2 Pat. 607: 4 Pat. L. T. 335:  
73 I. C. 822: 1923 P. 492.

Personal liability of ward—Covenants by guardian—If can impose. *See* U. P. COURT OF WARDS ACT, S. 61. 74 I. C. 90.

Promissory note by guardian—Necessary purpose—Minors not bound.

The promissory note sued upon contained the words I (the sister) had taken these rupees because I conduct a suit in the Court as the guardian of minors named Thakordars and Sangerlal (brothers) and I shall pay you the rupees of the promissory note with interest at one percent per mensem whenever you will demand to same. *Held* that assuming that she the executant (sister of minors) was a *de facto* guardian she does not purport in the document to bind the minors. They cannot therefore be personally responsible on the note, nor could the sister as the next friend or as sister of the minors make a contract with the plaintiff which would bind the estate of the minors. The plaintiff may proceed against the minors to recover moneys which they might be liable to pay as a debt incurred by their father or by their mother or sister for necessary purposes, in another suit properly framed. (*MacLeod C. J., and Crump, J.*) PARBHUBHAI *v.* BAI LALITA 1923 Bom. 304.

GUARDIANS AND WARDS ACT—Proceedings under—Scope of Inquiry—disputes between minor and strangers.

The summary enquiry under the guardians and wards Act is only intended to protect the interests of the minor. Disputes between minors and strangers who have no interest in the guardianship of the minor are not to be enquired into in such proceedings. (*Subbanna and Ramaswamy Iyengar, JJ.*) KRISHNA SETTY *v.* LAKSHMIDEVARAMMA.

1 Mys. L. J. 124.

Ss. 7 and 8—Appointment of guardians—Application for.

Sections 7 and 8 of the Guardians and Wards Act do not necessarily require that when once

## GUARDIANS AND WARDS ACT, S. 7.

proceedings have been instituted on a proper application should be taken from the person whom the Court appoints, though certainly in practice it is more usual to take one. (*Daniels, A. J. C.*) MT, ISLAMAN v. MT. MAQBULAN.

90 & A. I. R. 74 : 73 I. C. 255.

## —S. 7—Appointment of guardian—Rights of mother—Wishes of relatives.

Where no charge of waste or mismanagement had been proved, the mere desire of the relatives of the minor is not a sufficient reason for depriving the widowed mother of the minor of her recognised claim to be the guardian of her minor child's property. (*Kotwal, A. J. C.*) MT. LAXMI BAI v. ABDUL KADIR.

1923 Nag. 129 (1).

## —Ss. 7 and 25—Father's right to custody—Arrangement with mother—Effect.

Where there is nothing established against a father except that he and his wife are on bad terms and living apart, he is entitled to the custody of his child. The fact that he at one time agreed to allow the child to remain with the other is immaterial as it is a revocable agreement (*Oldfield and Venkatasubba Rao JJ.*) SRI RAJA BOMMADEVARA SATYANARAYANA v. NARASAYAMMA.

18 L. W. 173 : (1923) M. W. N. 668 : 73 I. C. 948 : 1924 Mad. 45

—S. 7—Guardian for property of which the minor is not entitled to present possession—Power of Court to appoint See (1921) DIG. COL. 586, ALWAR AMMAL v. NARAYANA NAICK.

70 I. C. 360.

—S. 7—Minor Shebait—Guardian for debutter properties—If can be appointed. See (1922) DIG. COL. 612, KILBY v. MT. BAHURIA.

70 I. C. 872 (2).

## —S. 8—Appointment of guardian—Right of appeal or revision.

It is open to a person on whom notice should have been served but has not been, to come forward and object in revision to the order passed appointing a person as guardian. (*Daniels, A. J. C.*) MT, ISLAMAN v. MT. MAQBULAN.

90 & A. I. R. 74 : 73 I. C. 255.

## —S. 10—Illness of child no reason.

Illness of a child in the custody of the adoptive father is no reason to make over the child to the natural father. (*Campbell, J.*) PIARE LAL v. UDAI RAM.

1923 Lah. 376.

## —S. 11—Fit case to appoint a guardian.

Where it was alleged that an alienation of a part of the property of the minors was necessary to pay off certain debts on which interest was accumulating and that it would be impossible to alienate so long as the applicant did not get a certificate of appointment from the Court. Held that this was a fit case in which the application for the appointment of a guardian ought to have been accepted. (*Moti Sagar J.*) MT. TAJAN v. SHADI.

1923 Lah. 601 (1).

—Ss. 11, 13 and 48 Refusal to appoint applicant as guardian—Subsequent application for the same purpose—Maintainability—Proceedings under the Act—Nature of.

## GUARDIANS AND WARDS ACT, S. 17.

Where a person's application to be appointed as guardian of a minor is rejected and there is no appeal from that order a subsequent application for the same purpose by him will not be entertained. Proceedings under the Guardians and Wards Act are not intended to be summary. Where a District Judge in appointing a particular person as guardian ignored the procedure laid down in Ss. 11 and 13 and failed to consider whether the guardian was by character and capacity a fit person and whether the appointment was for the welfare of the minor, his procedure is materially irregular. (*Kotwal, A. J. C.*) GOPALRAO v. SHRAWAN.

1923 Nag. 36.

## —S. 17—Appointment of guardian—Consideration to be taken into account—Management of business—Purdanashin lady—Security—Remuneration.

The mere fact that an applicant is a purdanasin lady is no ground for rejecting her claim to be appointed guardian of the property of a minor. Where however the minor's estate owns a big business which could not be managed by a woman of the status of the applicant without an assistant, that may be a ground for appointing another person as guardian. Where an appellate court considers the advisability of the appointment of a particular person as guardian it may take into consideration also the questions of the remuneration that will have to be paid to him as well as the security which he is likely to furnish. (*Kotwal, A. J. C.*) MT. RAJRANI v. BHAGWAN-DAS.

69 I. C. 596.

## —S. 17—Father as guardian.

Where there was a maintenance order against the father the amount under which was long delayed and partly not paid and where the ward a boy of 14, wanted to learn tailoring while the father wanted him to be put to school. Held the father should not be appointed a guardian especially when he had re-married and divorced the ward's mother. (*Campbell, J.*) MT. MUKABAR v. KARIM BAKHS. 75 I. C. 496 : 1923 Lah. 283.

## —Ss. 17 and 19—Guardianship of minor—Father—Suit for custody of child.

Where a father has never had custody of his infant child there is no provision under Guardians and Wards Act by which the father can obtain the custody of the child. S. 19 of the Guardians and Wards Act precludes from appointing any one other than the father of the minor as guardian of the minor unless the minor's father is found to be unfit to be guardian of the minor's person. The words of S. 19 of the Guardians and Wards Act so far from being subject to the provisions of S. 17, expressly override them. 38 M. 807 followed. (*Batten, J. C. and Hallifax, A. J. C.*) DHAN KUMARI DEVI v. MAHENDRA SINGH. 71 I. C. 443.

## —Ss. 17 and 19—Person of minor—Guardian—Appointment by Court.

Where the father of a minor is alive and fit to act as the guardian of a minor the Court will not appoint another person as guardian. The words of S. 19 of the Guardians and Wards Act so far

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from being subject to the provisions of S. 17 expressly override them. (*Bakten, J. C. and Hallifax, A. J. C.*) *RANI SAHEBA v. THAKUR MAHENDRA SINGH.* 19 N. L. R. 45 : 6 N. L. J. 111 : 1923 Nag. 199

**—S. 17—Unchaste mother—Rights of guardianship**

The mere fact of unchastity is not enough to deprive a mother of her rights of guardianship. (*Kotwal, A. J. C.*) *MT. GANGU v. MT. KONGSHI* 74 I. C. 53 : 1923 Nag. 305.

**—S. 17 (1) and (2)—Guardianship of the person of a minor—Preference among claimants—Presumptive heir ineligible.**

When the claims of distant relations to the guardianship of the person of a minor have to be compared there is no question of preference other than what arises from a consideration of the minor's welfare. The presumptive heir to the property of a minor is not a suitable person to be appointed guardian of his person as such a person stands to gain by the minor's death. 10 M. L. J. 357 ; 2 C. L. R. 583, 10 I. C. 283 Ref. (*Spencer and Venkatasubba Rao, JJ.*) *NARASAYYA v. VENKATAPPA.* 44 M. L. J. 62 : (1923) M. W. N. 12 : 17 L. W. 92 : 71 I. C. 298 : 1923 Mad. 359.

**—S. 19—Appointment of guardian—Father—European British subject.**

Where the parties to a case are not European British subjects. S. 19 of the Guardians and Wards Act lays down in clear and unmistakable terms that the Court is not authorised to appoint or declare a guardian of the person of a minor whose father is living, unless that father is unfit to be guardian. There is no reason to suppose that an application by the father himself was intended to be excepted from the provisions of the section. The view of the legislature presumably is that the father is the natural guardian and does not require appointment. (*Brown, A. J. C.*) *RAMJAN KHAN v. MARIAN BIBI.* 72 I. C. 200 : 1923 Rang. 120.

**—S. 19—Power to appoint father.**

The District Judge has no power to appoint the father guardian of his minor son under S. 19, of the Act. (*Dalal, J. C.*) *MT. CHANDRA KUAR v. CHOTEY LAL.* 9 O. & A. L. R. 913.

**—S. 19 (c)—Mother appointed guardian of children—Declaration of estate being taken by Court of Wards.**

It is only where the Court of Wards has actually assumed superintendence of the person, that a District Court in Bombay is deprived of its jurisdiction to appoint a guardian for a minor. (*Shah, A. C. J. and Crump, J.*) *NAGAVA GURLINGAYA NANDI v. COLLECTOR OF BELGAUM.* 25 Bom. L. R. 1232.

**—S. 25—Father's right to custody of minor child. See GUARDIANS AND WARDS, ACT Ss. 7, 25**

18 L. W. 173.

**—Ss. 29 and 30—Order under—Not appealable.****GUARDIANS AND WARDS ACT, S. 46.**

An order under S. 30 of the Guardians and Wards Act is not appealable. (*Piggott and Walsh, JJ.*) *LACHMI PRASAD v. BALDEO DUBE.* 1923 A. 14 (1).

—Ss. 29 and 30—Transfer without sanction of Court—Sanction obtained under O. 21, R. 83 C. P. Code—Effect of. See (1922) DIG. COL. 613, *DWJENDRA MOHAN SARMA v. MANORAMA DAS.* 49 Cal. 911 : 28 C. W. N. 57 : 70 I. C. 990.

**—S. 31—Permission—When to be granted—Inquiry—Necessity for.**

S. 31 of the Guardians and Wards Act requires that permission to a guardian to do any of the acts mentioned in S. 29 shall be granted only in case of necessity or advantage to the ward. The order granting the permission should also recite the necessity or advantage. But the absence of any enquiry does not make the order a nullity. (*Mookerjee and Rankin, JJ.*) *PROHLAD CHANDRA CHOWDHURY v. RAMSARAN CHOWDHURY.* 38 C. L. J. 213.

**—Ss. 34, 47 and 48—Appeal—Order directing filing of accounts and payment of money.**

Where the District Court passes an order under S. 34 of the Guardians and Wards Act directing the guardian to pay into the Court a certain sum of money as being the balance due to him on an examination of accounts, the order is not open to appeal but may be questioned in revision. (*Broadway, J.*) *RAM JAS V. CHANI.* 1923 Lah. 89 (1).

**—Ss. 34 and 39—Appointment of guardian—Order when effective—Omission to furnish security—Removal.**

An order appointing a person as guardian though appealable as soon as it is made does not become effective or entitle the guardian to act as such, until he has furnished security. Failure to furnish security is a ground for removal of the guardian. (*Harrison, J.*) *MT. KHUSAL DEVI v. SUKH DIAL.* 71 I. C. 572.

**—Ss. 34, 35, 45—Attachment of property guardian of improper.**

The Court has no power to attach the property of the guardian or his surety for the purpose of realising the balance.

Section 35 of the Act provides the remedy for the realisation of the amount due from the guardian. Ample powers are also given under section 45 of the Act to the District Judge. (*Abdul Raoof, J.*) *RADHAKISHAN v. KHUSHI RAM.* 1923 Lah. 506 (1).

**—S. 40—Removal of—Successive applications—Same allegations—Grounds for removal. See (1922) DIG. COL. 615**

*BHAGWAN DAS v. MANGALIA.* 45 A. 196 : 71 I. C. 416.

**—S. 46—Report of Collector—When evidence.**

It is only when the District Court calls upon the Collector for a report under S. 46 that it is open to the Court to treat it as evidence. (*Shah, A. C. J. and Crump, J.*) *NAGAVA GURLINGAYA NANDI v. COLLECTOR OF BELGAUM.* 25 Bom. L. R. 1232.

## GUARDIANS AND WARDS ACT, S. 48.

—S. 48—Order refusing to remove guardian—Finality of—Appeal.

Where the District Court refuses to remove a guardian its order is final and there is no appeal against it. (*Oldfield and Devadoss, JJ.*) KONTALATHAMMAL v. THANASWAMI PILLAI

46 Mad. 873 : 45 M. L. J. 481 : 18 L. W. 256 :

33 M. L. T. (H. C.) 80 : 74 I. C. 896 :

(1923) M. W. N. 902.

## GUJARAT TALUQDAR'S ACT (VI of 1888) S. 2

(1) (a)—Mulgameti—Meaning of—Kathis of Salangpur—Status of—Talukdars

The Talukdari estates in Gujarat are the remnants of old Rajput kingdoms, those disintegrated being either disrupted by internecine feuds or crushed by foreign invaders. The Subordinate States thus formed were known by names generally indicative of their origin. The smallest of these subordinate rulers was the Gameti or ruler of a single village. Under the British rule the old rulership slowly degraded into a mere landlord estate. A Talukdari is therefore an estate which connoted rulership in pre-British times but which is now a landlord estate to which some seigniorial or subordinate rights may or may not still be attached. When the estate connoted rulership of a single village the holder is a Mulgameti (i.e.) a gameti who has lost all or most of his lordships. These estates being very small the holder was not included in the definition of Taluqdar until the Amending Act (II of 1905) recognised as a Taluqdar a Mulgameti who holds lands directly from Government.

*Per Marten, J.* : A mulgameti is one who is descended from a former ruler and owner of the village and still retains by regrant or otherwise some portion of the lands or interests therein of such former ruler and owner, but not necessarily any of his governing rights.

The kathis of the village of Salangpur in the Dhanduka Taluka of the District of Ahmedabad are Mulgametis but they do not hold land directly from the Government and are not therefore Talukdars within the meaning of S. 2 (1) (a) of the Gujarat Taluqdar's Act, 1888 as amended by S. 2 (1) of Act II of 1905. (*Marten and Pratt, JJ.*) SIR DOLAT SINGH v. OGHAD VIRA.

25 Bom. L. R. 726.

**HALAI MEMONS**—Law applicable—Succession and inheritance—Exclusion of females—Applicability of Hindu Law. See MAHOMEDAN LAW, APPLICABILITY.

44 M. L. J. 35 (P. C.).

**HIGH COURT**—Chief Justice—Powers of—If can constitute Bench for trying only an issue in a case.

It is open to the Chief Justice of a High Court to appoint a special Bench to try a case, but it is not open to him in any way to fetter the discretion of the Court as to how it should be tried. He cannot appoint a Bench to merely try one issue in a case. (*Greaves and Buckland, JJ.*) GIRIDHARILAL HANUMANBUX v. EAGLE STAR AND DOMINIONS INSURANCE CO., LTD.

27 C. W. N. 955.

**Powers of**—Case in another province.

A High Court has no power for declaring that a case which is being tried in another province is

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solely triable elsewhere. Nor can it stay further proceedings pending in a court not subject to its jurisdiction. (*Walsh J.*) RADHIKA NATHA SAHA v. JOTISH CHANDRA SADHU. 73 I. C. 523 (1) : 24 Cr. L. J. 635 (1) : 1924 A. 71.

—Powers of superintendence—Proceedings of Board of Revenue under S. 169 Madras Estates Land Act—If can be revised. See C. P. CODE, S. 115. 45 M. L. J. 725 : 33 M. L. T. 92 (H. C.).

**HIGHWAY**—Dedication—Inference from user—English law—Applicability of.

It is competent to a Court to draw an inference of dedication of a highway to the public from long user. Though the general principles of English Common law as regards highways are applicable to India, the whole of the English Common law should not be bodily imported. (*Wazir Hasan, A. J. C.*) RAI BAJIRANG BAHADUR SINGH v. BABU BADRA NATH. 70 I. C. 74 : 1923 Oudh 26.

—Village pathway—Special damage not necessary to enforce right to pathway.

The plaintiffs asked for declaration of a village pathway used by all the people of the village for certain specified purposes. The defendants contended that the alleged pathway was not a public highway but was a permissive foot track.

*Held* : that the suit was for the enforcement of a village pathway and no question of special damage arose in the case. 15 Cal 460 Foll.

It is only in the case of a public highway that the question of special damage arises; where the case is one of a village pathway, there is no question of special damage. 23 C. W. N. 91 Ref. (*Mookerjee and Rankin JJ.*) HARISH CHANDRA SAHA v. HARISHCHANDRA CHACKERBUTTY. 1923 Cal 622.

**HINDU LAW**—Adoption—Age of adoptee—Restrictions on—Kshatriya boy of 19.

Among Kshatriyas a boy of the age of 19 whose *upanayanam* ceremony had not been performed at the time of his adoption could be validly adopted and notwithstanding the prohibition of the adoption of a boy over 5 years of age in the Dattaka Mimamsa. (*Muller, C. J. and Foster, J.*) RAJA MAKUND DEB v. SRI JAGANNATH JENAMONI.

2 Pat. 469 : 4 Pat. L. T. 427 : (1923) Pat. 97 :

1 Pat. L. R. 201 : 72 I. C. 230 : 1923 P. 423.

—Adoption—Authority—Construction.

Where the will recited "I have no male issue, etc., but have two married wives only. They two should adopt a boy for the perpetuity of my name after me. And at present there is one of my kinsmen, X-resident of Burhampur. My wives should adopt him as son after me. If he is not available, my two wives should, with the consultation of each other, adopt any other boy of my own family. If no boy in the family is available my wives should adopt none. If there is a difference of opinion between the two wives as to the boy to be adopted that boy should be adopted whom my younger wife Sonu will choose and "perpetuate my name and manage the property"

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*Held*, looking to the intention of the testator which was that a certain boy was to be adopted, though both widows are mentioned, the will does not restrain the authority of either. The main object was that a particular boy was to be adopted, the mentioned of both widows was subservient to the adoption itself. The document gave the widows as far as this boy is concerned no option. It did not allow them any power of selection. Therefore the fulfilment of the wish of the testator by the remaining widow who was the only person who could fulfil it was not against but in accordance with what the testator contemplated. (*Kotral and Prideaux, A. J. C.*) *AMBADAS v. KASHIBAI*. 71 I. C. 979 (2) : 1923 Nag. 27.

## —Adoption—Authority—Consent—Will—Construction.

There is no authority for holding that a father-in-law can authorise his daughter-in-law to adopt under the Hindu Law; the only way in which a widow can adopt is either by the authority of her husband or by the consent of her nearest sapindas given *bona fide* and honestly. No sapinda is entitled to give by way of a will to take effect after his death, a consent to an adoption by a widow. The consent has to be given with reference to the circumstances attendant upon the proposed adoption and usually at the request of the widow. Consent to a future adoption cannot validate the adoption. 36 Mad. 145 Ref. (*Krishnan and Ramesam, JJ.*) *TADEPALLI LAKSHMI NARASIMHAM v. RUKMANIAMMA*. 1923 Mad. 225.

## —Adoption—Authority to adopt—Original owner dying leaving behind him his widow and a son—Death of son after attaining 25 years of age—Power of adoption of the widow of the original owner, not at an end.

Where a Hindu died leaving his widow and his son and the latter died after having attained his age of majority, but without leaving him surviving his widow, the power of adoption of the widow of the original owner is not exhausted and she can adopt a son to her deceased husband. Observations in 41 M. 855 (P. C.) considered as obiter and not binding.

35 M. L. J. 798 and observations of Sir John Wallis, C. J., in 25 M. L. T. 204 dissented from.

The case law on the subject reviewed and discussed. (*Schwabe, C. J. and Wallace, J.*) *YADAVALLI TRIPURAMBA v. YADAVALLI VENKATARATHNAM*. 46 Mad. 423 : 44 M. L. J. 349 : 72 I. C. 278. 1923 Mad 517.

## —Adoption—Ceremonies—Putreshti Jag—Necessity for.

*Putreshti Jag* ceremony is not essential to the validity of an adoption even amongst the regenerate classes. An adoption is valid if *upanayanam* is not performed in the natural family although the other initiatory rights including tonsure have already taken place in the natural family of the adopted son. 20 C. W. N. 19, 2 Pat. L. J. 481 ; 20 C. W. N. 901 Referred to. (*Miller, C. J. and Foster, J.*) *RAJA MAKUND DEB v. SRI JAGANNATH JENAMONI*. 2 Pat. 469 : 4 Pat. L. T. 427 : (1923) Pat. 97 : 1 Pat. L. R. 201 : 72 I. C. 230 : 1923 P. 423.

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—Adoption—Custom—Entry in *Wajib-ul-az*.

An entry in the *wajib-ul-az* that the widows could adopt in a certain locality is the statement of a custom to the effect she could do so even in the absence of authority from her husband. (*Sir John Edge.*) *BISHWANATH SINGH v. JUGAL KISHORE*. 45 M. L. J. 215 : 18 L. W. 88 :

73 I. C. 244 (2) : (1923) P. C. 90 : (1923) M. W. N. 620 : 26 O. C. 228 : 38 C. L. J. 299 : 33 M. L. T. (P. C.) 289 : 9 O. & A. L. R. 563 : 10 O. L. J. 379 : 50 I. A. 179.

## —Adoption—Effect—Adopted son—Rights of—Alienations by widow—Effect on.

As soon as a person is adopted, all the alienations of the estate made by the widow would become ineffective against him unless it could be shown that they were made for necessity (*Macleod C J and Crump, J.*) *GANPATI SHANKARAPPARI v. KSHNAPPA*. 73 I. C. 204.

## —Adoption—Evidence.

Mere execution of a deed does not effect an adoption, and if has yet to be found in a court of law that in a community where an orphan adoption is recognised as valid such an adoption could be made up by a deed alone. (*Macleod, C. J. and Crump, J.*) *SHIDAPPA v. SANTAWAKOM*. (1923) Bom. 302.

## —Adoption—Form of—Dattaka form—Jains—Rights of adopted son.

Their is nothing in *Munak Chand v. Munna Lal* 95 P. R. 1909 to show that Jains cannot adopt in *Duttaka* form or that an adopted son among Jains can, in no case, become a member of the family of his adoption. (*Broadway and Abdul Qadir, JJ.*) *GOPI MAL v. PANNA LAL*. 72 I. C. 424.

## —Adoption—Presumption as to factum.

Where an adoption was never challenged for many years it would be a little difficult for the adoptee to establish exactly what occurred. *Held* therefore that the factum of adoption must be taken as proved and that it is a fair presumption to make that such adoption was made with the necessary assent of the collaterals. (*Broadway, J.*) *KANHAYA v. NAURANG*. 1923 Lah. 374.

## —Adoption—Proof.

Where in none of the correspondence which passed between the uncle and the nephew did the former refer to the nephew as his son; nor did he refer to his wife as his mother but on the contrary referred to her as his aunt, and as the nephew was the only other member of the family there was no necessity to adopt him. *Held* the alleged adoption is not proved. (*Scott Smith and Mohi Sagar, JJ.*) *MT. UTTAM DAI v. DINA NATH*. 1923 Lah. 359.

## —Adoption—Proof of—Ceremonies—Performance of—Presumption.

Where an adoption has taken place more than 48 years ago and the adoption has not been challenged during that time by any member of the family interested in so doing and it was urged that the adoption was invalid for non-performance of *dattahomam*, *Held* that it was permis-

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sible to presume from the fact that the adoption had not been challenged for such a long period that if the ceremony was necessary, it must have been performed, 29 A. 184; 29 A. 519 Rel. (*Kanhaya Lal and Sulaiman, JJ.*) CHHOTE LAL v. CHANDRA BHAN. 45 All. 59 : 1923 A. 176.

## —Adoption—Onus — Proof—Treatment in family for long time.

The onus of proving an adoption is on the party setting it up. But very slight evidence may be sufficient for this purpose, where the alleged adopted son has been treated as such for a long series of years. (*Mookerjee and Cuming, JJ.*) KAILASH CHANDRA NAG v. BEJOY CHANDRA NAG. 72 I. C. 680 : 1923 Cal. 18.

—Adoption — Proof of — Widow of immature age—Adoption of son of certificated guardian. See (1922) Dig. Col. 618. GHANSHAM DAS VISHNUDAS v. LAXMIBAI. 70 I. C. 955.

## —Adoption—Rights of adopted son—Bequest as to charity—Dispute as to.

Where a Hindu testator being the sole owner of certain properties made a will giving authority to his wife to adopt a son and also making certain dispositions of his property to charity, the son adopted under the authority cannot dispute the bequest under the charity. 21 M. 11, 43 B. 542; 12 L. W. 17, 12 M. 490 Rel. (*Spencer and Devadoss, JJ.*) SRI GADICHERLA VENKAI NARASIMHA RAO GARU v. NAYAPATHY SUBBA RAO. 46 Mad. 300 : 17 L. W. 31 : 32 M. L. T. (H. C.) 47 : (1923) M. W. N. 111 : 73 I. C. 991 : 1923 Mad. 376.

## —Adoption—Rights of adopted son—Postponement of vesting of estate—Validity of.

Where a person is adopted a condition postponing the vesting of the estate in the adopted son beyond two lives in existence is invalid. (*Hallifax, A. J. C.*) KOLHI v. MT. CHOTTIBAI. 1923 Nag. 121 (1)

## —Adoption—Rights of adopted son—Property obtained on partition in natural family.

Where a person governed by the Mitakshara Law, has obtained at a family partition with his father his share of the ancestral property and he is subsequently adopted in another family he is not thereby divested of the property which vested in him on partition, 29 M. 437 foll. 40 B. 429 dist. (*Macleod, C. J. and Crump, J.*) MAHABLESHWAR v. SUBRAMANYA. 47 Bom. 542 : 25 Bom. L. R. 274 : 72 I. C. 309 : 1923 Bom. 297

—Adoption—Rights of adopted son—Succession See (1922) Dig. Col. 619 KUAR NAGESHAR SAHAI v. KUAR MATA PRASAD. 69 I. C. 730

## —Adoption—Rights of adopted son—Succession to maternal grand father's property in natural family.

Where a person is adopted into another family he cannot succeed to the property of his maternal grand father in his natural family. 43 I. A. 86, 68; 10 I. A. 138 Rel. (*Macleod, C. J. and Crump, J.*) BHASUHEB SHIDGAUDA v. RAMGAUDA ANNAGAUDA. 25 Bom. L. R. 813.

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## —Adoption — Validity of—Execution of document—Effect of.

Where an adoption is illegal the mere execution of a deed of adoption cannot validate it. (*Fremantle, S. M. and Burn, J. M.*) BRIJ RAJ SINGH v. LALTA PRASAD I. R. 4 A 238 (Rev.).

## —Adoption — Validity of—Giving and taking—Motives of adopter—Relevancy of.

A mother can give her son in adoption even without her husband's express consent where such consent cannot be obtained as where he is dead or has joined a religious order. The fact that the person adopting had mixed motives for the adoption could not be sufficient in law to render the adoption invalid. Where the adopter has a right to adopt, the fact that there were motives of a worldly nature which induced him to adopt would not vitiate the adoption especially where the rights of other persons are not infringed. (*Muller C. J. and Foster, J.*) RAJA MAKUND DEB v. SRI JAGANNATH JENAMONI. 2 Pat. 469 : 4 Pat. L. T. 427 : 1923 Pat. 97 : 1 Pat. L. R. 201 : 72 I. C. 230 : 1923 P. 423.

## —Adoption—Who can give—Gift by Hindu widow—Only son.

A Hindu widow can make a valid gift of her only son in adoption. 25 B 539 Foll. (*Macleod C. J. and Crump, J.*) GANPATI SHANKARAPPA v. KRISHNAPPA. 73 I. C. 204.

## —Adoption — Who may be adopted—Daughter's son—Agarwala Vaishas.

Among the Agarwala Vaishas there is a custom which permits the adoption of a daughter's son (*Lindsay and Sulaiman, JJ.*) BALLO v. RAM KISHUN. 21 A. L. J. 478 : 1924 A. 49.

## —Adoption—Who may be adopted—Daughter's husband. See (1922) Dig. Col. 619.

SITABAI NAGESH DESAI v. PARVATIBAI NAGESH. 47 Bom. 35 : 69 I. C. 172

## —Adoption—Who may be adopted—Married boy.

A married boy cannot be validly adopted among any class of Hindus 10 B. 80; 13 M. 129; 32 A. 247; 35 A. 263 Rel. (*Chevis, J.*) HIRA v. HARDAT SINGH. 1923 Lah. 26.

## —Adoption—Who may be adopted—Orphan—Adoptive father if estopped from questioning adoption.

An adoption of an orphan is invalid and the adoptive father himself may dispute its validity. There can be no estoppel where both sides know the full facts. A representation as to a matter of law, viz the validity of an adoption cannot give rise to an estoppel. 11 B. L. R. 291, 395; 21 M. L. J. 500, 503 Rel. (*Ayling and Odgers, JJ.*) RAJAMBAL AMMAL v. SHANMUGA MUDALIAR. 70 I. C. 653 : 1923 Mad. 11.

## —Adoption—Who may be adopted—Sister's son—Leva Patidars of Gujarat.

Among the Leva Patidars of Gujarat, who are Sudras, the adoption of a sister's son is valid. (*Macleod, C. J. and Crump, J.*) KAHANDAS NARAN v. JIVAN. 25 Bom. L. R. 510 : 73 I. C. 1023 : 1923; Bom. 427.

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—Adoption—Who may be adopted Sister's son—Nullity—Void adoption confers no title.

Among the Deshasha Brahmans, the adoption of the sister's son is a nullity.

An adoption is either effectual for all purposes or a nullity. A void adoption confers no right and creates no disability. Hence where a person is once adopted which adoption is null and void, there is no bar to his being validly adopted a second time into another family. (*Macleod, C. J. and Crump, J.*) BHAI ABASI DESHPANDE v. HARI RAMCHANDRA PATKI. 25 Bom. L. R. 411 : 72 I. C. 631 : 1923 Bom. 301.

—Adoption—Widow.

If it is established that events had occurred which could constitute an adoption, apart from any question of the competency of the person alleged to be adopted the widow cannot dispute such an adoption made by her husband 24 Bom. L. R. 496 Foll. (*Macleod, C. J. and Crump, J.*) SHIDAPPA v. SANTAWAKOM. 1923 Bom. 302.

—Adoption—Widow—Limits of her power—Extinction of joint family—Vesting of property in co-parcener's widow

The widow of a deceased coparcener of a joint Hindu family cannot in the absence of specific authority make an adoption subsequent to the death of the coparcener who survived her husband especially when the estate has vested in the widows of the surviving coparcener. 41 B. 453 ; 26 B. 526, 48 I. A. 543, 14 B. 463 Ref. (*Shah, A. C. J. and Crump, J.*) SHIVBASAPPA v. NILAYA. 47 Bom. 110 : 1923 Bom. 17.

—Adoption—Widow—Limits of her power—Widow inheriting as gotraja sapindas. See (1922) DIG. COL. 621 YEKNATH NARAYAN KULKARNI v. LAXMIBAI KESHO GOPAL. 47 Bom. 37.

—Adoption—Widow—Power to adopt after death of son aged 18—Consent of sapindas—Corrupt consent—Person claiming through such sapinda—Estoppel.

Where a Hindu widow succeeds as heir to her unmarried son who died at the age of 18, she is competent to adopt a son to her husband with the consent of his sapindas. The mere promise of payment for the consent of a sapinda does not vitiate the consent. There must be something more than a promise of payment to raise the plea of the invalidity of the consent on the ground that it was corruptly given.

*Obiter* : Neither a sapinda who has given his consent for a bribe or through corruption nor any one claiming through such a sapinda, can set up the invalidity of the adoption on the ground that there was no proper consent. The maxim "*Nemo allegans furitudinem suam est audiendus*" is one applicable to India. 32 M. L. J. 484 : 31 Bom. 405 Ref. (*Schwabe, C. J. and Coutts Trotter, J.*) PARTHASARATHY REDDY v. KANDASAMI REDDI. 45 M. L. J. 161 : 18 L. W. 156 : (1923) M. W. N. 423 : 32 M. L. T. 349 (H. C.) : 73 I. C. 954 : 1923 Mad. 711.

—Alienation—Necessity—Antecedent debt due to third party.

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The existence of the antecedent debts due to third parties constituted valid necessity. (*Scott Smith and Fforde, J.J.*) MT. BASANTI v. CHANDIA SINGH. 1923 Lah. 502 (2).

—Applicability of—Aboriginal Bhuiyas—"Chowrasi" gadi—Succession—Adoption—Special custom—Property situate in Santhal Parganas—Bhagalpur Court—Jurisdiction—Regulation III of 1872

The holders of "Chowrosi" gadis, of which Lachmipur Raj is one claim to be Surjabansi Rajputs and as such high caste Hindus. They are really descendants of aboriginal Bouiyas who had become Hindus long ago. On the question whether an adopted son succeeds to the gadi, either by law or custom, *Held*, that this claim of Chowrasi gaditshad adopted in general, not only Hindu religion and Hindu social usages, but also the Hindu Law regulating succession to landed property, though they still retain some relics of non-Hinduism.

*Held*, also on the evidence that the custom of excluding adopted sons from succession was not established.

Custom of impartibility and succession of nearest of kin discussed and distinguished.

Decision on the question whether, under Regulation III of 1872 relating to Santhal Parganas, the Bhagalpur court had jurisdiction to try the suit, part of subject matter being situate in Santhal Parganas considered unnecessary. (*Lord Phillimore*) SAHDEO NARAIN DEO v. KUSUM KUMARI. 44 M. L. J. 476 : (1923) P. C. 21 : 32 M. L. T. (P. C.) 121 : 4 Pat. L. T. 217 : 2 Pat. 230 : 37 C. L. J. 369 : 18 L. W. 597 : (1923) M. W. N. 377 : 27 C. W. N. 901 : 25 Bom. L. R. 560 : 71 I. C. 769 : 50 I. A. 58 (P. C.).

—Applicability of—Brahmos—Whether Hindu—Declaration under Act III of 1872.

A man by becoming a Brahmo does not necessarily cease to be a Hindu, that is to say, something further than mere becoming a Brahmo is necessary for a man to cut himself off from Hinduism. A declaration under Act III of 1879 is effective only for the purposes of the Act and does not involve a renunciation of the Hindu religion. (*Greaves, J.*) JNANENDRA NATH ROY IN THE GOODS OF, 49 Cal. 1069 : 70 I. C. 463 (2) : 1923 Cal. 265.

—Applicability—Converts—Hajari Memons of Porebunder. Inheritance Exclusion of females. See (1922) DIG. COL. 1092 KHATUBAI v. MAHOMED HAJE. 44 M. L. J. 35 : 17 L. W. 208 : 37 C. L. J. 131 : 32 M. L. T. (P. C.) 45 : 25 Bom. L. R. 127 : L. R. 4 P. C. 42 : 47 Bom. 146 : 27 C. W. N. 774 : 72 I. C. 202 : 50 I. A. 108 (P. C.).

—Applicability of—Hajari Memons—Bom. bay. See (1922) DIG. COL. 623 MAHOMED YUSUF v. HARGOVANDAS. 47 Bom. 231 : 70 I. C. 268

—Applicability of—Cutchi Memons—Joint family—Succession and inheritance.

The application of the rules of Hindu Law by custom to the Cutchi Memons is limited to rules



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of inheritance and succession and does not extend to the rules relating to the joint family property as applicable to Hindus. 16 Bom. L. R. 244, 41 B. 181 Ref. (*Shah, A. J. C. and Platt, J.*)  
**Haji Osman Haji Ismail v. Haroon Sallee Mahomed.** 47 Bom. 369 : 1923 Bom. 148.

—Applicability of—Cutchi Memons—Law of joint family and inheritance—Partition—Will. See (1922) DIG. COL. 622. **Siddick Hajeer Aboo Bucker Sait v. Ebrahim Hajeer Aboo Bucker Sait.** 70 I. C. 715.

—Applicability of—Dayanandis—Arya Samaj. See (1922) DIG. COL. 623 MT. SCRIV JOTE  
**Kuar v. Mt Attar Singh.** 1 Pat. 706.

—Applicability—Gonds of Central Provinces—Burden of Proof.

A Gond is not a Hindu and is not Governed by the Hindu Law. In the case of any particular Gond, he can prove he has adopted any particular Custom or all the principles of Hindu Law, but it is for him to prove his allegations. (*Hallifax and Kotwal A. J. C.*) **Vithoba v. Lalsingh** 19 N. L. E. 104 : 1923 Nag. 317

—Applicability of—Gujars of Ninar—Central Provinces.

The Gujars of the Ninar District of the Central Provinces are governed by the Benares school of Hindu Law. (*Batten, J. C.*) **Ram Bhabai v. Tota Ram.** 6 N. L. J. 39 : 71 I. C. 727 : 1923 Nag. 188.

—Applicability—High Caste Hindus in the Punjab.

High caste Hindus living in towns in the Punjab and working as traders are governed by Hindu Law, in the absence of evidence to show custom in derogation of the Hindu Law. (*Martineau and Zafar Ali, JJ.*) **Mt. Bal Kaur v. Deoki,** 4 Lah. 286 : 75 I. C. 109 : 1923 Lah. 579.

—Applicability—Khatris Series of Punjab, See Custom—Succession. 1923 Lah. 6

—Applicability of—Migrating family—Mithila School—Dayabaga Law

A Hindu family, residing in a particular province of India, is presumed to be governed by the law of the place where it resides. 20 C. 409 referred to. This presumption is rebutted, where the family is shown to have migrated from one province to another. The presumption then arises that the family carried with it the laws and customs as to the succession and family relation prevailing in the Province from which it came. 12 Moo. I A. 81, 29 C. 433 referred to. Thereafter the burden shifts and lies upon those who assert it to prove that the family after migrating has adopted the law and usages of the place to which it has migrated, 31 A. 477, 24 M. 650 : 40 C. 407, 34 B. 553 referred to. Where however it is proved by numerous instances of succession in the family and evidence of the observance of right and ceremonies at marriages, births and deaths which indicates the relinquishment of Mithakhara law and the adoption of the Dayabaga Law in the family, the Court would act upon such evidence and infer that the family had

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adopted the Dayabaga law. The Hindu law is not merely a local law but is essentially a personal law, an integral factor of the status of every family which is governed by it. In its new domicile, the family may, by the reflex action of manners and customs prevalent in resident families, consciously or unconsciously, modify its own governing rules, there may thus be an acceptance of a new law not due to sudden change by choice or agreement, but by the gradual evolution of a family usage. When a new family usage has thus grown up in the course of generations possibly with the concurrence or acquiescence of families of the same group, that furnishes the governing law of the family. 29 C. 433 ; 43 I. A. 35 ; 47 I. A. 213 followed. (*Mookerjee and Cumming, JJ.*) **Sarada Prasanna Roy v. Uma Kanta Hazari,** 50 Cal. 370 : 37 C. L. J. 233 : 1923 Cal. 485.

—Applicability—Rajbansis.

Rajbansis are governed by the ordinary Hindu Law (*Ghose and Panton, JJ.*) **Santala Bewa v. Badaswari Pasi** 50 Cal. 727 : 27 C. W. N. 669 : 75 I. C. 11.

—Applicability—Sub—School of Hindu Law—Jaiswar Sub-division of Kalar caste—Residence—Domicile

In view of the decision of the Privy Council in 48 C 30 (P. C.) a Hindu residing in a particular province of India is prima facie subject to the doctrines of Hindu Law recognised in that province. The Jaiswar Sub-division of the Kalar caste residing in the Central Provinces is governed by the Benares School of Hindu Law, having originally migrated from Oudh. In determining a person's domicile, the place where his property is situate is not conclusive. (*Kotwal and Prideaux, A. J. C.*) **Govind v. Radhabai Kalar** 1923 Nag. 7 (2).

—Applicability—Thattans of North Malabar—Presumption as to partibility—Illegitimate sons of Thattans—Rights of inheritance. See MALABAR LAW—THATTANS. 44 M. L. J. 274.

—Converts—Law applicable—Presumption.

Where the person in question continued to maintain a close connection with his family and brotherhood at his original place of residence, the presumption is that his family is governed in matters of succession by the same rules as are in force in its original home. Where the family is descended from converts to Mahomedanism from Hinduism the presumption is that they follow Muhammadan Law. The presumption is a rebuttable one. (*Broadway and Campbell, JJ.*) **NAJM-UD-DIN v. ABDUL HAMID,** 72 I. C. 845 : 1923 Lah. 175.

—Converts—Succession—Instances of following Hindu law.

Instances showing that converts to Mahomedanism had departed from strict Muhammadan Law in other matters could not be regarded as raising any presumption that Muhammadan Law had been abrogated by custom in matters of succession. But instances are relevant, and of importance, not to prove the special custom set up but to show that in spite of the fact that the

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parties are converts to Islam from Hindu Khatris. Strict Muhammadan Law has not been invariably followed and thus to weaken the presumption referred to in 20 Bom. 53, and 45 Mad. 308, (*Broadway and Campbell, JJ.*) *NAJM-UD-DIN v. ABDUL HAMID*, 72 I. C. 845 : 1923 Lah. 175.

———Converts—Halaṁ memous.

44 M. L. J. 35 (P. C.)

———Custom—Applicability of—High caste Hindus.

It would be dangerous to seek to extend custom by such logical processes as analogy.

The initial presumption in the case of high caste Hindus is in favour of such Hindus following their personal law, and the onus of proving any special or general agricultural custom lies on the person asserting the existence of such custom. (*Broadway, J.*) *PARS RAM v. HUKMAN SINGH*, 73 I. C. 239.

———Custom in contravention of general Hindu Law—Quantum of proof.

A custom in derogation of the general Hindu Law is a matter which has to be proved with more thoroughness and with greater precision than a case which merely affects the parties on record and does not adversely affect parties who themselves are not present in Court, but are nevertheless interested by virtue of belonging to the same community. (*Mears, C. J. and Piggott, J.*) *MT. DHOLA KUAR v. MATHURA SINGH*, 75 I. C. 657 : 1923 A. 341.

———Custom—Dancing girls—Inheritance—Males and female inherit equally.

There is a custom in the caste of dancing girls by which sons and daughters share the inheritance equally, contrary to ordinary Hindu Law. Thurston's Castes and Tribes of Southern India, Vol. II, page 127 Ref. (*Schwabe C. J. and Coleridge, J.*) *BERA CHANDRAMMA v. CHANDRAM NAGANNA*, 45 M. L. J. 228 : (1923) M. W. N. 567 : 18 L. W. 309 : 75 I. C. 170.

———Debts—Antecedent debts what are, *See*, 46 M. L. J. 23 : 21 A. L. J. 934 (P. C.)

———Debts—Antecedent debts.

Prior mortgage debts forming consideration of the mortgage in suit are not antecedent debts so as to bind the sons, but an oral debt incurred by a co-parcener of the grandfather which, was binding on the grandfather binds the grandson as an antecedent debt (*Piggott and Sulaiman, JJ.*) *RAM RATAN MISIR v. KAPIL DEO SINGH*, 1923 A. 20.

———Debts—Antecedent debts—Alienation by father—Pro-notes.

Where a mortgage was taken by the creditor in lieu of pro-notes executed by the father, Held the effect of the novation of the contract was practically to render the earlier bonds unenforceable. The consideration of the mortgage is therefore a good consideration binding on the sons who were charged under the Hindu Law with the responsibility of paying the debts due by their father who died during the pendency of the suit on the mortgage. (*Kankhaiya Lal, J. C.*) *RAM SINGH v. MT. RAGHUBANSA*, 26 O. C. 201 : 9 O. & A. L. R. 29 : 72 I. C. 877 : 1923 Oudh 3.

## HINDU LAW—DEBT.

———Debt—Antecedent debt, contracted on the security of family property.

A Hindu father has power to alienate the joint family property for an antecedent debt where such antecedent debt has been contracted on the security of the family property. This rule is not affected in any way whatever by the observation of the Privy Council in 39 All. 437, (42 Mad. 711, F. B., Foll.) (*Mohi Sagar, J.*) *DAHIT SINGH v. HARI CHAND*, 1923 Lah. 669.

[*See Now* 46 M. L. J. 23 P. C. Ed.]

———Debts—Antecedent debt—Liability for—After born sons. *See* (1922) DIG. COL. 623. *SHEO NARAIN v. NATHU*, 19 N. L. R. 81.

———Debts—Antecedent debt—Joint family property—Father's alienation.

Where a Hindu father mortgages joint family property and borrows money, the debt cannot form an antecedent debt to support a subsequent mortgage to pay off the prior one. The sons can in a suit brought on that mortgage set up that there was no legal necessity. (*Batten, J. C. on a difference between Drake Brockman, J. C. and Hallifax, A. J. C.*) *GANPAT RAO v. LAXMI CHAND*, 6 N. L. J. 239 : 1923 Nag. 1.

———Debts—Antecedent debt—Money required for satisfying decree for pre-emption—If one.

A pre-emption decree merely gives an option of acquiring certain property at a certain price. The decree-holder is under no obligation to acquire the property unless he chooses. Money required for such a purpose is not an antecedent debt.

*Per Walsh J.*—There must be a real dissociation in fact to give effect to the doctrine of antecedency. (*Piggott and Walsh, JJ.*) *CHATUR BHUI v. GOBIND RAM*, 45 A. 407 : 21 A. L. J. 348 : L. R. 4 A. 409 : 74 I. C. 571 : 1923 A. 218 (2).

———Debts—Antecedent debt—Mortgage at a time when there was no son in the joint family.

Where a person mortgaged his property before the birth of a son and subsequently after the birth of such son he again mortgaged it in order to discharge the previous mortgage held that the prior mortgage constituted an antecedent debt 39 A. 437 : 41 A. 382 referred to. (*Daniels, J.*) *TIRLOK SAITHWAR v. LALSA SAITHWAR*, 71 I. C. 465 : 1923 A. 488 (2).

———Debts—Antecedent debt—Mortgage debts. *See* (1922) DIG. COL. 624 *HARI PRASAD SINGH v. SOURENDRA MOHAN SINHA*, 1 Pat. 506

———Debts—Antecedent debts—Mortgage incurred previously.

It is settled law that a mortgage executed by a father is not an antecedent debt since it is not incurred by the father independently of the security of the joint family property, 39 A. 437 followed. (*Prideaux, A. J. C.*) *PURNIA v. SONIA*, 69 I. C. 569 : (1923) Nag. 23.

———Debts—Antecedent debts—Mortgage—Necessity. *See* (1922) DIG. COL. 624 *RANJIT SINGH v. GANGA SAHAI*, 69 I. C. 765.

———Debt—Antecedent debt—Prior mortgage debt.

Antecedent debt means antecedent in fact as well as in time, that is to say, the debt must be

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truly independent and not part of the transaction impeached.

Where to pay off a prior mortgage debt on joint family property the father executes a mortgage of the same to another, the former mortgage debt is an antecedent debt and makes the latter binding on the sons. (*Lord Dunsdin*.) **RAJA BRIJ NARAIN RAI v. MANGLA PRASAD RAI.** 21 A. L. J. 934 : 46 M. L. J. 23 : 19 L. W. 72 : 33 M. L. T. (P. C.) 457. 1923 P. C.

———*Debts—Antecedent debts—Promissory note—Deposit of title deeds—Personal covenant—Liability of ancestral property for debts of father*

Where moneys are advanced to a Hindu father and a promote is taken for the amounts advanced and subsequently the title deeds of properties are deposited as collateral security, in a suit by the creditor to enforce the debt held, that the promissory note debt remained a simple money debt, though subsequently secured by a deposit of title deeds and that being dissociated in fact from the mortgage, it constituted an antecedent debt for which the whole of the family properties were liable including the shares of the sons.

Per *Spencer, J.*—The personal covenant contained in an earlier mortgage and subsisting at the time of a later mortgage cannot constitute an "antecedent debt" in a legal sense. A personal covenant given by a father at the time of entering into a mortgage does not constitute an antecedent debt. 39 A. 437 : 44 A. 368 Rel. 60 I. C. 177 diss.

Per *Devadoss, J.*—A personal covenant in a prior mortgage can be an antecedent debt in respect of a subsequent mortgage of the same properties. 39 A. 437 : 44 A. 368. 21 C. W. N. 957 Ref. (*Spencer and Devadoss, JJ.*) **VADAMALAI PILLAI v. SUBRAMANIA CHETTIAR.** (1923) M.W.N. 57 (2) : 71 I. C. 130 : 1923 Mad. 262.

———*Debt—Decree debts—Decree against father.*

A decree against the father on a mortgage by the father has no more force than the mortgage itself, which must be proved in order to bind the son for an antecedent debt or for legal necessity. (*Scott-Smith and Zafar Ali, JJ.*) **HANS RAJ v. BALAQI MAL.** 1923 Lah. 356.

———*Debts—Liability for—Failure by father to render accounts—Son's liability.*

Where defendant's father as manager of plaintiff's estate during his minority and while it was under Court of Wards failed to account. Held liability imposed by the Court upon the father to indemnify the person with whose property he had improperly interfered creates a debt for which the ancestral property in the hands of the son might justly be held liable. Admittedly the father was not criminally prosecuted and the suit was one for accounts which he had failed to deliver. Every breach of civil liability does not necessarily involve a moral turpitude, and it has not been shown that the debt in question was criminal in law for the discharge of which the son is not liable. (*Abdul Raoof and Moti Sagar, JJ.*) **GUR SARAN DAS v. MOHAN LAL.** 4 Lah. 93 : 1923 Lah. 399.

———*Debts—Liability for—Family trade—Debts borrowed by member conducting business—Liability of minor members.*

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Where a member of a joint Hindu family who carries on an ancestral business on behalf of the family contracts debts for purposes of the trade, the creditors are entitled to go against the whole of the family property including the shares of the minor members inasmuch as the debt is borrowed for a family purpose. I. L. R. 35 M. 692 distinguished, 5 L. W. 341 ; 34 Bom. 72 ; 38 M. L. J. 55 Rehed on. (*Spencer and Devadoss, JJ.*) **SUBBARAYA MUDALI v. THANGAVELU MUDALI.** 45 M. L. J. 44 : 72 I. C. 815 : 1924 Mad. 33.

———*Debt—Liability for—Father's debt.*

By the Mitakshara law according to 44 Cal. 524. a judgment against the father of the family cannot be executed against the whole of the Mitakshara property if the debt in respect of which the judgment has been obtained was a debt incurred for illegal or immoral purposes. In every other event it is open to the execution creditor to sell the whole of the estate in satisfaction of the judgment obtained against "the father alone." These words could not be clearer and they are absolutely comprehensive. There are no limitations, qualifications or reservations to the effect that the debt must be incurred by the father representing the estate or purporting to be for the benefit of the estate or in some capacity other than his personal capacity. The words in 44 Cal. 524 are "In every other event it is open to execution creditor to sell the whole of the estate in satisfaction of the judgment obtained against the father alone" and there is nothing to qualify the words "the father alone." The decision in 44 Cal 524 is to the effect that, once a simple money decree is passed against the father and manager of a joint Hindu family, that simple money decree can be executed by the execution creditor against the whole of the estate, and will operate against the interests of the sons, unless the debt has been incurred for illegal or immoral purposes. The decision in 15 A. L. J. R. 437 lays down an absolutely different proposition that joint family property cannot be transferred by an act of volition on the part of the manager, except with the consent of other co-parceners or for legal necessity or in payment of antecedent debts, and that the doctrine of the pious duty of a Hindu son to satisfy his father's debts can have no operation to validate such a transfer, so long at any rate as the father is alive. But in order to apply the principle of the second decision, there must be a transfer by the volition of the manager. (*Stuart, J.*) **SHAMBU DIYAL SINGH v. ISWAR SARAN.** 75 I. C. 597 : 1923 A. 306.

———*Debts—Liability for—Father and son.*

Where father borrowed first and then son took upon himself liability and borrowed further, held the father is not liable even for the debt incurred by him unless family necessity has been proved. (*Campbell, J.*) **BALLA v. BARU MAL.** 1923 Lah. 685 (2).

———*Debts—Liability for—Father—Son's liability—Decree against father when can be reopened.*

If in regard to an admitted or proved existing debt of their fathers the sons are only entitled to plead that it was illegal or immoral, it must be admitted that they are also entitled to plead that there was no debt of their fathers existing at the time at all and there is no difference between

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that and the plea that there was no debt of their father existing at the time which was of such a nature as to justify an alienation of their shares for its satisfaction.

The term "illegal" or "immoral" is used as a translation of the word *Avyavaharika*. A summary of the eight kinds of debts coming within that category which are specified in the texts is given in the judgment of Mukerjee, J. 39 C 862 and it includes 'promises without consideration' (*Hallifax, A J C*) ARJUN v. CHHAGAN LAL.

72 I. C. 1044 : 1923 Nag. 300

——— *Debts—Liability for—Father—Son's liability—Immoral or illegal debts—Burden of proof.*

Where a son impeaches an alienation by his father on the ground that the debts were incurred for immoral or illegal purposes, it is not necessary to prove that each item was expended for an immoral purpose. When a person is shown to be leading a licentious life and living beyond his means, the fact that there is no business proved on which the loans could have been expended raises a presumption that they must have been expended for licentious purposes. (*Pipon, J C*) BHAGAT SINGH v. RAM PARKASH

69 I. C. 602.

——— *Debts—Liability for—Father—Son's liability during father's life time.*

Where the debts incurred by a Hindu father were not incurred for legal and justifying necessities of the joint family or for the benefits of the defendants Nos. 3 and 4 (his sons) and it is also not found that the debts were incurred for immoral purposes the minor sons of the father are bound to satisfy their father's debt on the theory of the pious obligation of the sons to pay their father's debt. The Court should accordingly make a decree against the Defendants nos. 3 and 4 and limit their liability to the extent of the co-parcenary property of the joint family (*Kulwant Sahay and Foster JJ.*) DEBENDRA KUMAR v. FYZABAD BANK LTD. 4 Pat. L. T. 516 : 75 I. C. 53.

——— *Debts—Liability for—Father—Son's liability—Pious obligation. See* (1922) DIG. COL. 626. RAM AUTAR v. BENI SINGH. 10 O. L. J. 7.

——— *Debts—Liability for—Father's Surely debts—Liability of sons.*

Under the Hindu Law sons are liable to pay their father's debts incurred by him as a surety for the re-payment of money lent case Law examined. (*Hallifax A. J. C.*) MAYARAM v. BHAIRO PRASAD. 19 N. L. R. 29 : 71 I. C. 351 : (1923) Nag. 115 (2).

——— *Debts—Liability for—Ancestral or self acquired property.*

The onus or proof of immorality or illegality as affecting the debt incurred by the father is upon the sons, for after the death of their father their liability to pay the father's debt arises under the express text of the *Mitakshara*, on the ground of their pious obligation to save their fathers from the region of torment or hell. The sons, are, therefore, bound to pay the decree debt of their father under the Hindu Law. The liability of theirs is a personal one, and it is not barred up to six years from the date of the decree. The rule

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of Hindu Law is that where a son or a guardian takes ancestral property by survivorship, he is bound to pay out of such property all debts of his ancestor not incurred for immoral or illegal purposes including the judgment-debtor, (*Jwala Prasad and Adami, JJ.*) SHEIKH KAROO v. RAMESHWAR SAO. 1923 P. 143.

——— *Debts—Liability for—Manager—Binding nature of—Onus*

There is no presumption that a debt contracted by the manager of a Hindu family is contracted for the benefit of the family and the burden is on the creditor to prove necessity or family benefit 34 A 135 : 113 P. W. R. 1915 : 48 P. W. R. 1919 Rel. (*Martineau and Zafar Ali, JJ.*) KHAZANA MAL v. JAGAN NATH. 4 Lah. 200 : 5 Lah. L. J. 236 : 74 I. C. 484 : 1924 Lah. 44.

——— *Debts—Liability for—Necessity—Pressure of creditors—Proof of.*

Where there has been a long series of transactions it is not always possible for the creditor to prove exactly the purpose for which any particular item was borrowed, and in such a case, it is sufficient for the creditor to show that the family was in chronic need of money and that the moneys were advanced on the representation of the manager that they were needed for such object. Moreover where the necessity arises from the pressure of a judgment-debt the person dealing with the manager of a joint Hindu family he is entitled to treat the judgment as *prima facie* proof of necessity, and he is under no obligation to go behind the judgment in order to enquire whether the debt covered by the decree was for legal and binding necessity of the family (*Das and Kulwant Sahay, JJ.*) DUKHIT OJHA v. JANKI SINGH. \* 71 I. C. 459 : 4 Pat. J. T. 377 : 1923 P. 443.

——— *Debts—Liability for—Necessity—Suit just within time—Evidence Act, S. 114—Conduct.*

Where a suit to set aside alienation by a father on the ground, among others, of want of necessity, was within limitation, yet the conduct of the plaintiff in instituting the suit just at the close of the period prescribed, was held to be an important factor in determining the nature of the transaction and in finding out whether the alienation was or was not for necessity. The mere fact that the area of the property comprised in the mortgage forming the antecedent debt is not known does not justify an inference of want of necessity. (*Moti Sagar, J.*) DALJIT SINGH v. HARI CHAND. 1923 Lah. 669.

——— *Debts—Liability for—Son's liability—Money debt—Auction sale.*

Where in execution of a decree obtained on a money debt, the interest of the family is sold in auction, the son cannot challenge the sale unless he proves the money debt was for an illegal or immoral purpose. (*Lindsay and Sulaiman, JJ.*) RAM CHANDER v. MUHAMMAD NUR. 45 A. 545 : L. R. 4 A. 237 : 21 A. L. J. 485 : 73 I. C. 656 : 1923 A. 591.

——— *Debts—Liability for—Son's liability—Mortgage by father.*

There is a difference between a suit by the son to have an alienation of joint family property by

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their father declared invalid and a suit by creditors seeking to fix the liability of the father on the son. It is only when a son seeks to avoid liability that he has to prove that the debt incurred by his father was an immoral one. Where the son filed a suit for declaration that a mortgage of ancestral property executed by his father was not for necessity and therefore not binding on him, held that the debt though not binding on the son as a mortgage still there was nothing to debar the mortgagee from enforcing the decree which he might obtain against the father for the amount of the loan against ancestral property including the property mortgaged. 53 P. R. 1901, 15 P. R. 1918 followed. (*Broadway and Campbell, JJ.*) *HAR-KISHEN SINGH v LAHORE BANK LTD.*

69 I. C. 552

———*Debts—Liability for—Son's liability—Mortgage in valid—Pious obligation to pay debt.*

The liability of a son or grandson to pay the debt of his ancestor, which is not tainted with immorality or was not taken for illegal purposes, cannot however be enforced so long as the original debtor is alive and is capable of paying his debts.

During the life-time of the father apart from any question of family benefit or necessity the liability of a son to pay a debt due by his father is only contingent. The existence of that liability contingent or vested, has been utilised to build up the doctrine of antecedent debt to validate a mortgage or sale effected by the father to pay such debt: and in many cases, a creditor has been allowed to recover a debt due by the father from the entire family property, if not tainted with immorality, as if the liability were concurrent. 44 A. 126: 39 A. 237 Ref.

If the attempt to enforce a mortgage on the theory of pious obligation fails, the right to attach the family property during the life time of the father on the strength of that pious obligation can be still less recognised because if no pious obligation exists, it must be as insufficient to support the one as to support the other.

The doctrine of antecedent debt, resting as it does on the theory of pious obligation, is only intended for the protection of third parties who may have acquired rights in good faith in the family property, and if a vendee cannot invoke it for validating a sale effected in lieu of an invalid antecedent mortgage in his own favour, it is still less open to a creditor, whose mortgage has been declared to be invalid, to recover the debt, represented by that mortgage, while the mortgagor is alive, from the shares of his sons, who have been exempted from liability out of the very property, the mortgage of which has been declared to be unenforceable. The debt for the payment of which this liability is sought to be enforced is in no sense an antecedent debt. It is the very debt for the repayment of which the mortgage was made; and if the doctrine of pious obligation cannot be invoked to support the mortgage, it can hardly be invoked during the father's lifetime to enforce the liability of the family property other than the interest of the debtor for its its repayment. (*Stuart and Kanhaiya Lal, JJ.*) *KISHAN SINGH v. CHETU SINGH.* 45 A. 90 : 1923 A. 206.

## HINDU LAW—DEBTS

———*Debts—Liability for—Son's liability for father's debt—Remedies of creditor.*

So long as a Hindu family remains undivided a creditor can proceed against the interest of the sons in the ancestral property for the debts of their father which have not been contracted for illegal or immoral purposes. 4 M. 1; 41 M. 136, 140; 38 M. L. J. 402 : 39 A. 437; 43 M. L. J. 98 Ref. (*Spencer and Devadoss, JJ.*) *KURUKUNDI SAMA RAO v FIRM OF MARWADI VANNAPI VAJINJI.* 46 Mad. 64 : 17 L. W. 661 : 32 M. L. T. (H.C.) 9 : 71 I. C. 153 : 1923 Mad. 36.

———*Debts—Liability for—Pious obligation—Father alive—Effect.*

There is a pious obligation on the part of the son to pay off his father's debts even when the father is alive. (*Lord Dunedin*) *RAJA BRIJ NARAIN RAI v. MANGLA PRASAD RAI.*

21 A. L. J. 934 : 46 M. L. J. 23 : 19 L. W. 72 : 33 M. L. T. (P. C.) 457.

———*Debts—Liability for—Pious obligation—Death of father—Effect.*

Where the debt of the father is neither for legal necessity nor antecedent, the son is not under a pious obligation to pay it merely because the father is dead. (*Daniels, J.*) *RAJA SINGH v. DURGA SINGH.* 73 I. C. 607 : 1923 A. 529 (1).

———*Debts—Liability for—Pious obligation—Death of son—Liability of mother succeeding to estate of her son.*

There may be no pious obligation on a mother succeeding to the estate of her son for the payment of the debts due by her husband, but if the son has succeeded to the estate of his father, the person who succeeds such son is as much liable for the payment of the debt due by his father to the extent of the family property, unless it is tainted with immorality as a person who would directly succeed to the property on his death. (*Kanhaiya Lal, J. C.*) *SHEO NANDAN LAL v. SHEO BALAK.* 9 O. & A. L. R. 264 : 10 O. L. J. 303 71 I. C. 974 1923 Oudh 251.

———*Debts—Rights of creditor—Interest—Borrowing by manager—Enforceability against family.*

When a contract of loan entered into by a head member or karta of a joint Hindu family is sought to be enforced against the other members on the ground of necessity, it must be shown not only that there was a necessity to borrow the principal sum but that the rate of interest agreed upon was also a necessity : in other words, that it was impossible for the karta or the head member to obtain a loan for family necessity except at the rate of interest agreed upon.

The creditor in such a case has not only to show that there was a family necessity so as to bind the members of that family on behalf of the parties to the contract with respect to the loan advanced but that the rate of interest was the market or commercial rate. He will not be entitled to enforce a higher rate of interest against the other members and to make the joint family properties liable for interest higher than the current market rate of interest. (*Jwala Prasad and Ross, JJ.*) *MAHADEO PRASAD v. BISSESSAR PRASAD.*

2 Pat. 488 : 4 Pat. L. T. 707 : 74 I. C. 695.

## HINDU LAW—GIFT

## — Gift—Acceptance—Revocation.

A gift which is not accepted can be revoked. (*Dalal A. J. C.*) NANHUN v. RAM DAYAL.

74 I. C. 818 : 9 O. & A. L. R. 460

## — Gift—Construction.

Where the expression used was "Jo waste, guzarike digari," held these words indicate that there was no intention of making over the lands to her as an absolute gift. 34 A 234 Dist. (*Scott Smith and Brasher, JJ.*) MT MALAN v. KISHORE CHAND

71 I. C. 833 : 1923 Lah 17

## — Gift—Construction—Defeasance clause—Effect of—Transferee from donee—Position of.

A clause in a deed of gift that the donor was to become entitled to the properties gifted on the happening of a specified contingency is not invalid or opposed to Hindu Law, A Hindu who had been sentenced to transportation for life made a gift of his properties to a relation of his subject to a condition that the donee should hand over the properties to the donor in case he returned to his native village after the termination of his sentence. The donee alienated the properties gifted to strangers who had notice of the terms of the gift. The donor subsequently returned and sued for possession. Held, that he was entitled to recover the properties from the alienee who could not be said to be bona fide purchasers. (*Krishnan and Venkatasubba Rao, JJ.*) VENKATARAMA AYYAR v. AYYASAMI AYYAR.

69 I. C. 673 : 1923 Mad. 67.

## — Gift—Daughter-in-law—Absolute estate—Bahamah wajib—Meaning of

Held on a construction of the gift that the estate conferred on the widowed daughter in law was an absolute estate and that the words "bahamah wajib" occurring in the deed of gift meant "with all rights". (*Stuart, J.*) ABHEY SINGH v. HIMTA.

1923 A. 234 (1).

## — Gift—Oral gift—Proof of.

The onus of proving an oral gift is upon the person setting it up. (*Das and Adams, JJ.*) RAMESHWAR NARAIN SINGH v. RIKNATH KOERI.

1923 P. 165.

## — Gift—Unborn person—Validity—Creation of annuity.

A grant of an annuity is a right of property and as it is an incorporeal right, the test of validity in each case is, whether, under the circumstances, the donor has sufficiently indicated an intention that the transfer should take effect as a corrody and with that intention has done all that is practicable by way of transferring such indicia of property as may be in existence. If there is such a transfer there is no room for the application of the rule in the *Tagore case* as to the invalidity of a gift to an unborn person. 13 C. L. J. 81. 39 C. 87 Ref. (*Mookerjee and Chotzner, JJ.*) JATINDRA MOHAN MONDAL v. GHANASHYAM CHOWDHURY.

50 Cal. 266 :

72 I. C. 1019 : 1923 Cal. 27,

## — Guardian—Alienation by—Binding nature on minor.

The test with regard to the binding nature of an alienation by a natural guardian upon the minor as laid down in *Hunooman Persaud's case* 6 M. I. A. p. 393 is that the power must be exercised by the guardian rightly for necessity or for

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the benefit of the infant. It would be open to the alienee to establish that he had made all proper and necessary inquiries and that he had acted in good faith in advancing the moneys to the natural guardian of the minor. (*L. A. Shah, and L. C. Crump, JJ.*) RAOJI THAKARAM v. PEMRAJ SADARAM MARWADI

75 I. C. 561 : 1923 Bom. 213.

## — Guardian—Step-mother—De facto guardian—Power to bind the minor's estate

A step mother, no doubt, is not the *de jure* guardian of a minor step-son but she may be his *de facto* guardian and the law is that when the transactions entered into by such *de facto* guardian or such as a prudent manager of the property would have made and are covered by legal necessity or benefit to the minor they can be upheld. (*Prideaux A. J. C.*) GANPAT v. FIRM OF BISSESSARLAL.

71 I. C. 491 : 1923 Nag. 230.

## — Guardianship—Member of undivided family.

Where an application was made by the managing member of a joint Hindu family governed by the Mitakshara Law for being appointed guardian of his minor son and for leave to sell the minor's undivided share in the ancestral property held that the High Court could under its general powers and apart from the provisions of the Guardians and Wards Act appoint a guardian of the minor's property 25 B. 353 foll. (*Greaves, J.*) HARINARAIN DAS *In re*.

50 C. 141 :

74 I. C. 244 : 1923 Cal 409.

## — Guardianship—Son by first husband.

The mother continues to be the natural guardian of her infant son, even after her remarriage with second husband, if the infant son lived with her. (*Shah and Crump, JJ.*) RAOJI THAKARAM v. PEMRAJ SADARAM.

75 I. C. 561 :

1923 Bom. 213.

## — Guardianship—Testamentary Guardian—Hindu father.

Under the Hindu law it is open to a father to appoint a testamentary guardian for his minor son. 41 M. 561 Referred to. Whatever doubts may exist as regards the power of the father to appoint a testamentary guardian for his minor son as regards ancestral property, it is open to him to appoint such a guardian as regards his separate or self-acquired property. A bequest by a Hindu father of his separate property to his minor daughter coupled with the appointment of a testamentary guardian for the minor's property would be valid. (*Oldfield and Devadoss JJ.*) KONTALATHAMMAL v. THANGASWAMI PILLAI.

46 Mad. 873 : 45 M. L. J. 481 : 18 L. W. 256.

(1923) M. W. N. 902 : 33 M. L. T. (H. C.) 80 :

74 I. C. 896.

## — Impartible Estate—Family custom—Proof of—Estate not absolutely owned by the family.

Impartibility never attaches to small estates and it cannot survive as a family custom independently of some particular estate. A family custom of succession to an estate not absolutely owned by the family can never exist. An impartible estate in Hindu Law is not only consistent with but postulates that the family to which it belongs is joint. No presumption against indivisibility of possession or title can arise by reason

## HINDU LAW—IMPARTIBLE ESTATE.

of joint living. (*Ashworth and Simpson, A. J. C.*)  
THAKUR RUDRA PRATAP NARAIN SINGH v.  
THAKUR NIRMAN PRASAD SINGH.

74 I. C. 225 : 1923 Oudh 61.

———*Impartible Estate—Partition by a member—Proof.*

It is competent to a member of a joint family to separate himself from the family by a clear and unequivocal intimation of his intention to sever, and this is also true with regard to an impartible estate; but as in that case the person separating forfeits his chance of inheriting the whole of the estate by survivorship, it requires strong evidence to establish such separation. (*Lord Buckmaster*)  
RANI JAGADAMBA KUMARI v. THAKUR WAZIR NARAIN SINGH. 44 M. L. J. 503 :

25 Bom. L. R. 676 : (1923) M. W. N. 460 :

18 L. W. 555 : 28 C. W. N. 98 :

37 C. L. J. 287 : 32 M. L. T. (P. C.) 157 :

L. R. 4 (P. C.) 65 : 4 Pat. L. T. 319 :

2 Pat. 319 : 50 I. A. 1 : (1923) P. C. 59.

———*Impartible Estate — Property acquired with income from the estate if an accretion.*

Where all the estate possessed by a Raja other than the impartible Raj was derived from the income of the Raj itself, *Held*, the produce of the impartible estate ordinarily does not belong to and form an accretion to the original property. The income when received is the absolute property of the owner of the impartible estate. It differs in no way from property that he might have gained by his own effort, or that had come to him in circumstances entirely dissociated from the ownership of the Raj.

*Quære*. Whether it be possible in any circumstances to treat moveable property as an accretion to a landed estate of this character. (*Lord Buckmaster*.) RANI JAGADAMBA KUMARI v. THAKUR WAZIR NARAIN SINGH.

44 M. L. J. 503 : 50 I. A. 1 : 37 C. L. J. 287 :

25 Bom. L. R. 676 : (1923) M. W. N. 460 :

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32 M. L. T. (P. C.) 157 : L. R. 4 (P. C.) 65 :

4 Pat. L. T. 319 : 2 Pat. 319 :

(1923) P. C. 59

———*Impartible estate—Succession by survivorship—Application for personal decree Succession certificate if necessary. See (1923) DIG. COL. 632* RAJA SRI SHIVA PRASAD SINGH v. BENI MADHAB CHOUDHURY. 4 Pat. L. T. 6 : 70 I. C. 24.

———*Impartible Estate—Succession—Divided and undivided family.*

Though the members of a joint Mitakshara family do not acquire in impartible property the same rights as impartible property belonging to the family such as the right of joint enjoyment, the right of partition or the right of restraint on alienation, they retain the right of survivorship of proving that an impartible estate was the separate or self-acquired property of the last owner is on those making the assertion, 25 C. W. N. 564 : 46 C. 362 : 15 C. 471 Ref. (*Miller, C. J. and Foster, J.*) THAKURAIN FULBATI KUMARI v. MAHARAJAB KUMAR RAO MAHESHWAR.

2 Pat. 685 : (1923) Pat. 181 : 4 Pat. L. T. 473 :

74 I. C. 668 : 1923 P. 453.

## HINDU LAW—INHERITANCE.

———*Impartible estate — Succession—Survivorship—Family arrangement superseding senior line—Effect.*

Where as the result of a family arrangement the junior line in an impartible estate was substituted for the senior line, but there was no other evidence of any further interference with the rights of the senior line, the estate still remains joint family property and on the extinction of the junior line, the senior line takes by survivorship.

Per *Krishnan, J.* To show that an impartible estate has become the separate property of the holder, it is not absolutely necessary to prove that there was some division in which that property was involved or that the right of others in it were abandoned. Each case has to be decided on its own facts.

Per *Ramesam J.* The holder of an impartible estate cannot by giving a registered notice to the junior members that he intends to be divided in status as regards all the partible properties and impartible properties put an end to the rights of junior members over the impartible estate.

Case law on the subject fully reviewed. *Krishnan and Ramesam, JJ.* ANNADANA JADAYA GOUNDER v. KONAMMAL 17 L. W. 107 : (1923) M. W. N. 15 : 71 I. C. 533 : 1923 Mad. 402.

———*Impartible Estate — Wainganga Zemindaris of C. P. C.—Amgaon zemindari*

The Amgaon Zemindari before the Thirty Years Settlement was of the nature of a Raj and therefore impartible and subject to the rule of single succession, the other members of the family of the Zemindar for the moment being entitled to suitable maintenance and to any specific share in the income. It was an estate of an exactly similar character that was conferred by Government on the Zemindar at the Thirty Years Settlement. In addition a custom had by that time grown up in the Amgaon family that the estate should be held as an estate of that nature and subject to those conditions. Nothing occurred at the Thirty Years Settlement or has occurred since, to alter the nature of the grant or to affect the validity of the family custom. The Zemindari is therefore declared to be impartible. Important history of the C. P. Zemindaris traced. (*Batten, J. C. and Halifax, A. J. C.*) MALHAR RAO v. MARTAND RAO. 6 N. L. J. 189 : (1923) Nag. 201.

———*Inheritance—Bandhus—Father's sisters great grandson*

A father's sister's great-grandson is not entitled to succeed to the estate of a deceased Hindu as a bhinna gotra spinda. (*Kyves and Gokul Prasad, JJ.*) SHEO NADAN v. MUNNI.

21 A. L. J. 288 : 71 I. C. 1015 : 1923 A. 398 (1).

———*Inheritance — Bandhus — Mother's brother's son—Mother's sister's son. See (1922) DIG. COL. 633.* RAJEPPA v. GANGAPPA, 47 Bom. 48.

———*Inheritance—Brothers and nephew.*

Rule under the Vyavahara Mayukha a brother's son takes with the brother when the inheritance to another deceased brother opens. But the same analogy does not apply in the case of distant

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Sapindas. (*Shah, C. J. and Kemp, J.*) HARIBHAI GULAB v. MATHUR LALLU. 47 Bom. 940 : 25 Bom. L. R. 929.

———Inheritance—Daughters and other females — Vatan family in Bombay — Rights of. See BOMBAY VATAN ACT S. 2. (1923) Bom. 382.

———Inheritance—Daughter's sons—Estate taken.

Where the estate of the maternal grandfather passes on his death to the sons of a daughter living as a joint family, there is no right of survivorship as between them; so that on the death of one, his heirs take his share of the estate. (*Das and Kulwant Sahay, JJ.*) RAO BAHADUR MAN SINGH v. MAHARANI NAWALKHBATI. 2 Pat. 607 : 4 Pat. L. T. 335 : 73 I. C. 822 : 1923 P. 492.

———Inheritance—Disqualification — Burden of proof—Leprosy.

Leprosy of the sanious or ulcerous type is a ground of disqualification for inheritance under the Hindu Law. The person who sets it up must give strict proof of his allegations. (*C. C. Ghose and Panton, JJ.*) KARALI CHARAN PAL v. ASHUTOSH NANDI. 50 Cal. 604 : 75 I. C. 474.

———Inheritance — Disqualification — Unchastity—Hostility.

Under Hindu Law, unchastity disqualifies a Hindu wife from succeeding to her husband's estate but it must be physical unchastity which occurred during the life time of the husband. In the absence of unchastity there must be malignant or unjustified hostility on the part of the wife to exclude her. (*Pipon, J. C.*) MT MUKANDI BAI v. JAMNI BAI. 73 I. C. 875.

———Inheritance—Exclusion from—Congenital blindness—Rule if obsolete.

The rule of Hindu Law excluding a congenitally blind Hindu from inheritance is not obsolete. Texts and cases reviewed. (*Sir Walter Schwabe, C. J., Oldfield and Coultis Trotter, JJ.*) PUDIAYA NADAN v. PAVANASA NADAN. 69 I. C. 313 : 1923 Mad. 215.

———Inheritance—Exclusion from — Congenitally blind person.

A congenitally blind son is excluded from inheritance under the Hindu Law and the rule of exclusion has not become obsolete. 43 M. dissented from. The disqualified member is however entitled to suitable residence in the family house and maintenance. (*Batten, A. J. C.*) NANA v. JOGILAL. 6 N. L. J. 81 : 71 I. C. 566 : 19 N. L. R. 69 : 1923 Nag. 151.

———Inheritance—Exclusion from—Insanity—Congenital insanity.

Insanity to be a ground of exclusion from inheritance under the Hindu Law need not be congenital. It is enough, if there is insanity at the time when the succession opens. 1 B. 177 not foll. 5 A. 509; 38 A. 117, 43 M. 464 foll. (*Macleod, C. J. and Crump, J.*) BAPUJI NARSO v. DATTU ANTAJI. 47 Bom. 707 : 25 Bom. L. R. 404 : 73 I. C. 279 : 1923 Bom. 425.

## HINDU LAW—JOINT FAMILY.

———Inheritance—Illegitimate son—Offspring of Hindu by Mahomedan mistress

An illegitimate offspring of a Hindu by a Mahomedan mistress is not a Hindu and cannot succeed to his property on his death. 27 M. 13 foll. (*Macleod, C. J. and Crump, J.*) SITARAM PANDURANG v. GANPAT. 25 Bom. L. R. 429 : 73 I. C. 412 : 1923 Bom. 560.

———Inheritance—Illegitimate son—Sudras.

An illegitimate son among Sudras is entitled to a share of the joint family property, his share being half that of a legitimate son. Case law reviewed. (*Mitra A. J. C.*) MAROTI v. TUKARAM. 19 N. L. R. 99.

———Inheritance—Illegitimate son—Sudras—Survivorship — Other castes — Distinction—Succession Certificate—Necessity.

Illegitimate sons in the three higher classes never take by inheritance but are only entitled to maintenance from the estate of their father. An illegitimate son of a Sudra takes his father's property by survivorship and consequently no succession certificate is necessary to enable him to recover his debts. 18 C. 151 Ref. (*Predeaux, A. J. C.*) GANULAL v. KASHIRAM. 1923 Nag. 67 (1).

———Inheritance—Illegitimate son—Sudra—Sharers of.

An illegitimate son of a Sudra takes half the estate of his putative father in competition with the widow, on the principle of the Mitakshara that an illegitimate son takes half of what he would have taken had he been legitimately born. Texts considered. (*Sir Lawrence Jenkins.*) KAMULAMMAL v. VISVANATHASWAMI NAICKER. 46 Mad. 167 : 44 M. L. J. 465 :

37 C. L. J. 363 : 25 Bom. L. R. 577 : 27 C. W. N. 1021 : 71 I. C. 643 : 50 I. A. 32 : 32 M. L. T. (P. C.) 48 : 17 L. W. 298 : 1923 P. C. 8 (P. C.).

———Inheritance—Sons and grandsons—Separated members—Succession per stirpes.

On the death of a Hindu governed by the Mitakshara law, his separated sons and grandsons succeed *per stirpes* to the estate. 30 M. 348 foll. (*Macleod, C. J. and Crump, J.*) GANGADHAR NARAYAN v. IBRAHIM BAVA. 47 Bom. 556 : 25 Bom. L. R. 197 : 72 I. C. 307 : 1923 Bom. 265 (1).

———Inheritance—Son—Mother and father—Preference. See (1922) DIG COL. 634. SUBEDAR SING v. BHIKHAM SINGH. 69 I. C. 649 : 26 O. C. 52.

———Inheritance—Sudra ascetic. See (1922) DIG. COL. 636. MAHANT NARASINHDAS GURU v. KHANDE RAO VINAYAK JOSHI. 70 I. C. 860.

———Joint-family—Accounts—Manager.

A manager cannot be freed, from the liability of rendering accounts simply because he has said that he possesses no account books and the plaintiff has been unable to prove the existence of such. (*Broadway and Zafur Ali, JJ.*) RAM KISHAN v. RANSHAN. 1923 Lah. 551.



## HINDU LAW—JOINT FAMILY.

—Joint family—Alienation—Burden of proof—Effect of pre-emption having taken place.

When an alienation by the father or a joint Hindu family is impeached by the son, it is for the creditor in the first instance to prove either legal necessity or at least such inquiry as would have satisfied a prudent man that necessity existed. The circumstance that a pre-emption has taken place with regard to the alienation and that the pre-emptor is the person against whom relief is claimed does not affect the question of onus. (*Damels, J.*) CHANDRIKA SINGH v. BHAGWAT SINGH. L. R. 4 Ali. 545.

—Joint Family—Alienation—Consent of other members.

A sale effected by a member of a joint Hindu family is not necessarily void, but only voidable, if an objection was taken to it by the other members of the joint family, similarly a gift by a member with the consent of the other members of the family is valid. (*Kanhैया Lal, J. C.*) MAHABIR PANDE v. MATHURA PRASAD.

9 O. & A. L. R. 822 : 72 I. C. 470.

—Joint family—Alienation—Consent of reversioner to one sale—Presumption. See (1922) DIG. COL. 639. TUKARAM v. GANPAT.

70 I. C. 767.

—Joint family—Alienation by co-parcener—Debts—Necessity.

Debts incurred for a litigation in respect of the abduction of the alienor's wife, may be reasonably regarded as necessary (*Broadway, J.*) ANOKH SINGH v. SAPURAN SINGH.

1923 Lah. 660.

—Joint family—Alienation—Co-parcener—Power of—Berar. See (1922) DIG. COL. 638 SYED KASAM v. JORAWAR SINGH.

50 Cal. 84 : 25 Bom. L. R. 1 : 21 A. L. J. 57 : 37 C. L. J. 73 : 27 C. W. N. 179, (P. C.)

—Joint Family—Alienation—Co-parcener—Purchaser from members—Rights of, and of other members—Partition suit by purchaser or by other members—Allotment of whole of alienated property to purchaser in—Conditions—Sale by member on his own behalf and on behalf of other members—Sale not in interests of family—Security bond taken by purchaser from vendor to indemnify former against loss due to claim by other members—Effect.

A purchaser from a member of a Joint Hindu family of property which that member has no right to sell, it being the joint property, can enforce the sale only by a partition of the entire family property; and if, in such partition, the property sold can, with due regard to the interests of the other sharers to the debts due by the family, and to an equitable allocation of the various items of family property to shares of the several co-parceners, be wholly allotted to the vendor's share, the purchaser will be entitled to the whole property which the vendor professed to convey to him. Whether the alienee in such cases can get the property does not depend upon whether a suit is first brought by him for a partition of the whole joint property or by the other co-parceners for a partition of a part.

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The decision in 40 C. 966 : 25 M. L. J. 512 (P. C.) is authority for the position that even in a suit by the other co-parcener for a share of the alienated property, it would be open to the Court on the application of the alienee to decree a general partition in which the principle of equity mentioned above should be applied.

The principle of equity applies equally to cases in which the alienor purports to sell the property on behalf of himself and of the other co-parceners and to those in which he purports to sell the property as his own. It applies whether or not the sale was a proper alienation in the interests of the joint family.

The purchaser is not to be deprived of this equity merely because, at the time of the sale, he took from the vendor a security bond (in the form of a charge on other joint family property) by which the vendor gave him an indemnity against the loss that might arise by any claim of the vendor's minor son. (*Schwabe, C. J. and Wallace, J.*) DAVUD BEEVI AMMAL v. RADHAKRISHNA AIYER

44 M. L. J. 309 : 17 L. W. 332 : (1923) M. W. N. 202 : 72 I. C. 81.

32 M. L. T. (H. C.) 263 : 1923 Mad. 467.

—Joint Family—Alienation—Co-parcener—Rights of alienee—Mortgage—Equity.

Under the Hindu Law as administered in the Punjab the interests of a co-parcener cannot be sold for consideration. But a mortgagee has an equity against the interest of the mortgagor. The manager of the family can alienate the coparcenary property for necessary purposes. If the manager happens to be the father he can alienate family property to discharge antecedent debts *i. e.* debts previously incurred wholly apart from the security afforded by the joint family estate. (*Pipon, J. C.*) BHAGAT SINGH v. RAM PARKASH

69 I. C. 602

—Joint family—Alienation—Co-parcener—Gift by—Void.

A gift even of his own share by an undivided co-parcener is invalid. (*Baker, J. C.*) MULLA FAIZ ALI v. MT. HARKUAR

1923 Nag. 334.

—Joint family—Alienation—Father—Liability of family property.

A mortgage of joint family property by the father cannot be enforced against property unless it is established that the consideration was taken for the payment of an antecedent debt independent of the mortgage or for legal necessity. (*Kanhैया Lal, J. C.*) RARAN v. SHEO LAL.

9 O. & A. L. R. 672.

—Joint Family—Alienation—Father—Recital as self-acquisition—Antecedent debt—Justifying necessity.

Where a father transfers property describing it as his self acquisition and it is found that the recital was incorrect but that there was necessity of justifying the alienation can be upheld. 34 A. 296 P. C. dist. 28 I. C. 365 Ret. (*Spencer and Davedoss, JJ.*) VADAMALAI PILLAI v. SUBRAMANIA CHETTIAR. 1923 M. W. N. 57 (2) : 71 I. C. 130 : 1923 Mad. 262.

—Joint family—Alienation by father—son's rights—Auction sale.

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It is only when joint family property has passed out on account of an antecedent debt or sold by public auction that the sons cannot challenge the alienation unless they show the debt was tainted with immorality. Where the sale is not at a public auction, the alienee has to justify the alienation by showing antecedent debt or legal necessity. (*Lindsay and Sulaiman, JJ*) SAHEB SINGH v. GIRDHARI LAL, 45 A 576 L. R. 4 A, 284 : 73 I. C. 1024 : 1924 A. 24.

———*Joint family—Alienation—Father—Suit by son to set aside—Form of decree—Consideration partly binding.*

Where a Hindu son sues to set aside an alienation of ancestral property made by his father on the ground that it is not binding upon him and the Court finds that out of the sale consideration, a portion was not required for family necessity the plaintiff would be entitled to a decree for possession subject to his re-imbursing the purchaser to the extent to which the sale was a valid sale. The form of decree in a case of this kind should, therefore, be a decree for possession in favour of the plaintiff subject to his paying to the purchaser so much of the consideration as was required for the necessity of the family, (*Mears, C. J. and Banerji, J.*) DWARKA RAM v. JHULAI PANDE. 45 A. 429 : 9 O. & A. L. R. 494 : 72 I. C. 134 (1) : 1923 A. 248.

———*Joint family—Alienation—Father—Portion of consideration not binding—Sale when set aside.*

In a suit by a son to challenge a father's alienation, where a portion of the consideration is not binding, what the Court should look at is the amount of the consideration in regard to which no legal necessity is established. If this amount is so trifling that it can be left out of account the sale should be upheld; other wise it should be set aside. Another test applied is whether the amount for which legal necessity is established could have been raised without the alienation sought to be impugned. (*Daniels, J*) CHANDRIKA SINGH v. BHAGWAT SINGH. L. R. 4 All 545.

———*Joint family—Alienation—Father—Setting aside After-born son—Rights of.*

Where a suit to set aside an alienation by a Hindu father of ancestral property is brought by a son who was in existence at the time of the alienation and before the suit is decided another son is born, such son also acquires a right to set aside the sale. 19 A. L. J. 978 followed. (*Dalal, J. C.*) JANG BAHADUR SINGH v. RANJIT SINGH. 10 O. L. J 353.

———*Joint family — Alienation—Father — Consideration—Small portion not for necessity—Suit by sons to set aside sale—Form of decree.*

Where the sons of a Hindu father sued to set aside alienations of the family property made by him and it was found that a portion of the consideration was not a family necessity, held that the sales ought not to be set aside as being unnecessary unless it can be proved or reasonably presumed that the sale of a lesser area for the exact amount required for necessity was feasible, 26 I. C. 418; 2 Lah 357; 6 I. C. 207; 1 B. L. R. 201

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followed. (*Martineau and Brasher, JJ.*) GOKHA RAM v. SHAM LAL. 3 Lah. 426 : 1923 Lah. 268.

———*Joint family — Alienation—Father — Antecedent debt—Mortgage*

The definition of an antecedent debt as one "incurred irrespective of the credit obtainable from joint family property" is to be regarded as one to be construed in the light of the particular facts before a Court and as not excluding from the category of antecedent debt money borrowed on a hypothecation bond where the personal liability continues irrespective of the security. A usufructuary mortgagor is not as such personally liable to pay the loan. It is open to the alienee to invoke the antecedency of the father's debts to support an alienation as against the son even during the father's life-time. 39 A. 437 23 O. C. 211 referred to. (*Ashworth, J. C.*) JAMNA PRASAD v. BALBHADDAR. 25 O. C. 388 : 9 O. L. J 601; 74 I. C. 353 (2) : 1923 Oudh 147.

———*Joint family — Alienation—Father—Setting aside—Burden of proof.*

It is only when the property has passed out of the family on account of an antecedent debt or where it has been sold by public auction, that the sons cannot challenge the alienation unless they show that the debt was tainted with immorality. It is not correct to say that in every case where the property has passed out of the family (though under a private sale not in lieu of any antecedent debt and even when the legal necessity has not been established), the sons cannot challenge it unless they show that the debts were contracted for immoral purposes. Where a property has been sold by a father and the sons bring a suit to recover it, and apparently the property has not been sold away at public auction, then it lies upon the transferee to justify the alienation of the estate by showing that the debt was in lieu of some antecedent debt or that the alienation was for some legal necessity. (*Lindsay and Sulaiman, JJ.*) SAHEB SINGH v. GIRDHARI

45 A 576 · L R 4 A 284 : 73 I. C. 1024 : 1924 A. 24.

———*Joint family—Alienation — Father—Mortgage—Decree against—Suit by son to set aside—Decree on mortgage—Effect of.*

Except in cases where joint ancestral property has passed out of the joint family either under a conveyance executed by the father in consideration of an antecedent debt or in order to raise money to pay off an antecedent debt under a sale in execution of a decree for the father's debts and in no others, the sons are not under an obligation to show that the debts represented by a mortgage executed by the father were debts which were contracted for immoral or other purposes not binding on the estate. A decree, unless it is binding on the sons, does not improve the position of the creditor any more than a sale which a father effects in order to pay a debt incurred by himself on the security of the mortgaged property. The exception to the general rule that no manager, guardian or trustee can be entitled for his own purposes to dispose of the estate, which is under his charge, cannot be extended where a liability under a mortgage merges into a decree, unless that decree can by any rule

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of law be held to be binding on the other members of the family. If a mortgage is not valid so far as it purports to encumber the joint family property, it cannot become a just and legal consideration, if, in the absence of the sons of the mortgagor a decree has been obtained on foot thereof against the mortgagor, otherwise the protection intended for the junior members of the family can in that way be easily circumvented and become illusory. (*Kanhaya Lal, J. C.*)  
**GANGA BAKSH SINGH v. RAGHUBAR SINGH.**  
 26 O. C. 299 : 9 O. & A. L. R. 359 : 73 I. C. 27 :  
 10 O. L. J. 61 : 1923 Oudh 182

——— *Joint family—Alienation — Father—Mortgage by—Public auction sale—Rights of parties.*

Where joint family property has passed out either under a conveyance executed by the father in consideration of an antecedent debt or a sale in execution of a decree against the father, the sons cannot recover the property unless they show the debts were contracted for immoral purposes and the purchasers had notice of the same. Where the sale was a public auction sale and the sons could safeguard their rights if they had taken steps in time, they cannot afterwards question the rights of the purchaser by challenging the validity of the original mortgage executed by their father. (*Kanhaya Lal, J.*) **JADUBIR v. GAJADHAR.** 21 A. L. J. 809

——— *Joint family—Alienation — Father—Mortgage—Sons' liability.*

There is a distinction between the sons' liability under a mortgage executed by a father of a joint Hindu family and his remedy after proceedings taken against the father on foot of the mortgage.

In the case of a joint Mitakshara family consisting of a father and minor sons, the father is necessarily the manager of the joint family, and as such, for all purposes, is a representative of the family. In the case of a joint Mitakshara family where the father, the managing member mortgaged family property for an antecedent debt and a suit was brought and decree obtained against the father, such suit and decree should be regarded as instituted and pronounced against him, in his representative capacity; and if a son after a decree being obtained against the father, upon a mortgage executed by the father, sues to have it declared that his share is not liable to satisfy the said decree, or after a sale in execution of such a decree, sues to recover possession of his share, he cannot succeed, unless he proves that the debt was contracted for immoral or illegal purposes, or that the debt was of an illusory character.

The rule as laid down in *Suraj Bansi Koer's* case is not limited to the cases in which the property had passed out of the hands of the family and gone into the hands of persons who were neither previous creditors when the sale is a private alienation nor judgment-creditors when the sale is by public auction. (*Dalal and Simpson, A. J. C.*) **RUP KISHORE v. KANHAIYA LAL.**  
 26 O. C. 266 : 10 O. L. J. 141 :  
 9 O. & A. L. R. 384 : 74 I. C. 563 : 1923 Oudh 227

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——— *Joint family — Alienation — Father—Mortgage without legal necessity or antecedent debt.*

A mortgage which is not binding on the estate in the father's life time would not be binding on the sons, for the mere circumstance of pious obligation of Hindu sons to pay their father's debts. 21 C. W. N. 957 (P. C. Foll. (*Dalal, and Daniels, A. J. C.*) **RAM SARUP SINGH v. JAGESHUR SINGH.**  
 26 O. C. 341 : 9 O. & A. L. R. 157 :  
 73 I. C. 466 : 1923 Oudh 150.

——— *Joint family — Alienation — Father—Decree—Sons challenging—Burden of proof.*

Where the mortgagees obtained a decree for foreclosure against a Hindu father and the sons sue for redemption, the burden is on them to prove the invalidating circumstances. Case law as to what should be proved reviewed (*Dalal, J. C. and Simpson, A. J. C.*) **MAHADEO BAKSH SINGH v. SURAJ BAKSH SINGH** 10 O. L. J. 252.

——— *Joint family—Alienation — Father—Execution of mortgage by all adult members*

All the adult members of a joint Hindu family joined in executing a mortgage reciting necessity for the loan. Twelve years later some of the surviving executants of the mortgage and the widow of another executant renewed the mortgage, the consideration for the renewed mortgage being the original mortgage deed. In the interval between the first and the second mortgage, several sons had been born to the executants of the mortgage. Held that the sons who had been born subsequently to the first deed of mortgage could not question the binding character of the transaction, 33 A. 283, 44 A. 193 Ref. (*Mears, C. J. and Pig-gott, J.*) **PARTAB, SINGH v. BOHRA NATH.**  
 45 All. 49 : 1923 A. 197.

——— *Joint family—Alienation—Father—No necessity—Effect on Mortgage.*

Where a mortgage of joint family property executed by a Hindu father is found not to have been made for purposes laid down in Hindu Law the mortgage as such becomes void *ab initio* referred to. (*Simpson, A. J. C.*) **UDAIRAJ SINGH v. RAMUDIT TEWARI** 10 O. L. J. 376.

——— *Joint family—Alienation by father—sons when bound—Principles guiding—Pious Obligation.*

The Privy Council in this case lay down the following propositions:—

(1) The managing coparcener of a joint undivided estate cannot alienate or burden the estate *qua* manager except for purposes of necessity, but

(2) If he is the father and the reversionaries are the sons, he may by incurring debt so long as it is not for an immoral purpose, lay the estate open to be taken in execution proceedings upon a decree for the payment of that debt.

(3) If he purports to burden the estate by mortgage, then unless that mortgage is to discharge an antecedent debt it would not bind more than his own interest

(4) Antecedent debt means antecedent in fact as well as in time, that is, the debt must be really independent and not part of the transaction impeached.

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(5) There is no rule that this result is affected by the question whether the father who contracted the debt or burdens the estate is alive or dead. (*Lord Dunedin*) *RAJA BAHADUR RAJA BIRJ NARAIN RAI v. MINGLA PRASAD RAI*.

21 A. L. J. 934 (P. C.) : 46 M. L. J. 23 : 19 L. W. 72 : 33 M. L. T. (P. C.) 437.

———*Joint Family—Alienation—Gift subject to mortgage—Donee if can impeach mortgage for want of legal necessity.*

A donee of joint family property subject to an antecedent mortgage cannot question the necessity or propriety of the mortgage. 11 N. L. R. 1 Ref. (*Pradeaux, A. J. C.*) *NARAYAN v. SHANKER LAL*. 1923 Nag. 127.

———*Joint family—Alienation—Invalid mortgage if good consideration for later sale—Antecedent debt—Liability of grandsons. See (1922) DIG, COL. 640.* *CHET RAM v. RAM SINGH*.

21 A. L. J. 114 : 37 C. L. J. 79 : 27 C. W. N. 150. (P. C.)

———*Joint family—Alienation—Debts—Necessity—Speculative litigation*

Where the manager of a joint Hindu family borrows money for the purposes of conducting a speculative litigation which is successful might enure for the benefit of the family, the debts cannot be justified on the ground of legal necessity. If the litigation resulted in benefit to the estate the debts would be binding on equitable principles 4 A. 532 : 44 I. A. 147 : referred to. (*Raftiq and Lindsay, JJ.*) *BHAGVAN DAS NAIK v. MAHADEO PRASAD PAL*. 45 A. 390 : 21 A. L. J. 271 : 71 I. C. 959 : 1923 A. 298 (2).

———*Joint family—Alienation by manager—Necessity—Proof.*

The alienee from the manager of a Hindu family has to prove that he made the necessary enquiries as to the necessity for the alienation and satisfied himself as to the same. When such enquiry is made and he acts *bona fide*, is not bound to see to the consideration being applied to meet such purpose. The burden of proving *bona fides* and enquiry is on him. (*Scott Smith and Fforde, JJ.*) *RODHA RAM v. AMAR CHAND*. 4 Lah. 208.

———*Joint family—Alienation—Manager—Necessity—Proof of—Recital—Value of.*

Where an alienation by the manager of a joint Hindu family is impugned by the junior members, the recitals in the deed of sale are not sufficient by themselves to establish necessity but they are clear evidence of the representation made by the manager. Where proof of actual enquiry has become impossible, the recital coupled with the circumstances, such as would justify the reasonable belief that an enquiry would have confirmed the truth of the recital is enough to support the necessity alleged. A representation by the father as to the existence of antecedent debts, is on the same footing as a representation by the manager as to necessity. The real value of the representation is that it indicates the scope of the enquiry that has been or may be presumed to have been made. 5 O. L. J. 629 : 29 O. C. 211 explained 36

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A. 187 : 43 I. A. 249 referred. (*Ashworth, J. C.*) *JAMNA PRASAD v. BALBHADAR*. 25 O. C. 383 : 9 O. L. J. 601 : 74 I. C. 353 (2) : 1923 Oudh 147.

———*Joint Family—Alienation by manager—Necessity proved in part—Position of purchaser.*

It is not always possible for a manager to sell or mortgage a property for the exact amount required for family necessity but that would not justify him to mortgage or sell property for a larger amount than is absolutely necessary. Rs. 80 out of the total consideration of Rs. 400 was held not to be such a small amount as might be neglected in considering the question of the valid necessity for the alienation. The deed was set aside and plaintiff was made to pay Rs. 320 to the purchaser (20 A. L. J. 621 : 27 All. 494 and 25 All. 330, *Full.*) (*Gokul Prasad, J.*) *MATADIN TEWARI v. SURAJBALI SINGH*. 1923 A. 522.

———*Joint family—Alienation—Manager—Legal necessity.*

To save other properties from sale at execution, the manager sold the mortgaged property. But full purchase money could not be paid by the purchaser and the manager became a surety to the mortgage executed by the purchaser in order to be able to find money to set aside the execution sale before confirmation.

*Held*, there was legal necessity for the last transaction and the manager was justified in becoming a surety to the mortgage. (*Das and Adams, J.*) *KANHAI LAL KHEMKA v. THAKUR PRASAD SINGH*. 1923 P. 268.

———*Joint family—Alienation—Manager—clause in adoption deed giving father free power of alienation—Effect—Bombay School.*

In a deed of adoption, the adoptee agreed not to object to his adoptive father's mode of management. He afterwards objected to certain alienations as not binding on him. *Held*, the alienations should be tested by the standard of a father's powers in spite of the deed and the son's share will not pass if it is an unauthorised alienation. (*Macleod, C. J. and Crump, J.*) *BALAPPA GHENAPPA v. AKKUBAI*.

74 I. C. 220 (2).

———*Joint family—Alienation—Manager—Family benefit.*

There is no rule of Hindu Law proper warranting the manager of a joint Hindu family to alienate property for the benefit of the estate. The original law allows such a thing only to arrest distress in the family. But British Indian Law has allowed the validity of such alienations. (*Gokul Prasad, J.*) *SHANKAR SAHI v. BINCHU RAM*. 74 I. C. 18 (2) : 1923 A. 569.

———*Joint family—Alienation—Manager by—No necessity—Jurisdiction of court to grant equitable relief.*

Where an alienee from the manager of a joint Hindu family fails to enquire and satisfy himself of the truth of the representations made by the manager, there is no room for the application of any equitable doctrine based on the representations. If notwithstanding the representation by the manager, he agrees to make good that

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representation if necessary by partition or otherwise the court has power to compel him to do that which he undertook. In the absence of any such undertaking the court has no power in a suit brought to set aside an alienation of joint family property to direct that the share of the executant be available for the alienee the transaction being void altogether. 39 A. 500 fool. 13 C W. N. 815, 14 C W. N. 552 diss. (*Das and Bucknill, JJ.*) *JATADARI SINGH v. DUKHI SINGH*. 4 Pat L T, 64, 72 I. C. 1053; 1923 P. 197.

———Joint family—Alienation—Manager—Necessity—Purchase of fresh properties—Minor co-parceners if bound. See (1921) DIG. COL. 627. *SUBRAMANIA CHETTY v. CHIDAMBARA MUDALI*. 69 I. C. 756.

———Joint family—Alienation—Manager without necessity—Voidable not void.

An alienation by the manager of a joint Hindu family without necessity is not absolutely void. It is voidable at the instance of the persons whose interests are affected by it, namely, the co-parceners in the property. 45 M. 449, 46 M. 40 Ref (*Ryves and Daniels, JJ.*) *JAGEPHAR PANDE v. DEODAT PANDE*. 45 A. 654, 21 A. L. J. 608; L. R. 4 A, 324, 9 O. & A. L. R. 879, 74 I. C. 931; 1924 A. 51.

———Joint family—Alienation—Manager Necessity—Alienation of properties subject to mortgage—Rights of.

Where a mortgage is executed by the manager of a joint Hindu family and subsequently equity of redemption is sold by all the members of the family it is open to the transferee to show that the mortgage was without necessity and therefore not binding on the family. A transaction which is voidable remains good so long as it is not challenged by the members who have the option to have it set aside. It is for them to exercise or not to exercise the option. If without exercising the option and in fact admitting the validity of the mortgage they transfer the property, the transferee cannot be allowed to say that he has acquired that option by the transfer. (*Lindsay and Sulaiman, JJ.*) *INAYAT ILAHI v. HARDEO SAHAL*. 45 A. 692; 21 A. L. J. 610; 74 I. C. 325; 1924 A. 29.

———Joint family—Alienation—Manager—Necessity—Proof of—Non-production of accounts—Effect of.

The burden of proving necessity for a loan contracted by the manager of a joint Hindu family is on the creditor who has advanced money on the security of the joint family property. But if he is unable to establish legal necessity, he is still entitled to succeed if he shows that there was a representation made to him as to the existence of a legal necessity and that he made an honest inquiry and that he was satisfied that there was such a necessity. It is very often impossible for the creditor to compel third parties to produce their account books and the plaintiffs cannot fail because the third parties did not produce the account books. (*Das and Adami, JJ.*) *CHINTAMANI MAHAPATRA v. SATYABADI KAR*. 1 Pat. 715. 70 I. C. 226; 1923 P. 71.

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———Joint family—Alienation—Manager—Necessity—High rate of interest

It is incumbent upon those who support a mortgage made by a manager of a joint Hindu family to show, not only that there was necessity to borrow, but that it was not unreasonable to borrow at such high rate of interest and upon such particular terms as are contained in the mortgage. Where it is not shown that there was necessity to borrow on such a high rate of interest that rate cannot stand and the Court is empowered to reduce the contract rate to a reasonable rate of interest. (*Simpson and Wazir Hasan, A.J.C.*) *BABU BASANT RAI v. LALA KESHO RAM*. 9 O. L. J. 612; 74 I. C. 346; 1923 Oudh 139.

———Joint family—Alienation—Manager—Necessity—Subsequent partition—Security of mortgagor's share.

A mortgage of the whole or a share of the joint family property of a mitakshara family is void and inoperative as against the property hypothe- cated and gives the mortgagee no right even against the mortgagor's undivided share. Where the mortgagor's interest has subsequently been separated from that of the other members of the family, it may become available as security for the mortgage debt. (*Simpson and Dalal, A.J.C.*) *RAM RATAN v. GANGA BUKSH SINGH*. 26 O. C. 245; 10 O. L. J. 193.

9 O. & A. L. R. 222; 71 I. C. 581; 1923 Oudh 265.

———Joint family—Alienation—Manager—Mortgage of ancestral property—Consideration used for legal necessity—Suit by reversioner.

Where money was borrowed by mortgaging ancestral property to fight out successfully an uncontested pre-emption suit. Held the act in borrowing the money to obtain the land by pre-emption was an act of good management and that it must be held that the loan was raised for valid necessity. (*Scott-Smith and Fford, JJ.*) *PARTAB SINGH v. HAKIM SINGH*.

4 Lah. 171; 75 I. C. 87; 1923 Lah. 480.

———Joint family—Alienation by manager—Setting aside—Major portion of the consideration binding—No misconduct—Form of decree.

Where in a suit by a minor to set aside an alienation of joint family property by his father it is found that out of the recited consideration of 500 rupees only Rs. 320 was paid for necessity and the balance was not so paid, on a question arising as to the proper form of decree to be passed in the case, Held, that as the value of the properties had appreciated considerably and as there was no misconduct on the part of the purchaser, the properties should be sold and the proceeds distributed in the shares to which the parties were entitled. (*Sir Walter Schwabe, C.J.*) *KUTTUVA MEENATCHI AIYAR v. DARMIAH RANGA CHARLU*. 1923 Mad. 120.

———Joint family—Alienation—Mortgage by manager—Necessity—Oaus. See (1922) DIG. COL. 641 *PIARE LAL v. SUNDER SINGH*. 44 A. 756.

———Joint family—Alienation—Mortgage—Necessity—Proof of.

In a case where a mortgagee wishes to enforce a charge against the family property the burden

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lies on him to satisfy the court that the mortgage transaction had been entered into for family necessity or in lieu of antecedent debt or with the consent, express or implied, of all the members of the family. A long series of renewals of mortgage transactions extending for over a generation without any protest by any member of the family would show its acquiescence, and raise a fair presumption, that if there had not been a valid necessity for them, some objection would have been raised. (*Lindsay and Sulaiman, JJ.*)  
 INAYAT ILAHI v. HARDEO SAHAL. 45 A. 692 :  
 21 A. L. J. 610 : 74 I. C. 325 : 1924 A. 29.

———*Joint Family—Alienation—Necessity—Antecedent debt—Exorbitant rate of interest—Liability of other members—Adult member joining in execution—Presumption of necessity—Setting aside alienation—Equities*

An alienation of joint family property effected by the concerted action of all the members of the joint family who had attained majority at the time raises a presumption in favour of such alienation having been made for real family necessity. Where the rate of interest specified in a mortgage is high and there is, in addition, a provision for a penalty on non-payment of interest punctually, the provision for compound interest and the penalty might be regarded as improvident and therefore not binding on the minor members of the joint family. The existence of an antecedent debt of the father does not justify his alienating the whole of the family property at a sum considerably less than the market value.

Where in a suit by the sons to avoid an alienation, the debt was partly for binding necessity, the plffs. are bound to discharge the binding portion of the debt before obtaining possession of the property alienated. (*Piggott and Walsh, JJ.*)  
 GOVIND DASS v. RAM CHARAN LONIA.

1923 A. 235.

———*Joint family—Alienation—Necessity—Burden of proof.*

The principle that where property has passed out of a joint Hindu family, the burden lies on the plaintiff (son) to prove that the transfer was made for an immoral purpose by the manager of the family applies only where the property has passed out of the family by foreclosure or sale in execution of a decree or where such a decree has been passed and new rights have come into existence. Where there has been a transfer for cash down and the son contests the legality of the sale the burden lies on the vendee to prove the valid nature of the consideration. (*Dalal, J. C.*)  
 JANG BAHADUR SINGH v. RANJIT SINGH.

10 O. L. J. 353.

———*Joint family—Alienation—Necessity—Burden of proof on purchaser. See (1922) DIG. COL. 640 RAM SARUP SINGH v. RAM SARAN SINGH.*

69 I. C. 845.

———*Joint family—Alienation—Necessity—Charge of Murder—Money raised for defence.*

Where a Member of a joint Hindu family stood charged with murder and in order to defend himself he raised funds by charging the family properties, the alienation is justified by legal neces-

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sity. 26 M. L. J. 528, 34 A. 4 Ref. Where a member of the joint family sues for a declaration that a charge created upon the family property should be declared null and void on the ground that it was created without legal necessity the plaintiff should give *prima facie* evidence before the creditor is called upon to give evidence with regard to the validity of his document on which the claim is based. (*Rifique and Piggott, JJ.*)  
 LALA RAM RAGHUBIR LAL v. DIP NARAIN SINGH  
 45 A. 311 : L. R. 4 A. 380 9 O. & A. L. R. 349 :  
 71 I. C. 749 : 21 A. L. J. 168 :  
 1923 A. 287

———*Joint Family—Alienation—Necessity—High rate of interest. See (1922) DIG. COL. 643. BINDESHRI PRASAD v. JAG. PRASAD RAI.*

69 I. C. 758.

———*Joint family—Alienation—Necessity—Minor Co-parcener*

A sale of a minor co-parcener's share of joint family property by the manager could be justified only on the ground of necessity. It is going too far to say that a manager of a joint Hindu family can justify a sale of joint family property merely on the ground that the sale at the time appeared to be advantageous. 44 I. A. 147 referred to. (*Macleod, C. J. and Crump, J.*)  
 VISHNU VISVANATHA v. RAM CHANDRA.  
 25 Bom. L. R. 508 :  
 73 I. C. 1017 : 1923 Bom. 453

———*Joint family—Alienation—Necessity—Not proved—Alienee's rights—Suit by surviving member for recovery of property alienated—Allotment of property alienated to vendee—Conditions—Mesne profits—Plaintiff's right to—Manager—Sale by—Voidable and not void.*

An alienee from an undivided co-parcener has a right to sue for the partition of the family property and to recover his alienor's share, in the case of a sale of an undivided share, that share, and in the case of a sale of a specific item of property, an equitable right to have that property assigned, if possible, to his alienor's share. The share of the alienor which passes to the alienee is the share to which the former was entitled at the date of alienation. In a suit by a co-parcener for the recovery of the property alienated by another co-parcener or for partition, the alienee is entitled to claim partition, if it can conveniently be done.

In a suit by a grandson to recover possession of properties sold by his deceased grandfather, the Court below held that the sale was not for necessity and gave a decree to the plaintiff for a division of the property into two parts and for recovery by plaintiff of one-half with mesne profits from the date of sale. On appeal by the alienee it appeared that the plaintiff was the only surviving member of the family, and that, at the date of the sale, the grandfather was entitled, as and for his share, to property at least equal in value to the property sold and that there would be no inconvenience in allotting entire property to the alienee. Held that the alienee was entitled to retain the whole of the suit property, that the plaintiff's suit should have been dismissed, and that the plaintiff was not therefore entitled to any mesne profits.

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*Held jurih r* that, the sale being by a manager the plaintiff would in no event have been entitled to mesne profits before the date of plaint (*Philips and Venkatasubba Rao, JJ*) RAMASWAMI AIYAR v VENKATARAMA AIYAR

46 Mad. 815 45 M L J 203 18 L W 188  
(1923) M W N, 786 75 I C 408

—Joint family—Alienation—Necessity—Onus—Antecedent debt—Suit by son to set aside alienation

To lay down a general proposition of law that in every case where a Hindu son brings a suit to recover possession of properties from the transferees from his father the burden lies on him to prove that the transfer was without any legal necessity, is not quite accurate. Of course in every case the burden *prima facie* lies on the plaintiff to establish his case, but where it is either admitted or proved that the plff was the member of the joint Hindu family the property transferred was an ancestral property that it had been transferred without the plaintiff's consent and not apparently in lieu of any antecedent debt or at an auction sale, the burden would lie on the defendant transferee to justify the alienation (*Lindsay and Sulasman, JJ*) BAJNATH RAI v GOKUL RAI

45 A 718 21 A L J 659 L R 4 A 598  
74 I C 498 1924 A 37

—Joint family—Alienation—Necessity—Onus of proof—Presumption

In suits by creditors for the money due from joint family, no general and inflexible rule can be laid down, the presumption proper to be made will vary with circumstances and must be regulated by and dependent on them (*Broadway and Zafar, JJ*.) CHALA RAM v KISHAN CHAND

1923 Lah. 462 (2)

—Joint family—Alienation—Necessity—Pre-emption decree—Payment of.

The fact that a transaction is entered into by all the adult members of the family is sufficient to raise a presumption of necessity. An amount payable under a pre-emption decree is a debt for which the manager is justified in borrowing money on the security of the family property (*Daniels A, J C*) SHAM SHER DATT SINGH v LALTA SINGH, 90 & A. L R 252 72 I C 1000

—Joint family—Alienation—Necessity—Pressure—Existence of debts

In order to justify an alienation made by the father of a joint Hindu family it is not sufficient in law to show that at the time of the alienation debts binding on the family were outstanding. It must be further shown that the alienation had to be undertaken under the pressure of a present necessity for the discharge of the debts. The power of the father to charge the estate can only be exercised rightly in case of need or for the benefit of the estate. The actual pressure on the estate, the danger to be averted or the benefit to be conferred upon it in the particular instance, is the thing to be regarded. These observations apply to a mortgage as well as a sale (*Rafique and Lindsay, JJ*.) BANDHU RAM v. RAM KISHUN, SONAR.

21 A. L. J. 354 L. R. 4 A. 406 :  
73 I. C. 1010 1923 A. 535.

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—Joint family—Alienation—Necessity as regards rate of interest—Plea necessary *See* (1922) DIG COL 643 AINTHU GOPE v THAKHAR SAHU 1 Pat 612

—Joint family—Alienation—Necessity—Recitals—Effect

Recitals in a mortgage document executed by one member of a Hindu family are not by themselves evidence of legal necessity, regarding which there must be some evidence *aliunde* (*Syed Wasim Hasan, A J C*) RAM NATH v RAM HARAKH 10 O. L. J 245 90 & A L R. 857

—Joint family—Alienation—Reversioners joining—Effect

Where a limited owner of properties makes a mortgage and the whole body of reversioners join in the execution and consent to it they cannot afterwards attack its validity (*Miller, C J and Adams, J*) RAGHUNATH PRASAD v BANK OF BEN GAI 69 I C 212

—Joint family—Alienation—Senior brother requiring the deed—If others party

Where the senior brother alone enters into a transaction on behalf of a joint family, it cannot be argued from the absence of the junior member in executing the document that he was not a party to it. A presumption can be drawn under S 114 Evidence Act that he too was a party, though only constructively (*Hallifax, A J C*) GANIA v GANGA PRASAD 6 N L J 269

—Joint family—Alienation—Setting aside—Proceeds of sale divided by members of the family—Effect

Where the proceeds of an alienation made by manager of a joint Hindu family are divided among themselves by the junior members at a family partition it is not open to the latter to impeach the alienation as not being supported by necessity. (*Schwabe, C J and Wallace, J*) DURAISAMIER v SUBBARAYA IYER 17 L W 348

32 M L T (H C) 277 72 I C 322.  
1923 Mad 442 (1)

—Joint family—Alienation—Setting aside—Rights of junior members and alienees

A coparcener in a joint Hindu family property, who establishes that a member of the family has alienated family property without legal necessity, can sue to recover the whole property. He cannot be allowed to sue for his own share of any specific portion thereof for the simple reason that in a Mitakshara joint family no particular share can be predicated as belonging to any individual member. The only concession, which the Courts have so far made in the direction of allowing the share of the transferor to be affected, is where the share of the transferor has been attached in execution of any money-decree. In such a case the Courts have held that a co-sharer who sues for the recovery of the whole property will be allowed to recover, but it will be declared that the purchaser of the interest of the transferor is entitled to a partition and to recover thereafter that portion of the property which represents the transferor's interest therein (*Mullick and Buckmill, JJ*) SHYAM SUNDER RAI v JAGARNATH MISRA, 2 Pat 925 1 Pat L R. 373.

(1923) Pat. 263. 74 I C 758. 1923 P. 590.

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*Joint family—Alienation—Setting aside Rights of members*

A single member of a joint Hindu family whose rights have been infringed by a sale of joint family property, can have the entire sale set aside. Either the vendors were entitled to deal with the joint family property, in which case the alienation is valid or they were not entitled to do so, in which case they cannot alienate even their own share. (*Dalal & Simpson, A J C*) DWARKA PRASAD *v* MT RAM DEI 10 0 L J 360

*Joint family—Alienation—When binding—Mortgage—Antecedent debt*

No mortgage can be enforced against joint family property unless it is established that its consideration was taken for the payment of an antecedent debt independent of the mortgage or for legal necessity. (*Kanhaya, Lal, J C*) PRAN *v*, SHEO LAL. 26 0 C 321

*Joint family—Ancestral property—Onus of proof. See (1921) DIG COL 624 see (1922) DIG COL 645* NIBARAN CHANDRA MUKERJEE *v* NIRUPAMA DEBI 69 I C 476*Joint family—Business not of the joint family—Minor not liable—Others liable in parties to contract. See (1922, DIG COL 645* SADASIVA MUDALIAR *v* HAJEE FAKER MAHOMED SAIT AND SONS. 44 M L J 396 17 L W 288

32 M L T (H C) 99. 27 C W N 677  
37 C L J. 569 72 I C 48 (P C)

*Joint family—Co parccener—Execution sale of the interest of a co-parccener—Remedy of other members—Rights of the purchaser*

Though a creditor of a member of a joint Hindu family can attach and purchase at an execution sale the interest of that member in the family property, is not open to the creditor to take possession of that interest. He acquires the right to compel a partition but not a right to enter into joint possession with the other members of the family. (*Das and Kulwant Sahay, JJ*) MEDNI PRASAD SINGH *v*. NAND KESHWAR PRASAD SINGH 2 Pat 386 1923 P. 451

*Joint family—Father—Compromise affecting family property found invalid—After born sons—Rights of See (1922) DIG COL 645* VENKATA RAO *v*. TULJARAM RAO 74 I, C 765.*Joint family—Father—Decree against—Execution against sons, See (1922) DIG COL 646* MOHAN LAL *v* BALA PRASAD 69 I C, 754*Joint family—Father—Decree against Execution—Right of sons to set aside the sale.*

A decree against the father of a joint Hindu Family cannot be executed against the whole family property if the debt in respect of which the judgment has been obtained was a debt incurred for illegal or immoral purposes. In every other event it is open to the execution creditor to sell the whole of the estate in satisfaction of the judgment obtained against the father alone. Where the properties of the family have been sold in execution of a decree against the father and purchased by a stranger, the sons cannot question the sale unless they can show that the debt was illegal or immoral. 39 A 437. 44 A 368-

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15 A L J 147 referred to, (*Lindsay and Sulai, man, JJ*) RAM CHANDER *v* MAHOMED NUR

45 A 545 21 A L J 485

L B 4 A 237 73 I C 656 1923 A 591.

*Joint family—Father—Decree against—Mortgage—Foreclosure—Sons' right to challenge the decree*

Where the sons bring a suit for a declaration that a foreclosure decree passed against their father is not binding on them on the ground they were not made parties to the foreclosure suit and it is not shown that the mortgage debt was either illegal or immoral, the sons' suit is not sustainable. The mere fact that in the foreclosure suit the father was not described as the manager of the joint family did not make the decree any the less binding on his sons, in the absence of proof that the father acted in a way prejudicial to the interests of the family. (*Kanhayulal, J C*) BHAGWATI PRASAD *v* KALLU RAM 70 I C 941

1923 Oudh 54

*Joint family—Father decree against—Mortgage—Son's interest whether passes See EXECUTION SALE* 25 Bom L R 494*Joint family—Father—Decree on mortgage—Suit by sons to recover*

Hindu sons cannot recover joint family property which has been sold in execution of a mortgage decree against their father without showing that the mortgage debt was for illegal or immoral purposes. 48 C 34, 42 A 38, 39 A 437 Kel. (*Ryves and Daniels, JJ*) SITLA PRASAD *v* MT CHAMELI BAHU 21 A L J 683

L R. 4 A 326 9 0. & A L R 766  
75 I C 316

*Joint family—Father—Insolvency of—Interests of sons—Liability of*

Where a Hindu father governed by the Mitakshara law is adjudicated an insolvent, the interest of the insolvent including that of his sons in the joint family property rests in the Official Assignee. The son must prove such circumstances as would exempt his share of family properties. 3 Lah 329 (F B) foll. *Scott Smith, J*) FIRM OF KALIA RAM JOWANDA MAL *v* OFFICIAL RECEIVER OF GUJRANWALA ESTATE 69 I C 729

*Joint Family—Father—Lease in favour of son—Effect on tenancy right of father*

A son cannot be said to be the managing head of the joint family when the father is alive and actually pays the rent and carries on the cultivation. His tenancy right could not be affected by any lease given to his son. (*Fremantle, S M*) UDIT RAI SUKHDEO L. R. 4 A 131 (Rev)

*Joint family—Father—Powers of—Gift in favour of daughter. See (1922) DIG COL 646* RAMALINGA ANNAVI *v* NARAYANA ANNAVI 37 C. L. J. 15 (P, C)*Joint family—Father and son—Presumption as to jointness*

There is an initial presumption in favour of jointness in a Hindu family and his presumption is particularly strong in the case of a father and his only son. (*Daniels and Lyle, A J. C*) MT PARBATI AND ANOTHER *v*. SAIED MAHOMMAD HADI, 1423 Oudh 31.



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*Joint family — Father Transfer of property Minor sons joining in alienation*

Where a brother and his two minor brothers under the guardianship of their mother execute a transfer of joint family property, in such a case a presumption may arise that the manager (brother) was not acting as the Kartha or manager of the family. But where a father makes a transfer and his minor sons are nominally joined, the presumption is that the transfer has been made by the father in his capacity as manager (*Datal, J, C*) JAGG BAHADUR SINGH v RANJIT SINGH 10 O L J 353

*Joint family — Alienation — Necessity enquiry as to*

The absence of an enquiry as to the necessity is immaterial when necessity has been proved in the case of an alienation of joint family property. (*Broadway and Zafar Ali, JJ*) CHAIRA RAM v KISHEN CHAND 1923 Lah 462 (2)

*Joint family — Manager—Compromise decree—How far binding on sons*

Where there is a compromise decree obtained against a Hindu father, the compromise is no better than an alienation of joint family property and the decree cannot affect the sons' rights in the joint family property (*Datal, J, C*) RAM DAYAL v NIMAR SINGH 26 O C 355

*Joint family—Manager—Contract by a member of the family — Liability of other members*

Where a contract is made by a member of a joint Hindu family, unless it is shown that that member was the manager of the family or that the contract was entered into in the course of the family business or that the other members derived a benefit from it, the other members are not liable on the contract (*Lyle, J, C*) RAMDHIR SINGH v MATA PRASAD 69 I C 846

*Joint family — Manager—Contract for purchase of immoveable property—Specific performance—Minor defendants—No necessity or benefit—Specific performance refused* See SP REL. ACT, S 27 (b) AND (c). 44 M. L J 226

*Joint family—Manager—Debts—business purposes—Necessity—Proof of*

Where the manager of a joint Hindu family mortgages a joint estate, it must be still incumbent on the parties supporting the mortgage to prove that the money raised on the mortgage was required for family purposes. No doubt if the family is carrying on a trading business, it would be very much easier to prove that the money was required for the purposes of that trade, and so for family purposes, than if the family were mere agriculturists (*Macleod, C J and Crump, J*) VITHAL YESHWANT v SHIVAPPA MALLAPPA 47 Bom. 637 25 Bom L R 323 72 I C, 659 1923 Bom 265 (2)

*Joint family—Manager—Decree against*

*Senior member to set aside decree—When has to be proved.*

*And when by the junior member of a joint family to set aside a decree against the manager as fraudulent, he has to show that there was no*

## HINDU LAW—JOINT FAMILY

legal necessity for the debts sued for, and it is not for the creditor to show that there was legal necessity for it.

Where the evidence adduced in a case based on fraud is equally consistent with the allegations of the plaintiff as with the denial of the defendants, a case of fraud is not established (*Das and Buchmill, JJ*) DAMODAR PRASAD v RAM SARUP KUMAR 4 Pat L T 102 (1923) Pat 137 71 I C 843 71 I C 843.

*Joint family—Manager—Hundi executed for family necessity—Liability of other members*

Where the manager of a joint Hindu family executes a negotiable instrument and borrows money for joint family purposes the whole of the joint family property including the share of the junior members would be liable for the hundi.

Whether the rate of interest is unduly high a creditor in order to bind the estate, must prove not only the necessity of the loan but also the necessity to borrow it at so extravagant a rate 20 A L J 233 30 A 394 46 I A 145 referred to (*Ryves and Daniels, JJ*) RAGHUNATH SINGH v SRI NARAIN 45 A 484 21 A L J 323 L R 4 A 211 73 I C 1018 1923 A 424

*Joint family — Manager — Liability to account* See (1921) DIG COL 628 KODALI KRISHNAYYA v KODALI GURUNAYYA 70 I C 146

*Joint family—Manager—Powers of borrowing—Necessity—Interest—Rate of*

The manager of a joint Hindu family has authority to borrow money upon reasonable commercial terms for purposes of necessity and all terms of the mortgage in excess of this necessity, are beyond the scope of his authority. The burden of proving that there was a necessity to pay a rate of interest in excess of the ordinary commercial terms is on the creditor. Where the junior members of the family in their written statement plead absence of necessity for a loan by the manager and that the joint family properties are not liable for the said debt it is open to the defendant to prove that the interest on the loan was exorbitant and far in excess of the ordinary commercial rate and therefore not binding on the family (*Lord Parmoor, J*) RAM BUJAWAN PRASAD SINGH v, NATHU RAM 44 M L J 615 4 Pat L T 29 32 M L T (P C) 129 2 Pat 285 38 C L J 25 (1923) M W N 382 1 Pat, L R 445 18 L W 767 25 Bom. L R 568 L R 4 P C 75 71 I C 933 50 I A, 14 (P C) (1923) P C 37.

*Joint family—Manager—Power to give discharge*

Where a mortgage is executed in favour of the manager and a minor member of the joint family it is competent to the manager alone to give a valid discharge of the mortgage to the debtor on receiving the mortgage money, (*Kanhayya Lal, J, C*) SHEO CHARAN DAS v BRIJ BAHADUR SINGH 26 O C 286

*Joint family—Manager — Promissory note—Liability—of co-parceners.*

## HINDU LAW—JOINT FAMILY

Where a promissory note is executed by a member of a joint Hindu family as manager the other members cannot be made liable on a suit on the promote, though they would be liable for the debt (*Macleod, C J, and Crump, J*) *VITHALRAO v VITHAL RAO*

25 Bom L R 151 72 I C 242 1923 Bom 244

———Joint family—Manager—Right to start new business—Liability to interest *See* (1922) DIG COL 648 *TADI BULLI TAMMIREDDI v GANGIREDDI*

70 I C 337

———Joint family—Manager—Right to sue for a debt due to the family *See* (1922) DIG COL 648 *SUBRAMANIA GURUKKAL v RAMAKRISANA IYER*

70 I C 160

———Joint family—Manager—Suit against—Decree if binding on minor members

Where a suit is brought against the managing member of a joint Hindu family and the other adult members, the decree obtained in the suit is binding on the minor members also though they were not parties to the suit (*Meais, C J and Banerji, J*) *TULSHI v BISHNATH RAI*

21 A L J 175 L R 4 A 134

71 I C 623 1923 A 284

———Joint family—Manager—Suit against Junior members not impleaded—Rights of—Mortgage suit.

A son or grandson cannot escape the effect of a foreclosure decree passed against his father on a mortgage executed for purposes binding upon the family estate merely because he was not impleaded by name in the suit. He is represented by his ancestor. If that ancestor has authority to execute the mortgage he equally has authority to represent his son or grandson in the litigation. The ancestor must be presumed to be the head of that branch of the family which includes his own descendants. It is open to a son who is not made a party to the suit to show that the debt in respect of which the mortgage was executed was not really antecedent in the sense accepted by the Privy Council or that if antecedent, it was for a purpose either illegal or immoral, but where the mortgage was within the scope of the father's authority the sons are bound by the decree. 23 O C 344, 24 O C 218, 38 A 383 47 C 924 referred to (*Dalal and Daniels, A J C*)

*BHAGIRATHI v PANDIT ONKAR NATH*  
10 O L J 185 90 & A L R 166  
72 I C 142 1924 Oudh 17.

———Joint family—Onus to prove joint family

Where separation is proved the onus is shifted on the plaintiff who asserts jointness of proving that the house is joint property (*Campbell, J*) *NARSINGH DAS v UTTAM CHAND*

1923 Lah 392

———Joint family—Presumption—Property

There is no presumption in Hindu law that a joint family possesses property, though there is one that father and son are joint and not separate (*Dalal and Simpson, A J C*) *BABU RAM RAJ SINGH v AVADH BIHARI LAL*

10 O L J 235

1924 Oudh 28

## HINDU LAW—JOINT FAMILY

———Joint family—Presumption—Jointness—Father and only son

There is an initial presumption in favour of jointness in a Hindu family and this presumption is particularly strong in the case of a father and his son 18 A 176, 23 O C 1 Rel (*Daniels and Lyle A J C*) *MT. PARBATI v SAIYED MAHOMED HADI*

1923 Oudh 31

———Joint family—Presumption of separateness—Entry of widow's name in revenue papers

The mere fact that a widow's name was entered in the revenue papers does not necessarily raise the presumption that she is the widow of a separated Hindu (*Lindsay and Sulaiman, JJ*) *UMAN SHANKER v. MT AISHA KHATUN*

45 A 729 74 I C 869,

———Joint family—Property—Acquisitions—Money spent on litigation as a result of which property was obtained *See* (1922) DIG COL 636 *CHETTIASAM ATCHAMMA v. CHELASAMI VENKATA SUBBAYYA*

70 I C 748

———Joint Family—Acquisitions—When joint family property—Nucleus—Existence of

The mere existence of a family nucleus will not impress the acquisitions of a member of the family with the character of joint family property unless it is shown that the acquisitions could have been made from the income derived from that nucleus. Consequently where a member of a joint Hindu family obtained on partition with his brothers properties worth 200 rupees and has allotted debts to the extent of Rs 500 and he subsequently acquired as Dubash (agent) of certain big commercial firm, *Held*, that the acquisitions were his own self-acquisitions and that the nucleus did not impress them with the character of joint family property. 27 M L J 677, 33 A 677 Ref 35 A 564 27 M 228, 2 Lah 40 Rel (*Spenner and Devadoss, JJ*) *VADAMALAI PILLAI v SUBRAMANIA CHETTIAR*

(1923) M W N 57 (2)

71 I C 130 1923 Mad 262

———Joint family—Property—Blending of joint with separate property makes property joint

When members of a joint family, who have control over the joint estate, blend that estate with property in which they have separate interests, the whole property becomes joint. Whether separate estate is brought into a joint family account or the joint family property is brought into the separate accounts, the result is the same. The real question for determination is what is the conclusion to be drawn when people united, by bonds of close relationship and living as a joint family, draw for the joint family expenses out of a fund enriched by other contributions. If the members of a joint Hindu Family confuse the incomes of their joint properties with their separate properties, their intention presumably is that the properties acquired with such mixed-up

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funds are for the joint family, (*Lord Buckmaster*),  
RAJANIKANTA PAL v JAGAMOHAN PAL

50 Cal 439 44 M L J 561  
25 Bom L R 683 37 C L J 515  
(1923) M W N 438 27 C W N 997  
18 L W 387 9 O & A L R 805  
73 I C 252 50 I A 173  
32 M L T (P C) 149  
L R 4 F C 70 (1923) P C 57

———Joint family—Property—Gains made by  
a member—Separate amounts

When the uncle at the time of his death was a  
Tahsildar under the Punjab Government, and  
the plaintiff, was living with his father-in-law  
in Ludhiana and was carrying on a money lend-  
ing business there and he and his uncle were  
therefore living apart, and there was no commen-  
sality *Held* there would, therefore be no strong  
presumption that they were joint. The acquisi-  
tion of distinct property by a member of an un-  
divided Hindu family without the aid of joint  
funds is his self-acquired property, and is not  
subject to partition. Hindu Law texts regarding  
gains of science establish it as a rule of Hindu  
Law that the ordinary gains of science are divi-  
sible when such science has been imparted at  
the family expense, and acquired while receiving  
a family maintenance, but that it is otherwise  
when the science has been imparted at the ex-  
pense of persons who are not members of the  
acquirer's family. Acquisition, made as a  
Government servant, which is kept quite separate  
from the joint family funds is impartible and he  
would deal with it as he chosen. When a person  
made deposits out of his separate acquisition in  
the Alliance Bank of Simla in the joint names of  
himself and of his wife and made them payable  
to either or to the survivor he intended that there  
should be a provision for his widow in case he  
died. (*Scott-Smith and Mohi Sagar, JJ*) MT  
UTTAM DEVI v DINA NATH 1923 Lah 359

———Joint family—Property—Nature of—  
Nucleus of ancestral property—Burden of proof

When there is a nucleus of joint family prop-  
erty with the assistance of which subsequent  
acquisitions has been made, the burden of proving  
that any particular property is separate lies on  
the person who asserts it. Such a nucleus need  
not be a substantial one but must be yielding  
some income (*Lindsay and Daniels, JJ*) SUKH-  
NANDAN v BRIJNANDAN 73 I C, 1052  
1923 A. 574

———Joint family—Property—Nattukottai  
Chetty—Money received for giving son in adop-  
tion—If enures to family.

In the absence of a custom, money paid to a  
Nattukottai Chetty for giving his son in adoption  
enures to the benefit of the whole family and is  
not the self acquisition of the father (*Aylmer  
and Odgers, JJ.*) RAMASWAMY CHETTY v.  
BALANIAPPA, 18 L W 656. (1923) M. W. N 841

———Joint family—Property—Presumption.  
Where property stands in the name of a  
female member of a joint Hindu family, there is  
no presumption that it is joint family property  
and not her absolute property. Where title deed

## HINDU LAW—MAINTENANCE

is in her name, the onus is on the person who  
sets up that the apparent is not the real state of  
things (*Mookerjee and Chotzner, JJ*) BHUBAN-  
MOHINI DARI v KUMUDBALA DASI

28 C. W. N. 131

———Joint family—Property—Question of  
status—Burden of proof

An agreement of Family settlement was follow-  
ed by an arbitration award and the award was  
duly registered. Under the award the house in  
dispute was assigned to the widows of one of the  
brothers. *Held*, the onus was shifted on to the  
plaintiffs' reversioners to prove that the property  
was joint Hindu family property at the time of  
alienation of the house in question by widow. A  
decree for maintenance against the male mem-  
bers of the family on the ground that the widow  
was entitled to be maintained out of her hus-  
band's share of the joint property does not help  
the plaintiffs to prove that there was any joint  
Hindu family. The house in suit might very well  
be joint family property without the family being  
joint in the true sense (*Scott Smith and  
Motisagar, JJ*) KARAM CHAND v MT HAR  
KVAR 1923 Lah 371

———Joint family—Property—Self acquisition  
Burden of proof—Existence of nucleus See (1922)  
DIG COL 650 RAJANGAM AIYAR v RAJANGAM  
AIYAR 46 Mad 373 27 C W N 561  
44 M L J 745 21 A L J 460  
37 C L J 435 (P C)

———Joint family—Property—Self-acquisition  
—Repurchase of property which has passed out  
of the family

Where a member of a joint Hindu family pur-  
chases with his own funds property which has  
validly and voluntarily passed out of the family  
by a conveyance, the property so purchased is  
the absolute and self-acquired property of the  
member 5 M H C R 156 Ref (*Schwabe, C J  
and Wallace J*) MAGDOON MUHAMMAD  
MARKAYAR v BANSILAL 71 I C 855  
1923 Mad 248

———Joint family—Representation in suits—  
Other members if necessary parties See (1922)  
DIG COL 649 KALIPADA DAS v RAJA SATI  
PRASAD GARGA BAHADUR 27 C W N 372  
72 I C, 722

———Joint family—Rights of junior members  
Mortgage for defending criminal case—Validity  
See (1922) DIG COL 650, DHANUKDHARI SINGH  
v RAMBIRCH SINGH, 70 I C 391

———Limited owner—Alienation—Necessity  
—Daughter—Mother's debts

Recitals in a deed of sale by a Hindu limited  
owner are not in themselves evidence of neces-  
sity 44 C 186 followed. It is not competent to  
a daughter to alienate the estate for her mother's  
debts so as to bind the ultimate reversioners. The  
reversioners are in no way bound by a decision  
against the daughters (*Stuart, J.*) SITA RAM v  
REWA RAM. 71 I C, 390 (1) 1923 A 366

———Maintenance—Claim under will—  
Liability of step-son.

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Where a Hindu lady claims maintenance under the will of her deceased husband she can enforce the claim against the son as well as the step-son 16 C 758 dist (*Mookerjee and Chotsner, JJ*)  
PULIN BEHARI DEY v SATYA CHARAN DEY  
70 I C 548 1923 Cal 79

———Maintenance—Daughter in law—Right to get maintenance from husband's family—Extent of

A widowed daughter in law has no legal right to maintenance as against the self acquired property of her father-in-law if her husband died during the life time of her father-in-law, 2 Beng L R. (A. C J) 15, 57 M 396 Ref.

But although the obligation of the father-in-law to maintain his widowed daughter-in law is only moral and not legal, when he has no ancestral assets in his hands the position of the heir who takes his estate by inheritance is different. What was a moral obligation in respect of the father ripens into a legal obligation when the estate passes into the hands of his heirs 11 A 194, 29 C, 557, Ref.

The plaintiff is not entitled to evade liability merely because he received the estate of his father not by inheritance but by way of gift during his lifetime (*Mookerjee and Chotsner, JJ*) GOPAL CHANDRA PAL v, KADAMBINI DAS 73 I C 235

———Maintenance—Partition of joint family properties—Provision for maintenance

When joint property is partitioned, provision may be made for the maintenance of such female members of the family as are entitled to maintenance from the estate (*Mookerjee and Chotsner, JJ*) GOPAL CHANDRA PAL v KADAMBINI DAS 73 I C 235

———Maintenance—Right to avarudha Stree—Concubine—Continuous keeping

A continuously kept concubine of a deceased Hindu is entitled to claim maintenance from his estate, even though she had, prior to her cohabitation with the deceased, been living with another and had several children 10 B H C R, 381, 12 Bom H C R 229, 12 B 26, 26 B 163 Ref. (*Shah, A C J and Crump J*) BAI MONGHIBAI v. BAI NAGUBAI 47 Bom. 401 1923 Bom 130 69 I C 291

———Marriage—Brahmins and Khatris

By custom, general or special, a marriage between a Khatri male and a Brahman woman may be valid, but it is void under the Hindu Law (*Broadway, J*) PARS RAM v HUKMAN SINGH 73 I C 239

———Marriage—Ceremonies necessary to constitute valid marriage

No prescribed ceremony is necessary to constitute marriage, provided that if any ceremony is customary and regarded by the caste as essential then it must be performed. The ceremony of *Saptapadi* is necessary to complete a marriage performed according to the orthodox rites, and that of *Vivah Hom* is also usually performed, but their non performance does not invalidate a marriage if otherwise completed. (*Maccoll, J*) RAMPAYAR v, DEVA RAMA. 1 Rang 129 1923 Rang 202.

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———Marriage—Daughter—Guardianship for purposes of marriage—Father and mother—Validity of marriage. See (1922) DIG COL 653, GAJJA NAND v EMPEROR, 71 I C 215 24 Cr L J, 87 64 I C 500

———Marriage—Mother's rights—Absence of consent of father

The rules as to the duty of giving a girl in marriage are directory and not mandatory, and in the absence of force or fraud, the marriage of a girl performed by the mother without the consent of the father is perfectly valid (*Moti Sagar, J*) JAGAN NATH v BASANT RAM 75 I C 24 1923 Lah 595 (2)

———Marriage—Person giving in marriage incompetent—Factum valet

It is established that when a person, not strictly entitled to do so gives a girl in marriage the doctrine of *factum valet* prevails (*Maccoll, J*) RAMPAYAR v DEVA RAMA 1 Rang 129 1923 Rang 202

———Minor—Debts contracted by guardian—Charge—Necessity—Enquiry See (1922) DIG COL 654 RAGHUBANS UPADHYA v INDERJIT SINGH. 45 A 77 69 I C 683

———New business started by Karta—Right of Karta—to raise money on joint property

Where a new business is started by the Karta of a family and it is for the benefit of the members of the family the joint property is liable for the payment of any money that has been borrowed by the Karta for such business (*Broadway and Zafar Ali, JJ*) CHALA RAM v KISHEN CHAND 1923 Lah 462 (2)

———Partition—Accounts Manager—Liability to account. See (1921) DIG COL 639 See (1922) DIG COL, 655 NIBARAN CHANDRA MUKERJEE v NIRUPAMA DEBI 69 I C 476

———Partition—Accounts—Purchase of property

In a partition suit the Court will not, except in special circumstances order an account to be taken of past transactions. Where it is impossible to predicate how much will ultimately be realized out of the outstanding debts, it is sufficient to give the plaintiff a declaration that he is entitled to his proportionate share of whatever may be recovered. Any property acquired by a member with his own money after the passing of the preliminary decree for partition would not be liable to partition, but when, it is shown that he possessed ancestral funds from which such property could be acquired, it lies on him to show that those funds were not employed for the purpose. If he fails to discharge this burden, it must be presumed, that the property was acquired with money belonging to the joint family and it is therefore, liable to partition (*Broadway and Brasher JJ*) LACHHMAN DAS v NANAK CHAND 70 I C 810 1923 Lah. 20

———Partition—Agreement to refer to an arbitrator to effect a partition—Effect of See (1922) DIG COL 655 SYEDKASAM v JORAWAR SINGH, 25 Bom. L. R. 1. 21 A L J 57 37 C L J 73 27 C W. N. 179 50 C 84

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———*Partition—Common property set apart at prior partition—Subsequent suit for partition—Maintainability of.*

It is an unabrogated rule of Hindu Law that a common way or a road of ingress and egress reserved as common property between the various sharers at a previous partition cannot be the subject of a partition. The expression "common way," referred to in *Mitakshara* Ch 1, S 1V, pp 16 and 25 is not confined to "common ways" existing prior to partition and is applicable to common passages created for the first time and reserved by agreement between the parties at the time of the partition. 36 B 379, 382 Ret.

*Per Crump, J.* Where there has been a complete partition under a decree of court and under that decree a passage is reserved for common use between the sharers, a fresh suit for partition of the common passage does not lie (*Shah, A C J. and Crump, J.*) SHANTARAM BALKRISHNA v WAMAN GOPAL WADEKAR 47 Bom 389 1923 Bom. 85

———*Partition—Conditions annexed to devolution of property allotted to each sharer—Arbitration—Award.*

Where certain arbitrators are appointed to make a revision of all the moveable and immovable property among certain brothers it is open to the arbitrators to allot a definite share of the estate to each of the referring parties and is also open to them to make the allotment subject to conditions which affect its tenure or devolution. Where the arbitrators annexed a condition to their award that property allotted to respective co-parceners is to be theirs but if any of them die without male issue, that person's share was to go to the other co-parceners held that the insertion of the conditions was valid and did not vitiate the award. The arbitrators did not alter the course of legal devolution in a mode at variance with the ordinary principles of Hindu Law, for according to Hindu Law the co-parceners could have validly agreed amongst themselves to exclude the widows from succession as the arbitrators had done. 29 M. L. J 214 referred to (*Kotwal, A J. C.*) MT PHULA v KUSAM SINGH 71 I. C 413 1923 Nag 70

———*Partition decree—Infant son, See (1922) DIG COL. 656, NARAIN DASS v ABINASH CHANDER 44 M. L. J. 728; 21 A. L. J 201 37 C. L. J. 457 27 C. W. N 299 69 I. C. 273 (P. C.)*

———*Partition—Effect*

The very conception of a joint Hindu family involves joint ownership of all family property by the members and the moment a partition takes place even if it is only of a portion of the property, they cease to be members of a joint family (*Le Rossignol and Martineau, JJ.*) BENI PARSHAD v MT. GUR DEVI. 4 Lah 252. 5 Lah L. J. 185. 73 I. C 894 1923 Lah 497 (1)

———*Partition—Effect of—Son's liability for father's debts.*

If the sons in a joint Hindu family effect a bona fide partition at a time anterior to the date when their father's debt is contracted, their responsibility is different and the father's creditor

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cannot then proceed against their divided shares 22 M 519, 41 M 138, 40 M L J, 473 Ret (*Spencer and Devadoss, JJ.*) KURUKUNDI SAMA RAO v. FIRM OF MARWADI VANNAPI VAJINJI 46 Mad 64 32 M L T (H.C.) 9 17 L W. 661 71 I. C 153 1923 Mad. 36

———*Partition—Evidence of—Alienation of shares*

Where the evidence of a partition in a joint Hindu family consists of alienations of their shares made by the various members of the family, this is no doubt *pro tanto* evidence of separation but, taken by itself, it is not sufficient. A member of a joint Hindu family may purport to alienate his own share. But by doing so he does not effect separation. (*Dalal and Simpson, A J. C.*) DWARKA PRASAD v MT RAM DEVI 100 L J 360

———*Partition—Evidence of—Separate living*

Where a member of a joint Hindu family, quarrelling with his family, seizes some part of the family property in order to provide himself with a living, he might not thereby forfeit his right to obtain a formal partition in which he would get his proper share (*Simpson, A J. C.*) CHAUDHURI JANGI SINGH v CHAUDHARI GANGA SINGH 100 L J 393.

———*Partition—Evidence of—Division in status*

Property given by a grandfather to his grandsons out of affection does not vest in them as joint tenants with rights of survivorship. The donees take as tenants in common (*Mookerjee and Cuming, J.*) SARADA PRASANNA ROY v UMA KANTA HAZARI 50 Cal 370 37 C. L. J. 233 1923 Cal 485

———*Partition—Evidence of—Separate living Separate transaction—Effect of*

The mere fact that the members of a joint family live separately or have separate dealings or execute documents in favour of each other does not conclusively prove a divided status but may be consistent with an undivided status. Nor does a document between the members of the joint family taking in a stranger as a co-parcener effect a severance between them (*Krishnan and Ramesam, JJ.*) VENKATACHELA PILLAI v ARUNTHAVATHACHAL (1923) M. W. N 225 17 L W. 755 72 I. C 548 1923 Mad. 568

———*Partition—Evidence of—Separate possession—Property excluded from partition*

There is no presumption that certain properties were excluded from partition in a joint family and the burden of proof is on the person who alleges such exclusion. Separate possession of certain properties is not conclusive evidence of partition and must be interpreted in the light of all the other circumstances of the case. (*Mookerjee and Cuming, JJ.*) KAILAS CHANDRA NAG v BIJAY CHANDRA NAG. 72 I. C 680 1923 Cal 18.

———*Partition—Joint business—Dissolution—Cause of action*

Where a separation is effected between brothers but a business is carried on by them, the business becomes an ordinary partnership

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subject to the Partnership Act. On the death of one brother the partnership is dissolved and a right to an accounting arises. If, however, on the brother's death the widow of the deceased brother is admitted as a partner to a new partnership, then the date of dissolution would only be the raising of the suit and no limitation can apply. The fact that the brother's share still continued to be dealt with in the books is no evidence of a partnership with his widow (*Lord Dunedin*). *Mr JATTI v BANWARI LAL* 18 L W 273 45 M L J 355 (1923) M W N 687 25 Bom L R 1256 4 Lah 350 74 I C 462 50 I A 192 21 A L J 582 L R 4 (P C) 135 (1923) P C 136

———*Partition—Partition between one brother and auction purchaser of the other brother—Mother entitled to an equal share.*

Where the share of one of the two joint brothers is transferred, at a partition between the other brother and the transferee the mother is entitled to a share equal to that of each of the sons and after her death half of her share will go to his transferee (*Kotval, A J C*) *RAMANATH v SITARAM* 19 N L R 147 74 I C 81 1923 Nag 288

———*Partition—Mother—Rights of—Maintenance*

Under the Hindu Law it is only in the event of a partition among her sons that a mother becomes entitled to a share in lieu of her maintenance 16 C 758, 31 C 262 *Rel (Mookerjee and Chotner JJ)* *JADU NATH SIKKAR v, HARAN CHANDRA SIKKAR* 49 Cal 1043 70 I C 687 1923 Cal 221

———*Partition—Partial partition—Effect—Adverse possession*

Where after a partial partition some lands are still left in the possession of one member, his possession is not adverse to the others till he does an overt act repudiating the title of the other or some acts of exclusive ownership which can be taken as notice to the others of such claim (*Ayling and Odgers, JJ*) *RAJAGOPALA IYENGAR v SOUNDARA RAJA IYENGAR* 45 M L J 476 (1923) M W N 636 74 I C 1018

———*Partition—Partial partition—Presumption—Property kept joint Status of Co-parceners*

Once there is evidence sufficient to satisfy the Court that the parties intended to sever, then the joint family status is put an end to, and with regard to any of the property which had hitherto been joint and has not been divided by metes and bounds there will have to be an express agreement between the parties that they should treat that property as belonging to them as joint tenants. They will then be joint tenants not as members of the joint family which no longer exists but under a special agreement made after the severance 43 I A 151, 18 B 611 *Ref (MacLeod, C J. and Crump, J)* *DAGADU GOVINDA v SAKUBAI* 47 Bom 773 25 Bom L R 806 73 I C 369 1924 Bom 31

———*Partition—Partial partition—Presumption—Rebuttal—Evidence—Ambiguous statements*

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of members in prior litigation—Effect of *See* (1922) DIG COL 659 *CHELASAMI ARCHAMMA v CHELASAMI VENKATASUBBAYYA* 70 I C 748.

———*Partition—Mesne profits*

In a suit for partition between one brother and auction purchaser in a decree against another brother, the auction purchaser will not get mesne profits unless it is shown that he was obstructed in taking possession of any part of the joint property (*Kotval, A J C*) *RAMANATH v SITARAM* 1923 Nag 288 19 N L R 147 74 I C 81

———*Partition—Portion left undivided—Right of widow of one of the members to demand partition*

When members of a joint family divide portion of the family property, a state of severance would in all probability result though it depends upon the circumstances in each case, and the facts provide, whether family still remained joint, each member holding his share of the property divided as his own separate property, and all the members holding the undivided property as members of a Hindu joint family. Where it was found that a very large portion of the family property was divided in 1889 amongst the members and from that date they began to separate, and had separate business and enjoyment in respect of their respective properties, it would be a legitimate presumption that they intended from that date to live divided and consequently they would own the property still remaining undivided as tenants-in-common and therefore a widow of one of the members is entitled to a formal partition of the property left undivided (*MacLeod, C. J. and Crump J*) *KASTURIBAI MANIBAI v BAI MAHALAXMI* 1923 Bom 464

———*Partition—Presumption*

If a property stood in the name of K, one of the four brothers, this is not even prima facie evidence that the property was obtained by K, for himself if at the time of acquisition, the family was still joint. There is no presumption with regard to any other property that it was excluded from the partition and the burden lies upon him who alleged exclusion, to establish his assertion. Separate possession is not conclusive evidence of partition and must be interpreted in the light of all the circumstances of the case. The sole occupation by one co-sharer, of a portion of joint property does not constitute an ouster of the other co-sharers, and a co-sharer in possession of a portion of the common land, with the tacit or express consent of his co-sharers, cannot change the nature of that possession (*Mookerjee and Cuming, JJ*) *KAILASH CHANDRA NAG v. BEJOY CHANDRA NAG* 72 I C 680 1923 Cal 18

———*Partition—Presumption.*

There is no presumption, when one co-parcener separates from the others, that the latter remain united. An agreement amongst the remaining members of a joint family to remain united or to reunite must be proved like any other fact (*Lord Dunedin*) *MT JATTI v BANWARI LAL* 18 L W 273 45 M L J 355 (1923) M W N 687 25 Bom L R 1256 4 Lah 350 74 I C 462 50 I A 192 21 A L J 582 L R 4 (P.C.) 135 (1923) P C 136

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## —Partition—Presumption.

Where one member of a joint family separates or shows his intention to separate, the presumption is that there is division in status as regards all Division by metes and bounds is not necessary (*Syed Wazir Hasan, A, J C*) MAHABIR PRASAD *v* SURAJPAL SINGH. 10 O. L J 240

## —Partition—Presumption.

The defendants in a suit by the widow to recover possession of a specified share of her husband on the ground of separateness, start with a certain presumption in their favour, but the presumption is not a very strong one where the relationship is not a very near one. The widow is not bound to prove a formal separation, accompanied by an apportionment. She can succeed if she can produce evidence to satisfy the Court that the position of her husband and the defendants up to the time of his death was such that they could not have been living as members of a joint undivided family. It is by no means an unusual thing for members of a joint family, when acquiring landed property by purchase, to cause to be specified in their document of title the shares which they would respectively take upon a partition. Where this is not done the ordinary inference from the document, on the face of it would be that the vendees are taking in equal shares, and the members of the family may well think it convenient that such a presumption, where the facts should be rebutted by specification of it is not in accordance with shares, (*Piggott and Walsh, JJ*) MT JAIRAJ *v*, BHAGWAT PRASAD PANDE 1923 All 225

## —Partition—Presumption—Partial Partition.

Where it is once admitted by the plaintiffs that there had been a partition before the date of their suit for partition the burden of proof lies upon them to prove that the properties in suit were joint family property and were undivided at the partition, that is, continued to be kept joined, till the date of suit the presumption being, that all property that belonged to the joint family was divided at the partition. Whether the property in suit was joint at the date of the partition and continued to be joint thereafter depends upon the questions, when was the property acquired and when did the partition take place (*Kotwal, A J C*) ANAND RAO *v*. DADA 71 I C 43

## —Partition—Presumption—Separation in food, worship and residence—Partial partition.

From the separation of the members of the family in food, residence and worship it does not follow that the family had divided, for it might well be that in order to manage the family business and property at different places the members had to go to and live in those places separately.

When a member of a Hindu family who is divided in status from others is in enjoyment of a portion of the family properties while the others enjoy other portions, he is not in law excluded or ousted from those other portions, so as to disentitle him to his share of those portions, however long their enjoyment by others.

A family may remain joint in regard to some properties after a separation in regard to

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the others. The mere fact that there had been a partial partition of the family property does not affect the rights of the parties to sue for partition in regard to the other properties which remained undivided (*Broadway and Zafar Ali, JJ*) BHAGWAN DAS *v* MT PARBATI 72 I C 742 1923 Lah 569

## —Partition—Proof of—Common living—Joint purse—Effect of.

It is not necessary that definite evidence should be given of a formal agreement between the parties to enable a court to hold that a separation had taken place. An inference of separation having previously taken place may be drawn from the subsequent acts of the parties without any proof of a formal agreement. But where the parties are found living together in the same house and meeting their expenses out of a common fund, it would require much stronger evidence than anything which was produced in the case to lead to the conclusion that they had put an end to their state of jointness (*Miller C J and Foster J*) TARINI PRASHAD SINGH *v* NUNU PRASAD SINGH 72 I C 1006

## —Partition—Proof of—Transfer of name in khata.

Merely from a transfer of khata from the name of the father in a joint family to that of one of the sons no presumption arises that the subject of the transfer has ceased to be joint family property and become the self acquisition of that particular member. There may be circumstances which indicate that the property was intended to be made the separate property of the son, (*Kotwal, A J C*) MT, KASHI *v* PANDURANG 69 I C 612 1923 Nag 75

## —Partition—Property set apart for trust acquired by one member—Claim of the other.

Where a Hindu father set apart some family property for a religious purpose and one of his sons purchased the same from the trustees, the other son cannot claim partition of the same in the hands of his brother (*Shah, A C J and Crump, J*) JAMNADAS KASHIDAS *v* VALLABHDAS KASHIDAS 25 Bom L R 1340

## —Partition—Religious office and perquisites—Birt Jigmani—Mode of partition.

Rights in birt jigmani are heritable and some times transferable. Where the Birt Jigmani consists of offerings given to a pragwal by pilgrims coming to bathe in the Ganges it is impossible to effect a partition of the right by allotting clients to one party or the other but only a division of books in which pilgrims enter their names can be made. In the case of things which are incapable of division, e.g., flag, it will be open to each party to use a similar flag. 43 A 35 Rei (*Ryves and Daniels JJ*) RAMACHANDER *v* CHHABBU LAL 45 A 445 21 A, L J 358 L R 4 A 200 75 I C 323 1923 A. 350

## —Partition—Separation of one member—Effect on the family.

There can be no presumption when one coparcener separates from the others that the latter remain united and unless it is shown that the rest of the members of the family agreed to remain

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joint it cannot be held that the minor was a member of the joint family to which the adult members belonged (*Abdul Raouf, J*) BASHLISHAR NATH GOELA v GANGA RAM

73 I C 281 1923 Lah 572

— — — Partition—Separation in status—Separateness

The mere fact that co parceners are messing separately does not mean that the possession of one co parcenar of joint family property is adverse to the other co parceners 33 C L J 344 Rel (*Greaves and Pantou, JJ*) HEMANGINI DAS v SITAL MONDAL, 1923 Cal 310 (1)

— — — Partition — Shares — Jyeshthabagam — Provision for marriage expenses of co parceners See (1922) DIG COL, 659 YERUKOLA v YLAKKOLA 71 I C 177

— — — Partition—Suit for—Mesne profits—Right of co-parcener—Accounts—Manager—Liability of—Property subject to mortgage.

A member of a joint Hindu family suing for partition and for the profits on his share is really suing for an account of the profits received by the manager of the portions in his possession so that the proceeds so received by the latter which are also divisible property may be divided and his share therein also given to him His right to such profits is not as mesne profits received by a person in wrongful possession but as appurtenant to his right in his share of the lands In a suit for partition by a member of a joint Hindu family, the plaintiff is not ordinarily entitled to claim past mesne profits He is not entitled to interest on his share of the profits realised by the defendant who was in possession subsequently The plaintiff is not disentitled to his share of the profits realised by the said defendant from family properties which were subject to mortgages and which were redeemed by the said defendant with family funds In that case plaintiff is entitled to the profits only from the date of redemption The defendant is not entitled to interest on the amounts paid by him for redemption (*Oldfield and Venkatasubba Rao, JJ*) T RAMASAMI AYYAR v T SUBRAMANIA AYYAR 46 Mad 47

74 I C. 804 1923 Mad 147

— — — Partition — suit by minor — Death—Effect of—Mesne profits

The filing of a partition suit by the next friend of a minor does not create a division in status as the discretion is in the Court to grant partition or not. If pending decree, the minor dies, his right survives to his co-parceners

In a partition suit, mesne profits are awarded if one co-parcener is entirely excluded from enjoyment (*Chandrasekhara Ayyar, C, J and Ramaswamy Iyengar, JJ*) RAJAGOPALACHAR v ACHAMMA 1 Mys L J 149

— — — Partition—Unilateral declaration—Service of notice by a coparcener See (1922) DIG COL 660 RAMALINGA ANNAVI v NARAYANA ANNAVI 37 C L J 15 (P C)

— — — Partition—Validity of—Assignment of debt due to the family to one of the members—Debtor not entitled to question—Death of member pending proceedings

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The death of a member of a joint Hindu family during the pendency of the partition proceedings does not affect the validity of the final partition Consequently where at the family partition a mortgage debt due to the family is assigned to one or some of the members of the family, it is not open to the debtor to raise an objection to the validity of the partition between the members of the creditor's family (*Rafiq and Lindsay, JJ*) ASLAH KHATUN v BALDEO PRASAD

70 I C 70 1923 A 63

— — — Partition—What amounts to

Unequivocal and manifest declaration of an intention to become divided in estate amounts to a valid separation and a disruption of the joint family 8 W R 82 35 All, 80, 43 Cal 1031 F. (*Jivala Prasad and Adams, JJ*) RAMJATAN RAI v BAIIRAM PRASAD 70 I C 846 1923 P 25

— — — Reversioner—Daughter's estate—Rights of daughter's—Partition—Effect of—Survivorship

Where two daughters who succeed jointly to the estate of their father effect an absolute partition amongst themselves and one of them dies, though it is not open to the reversioner to sue for possession of the share of the deceased daughter it is open to him to sue for declaration of the invalidity of the alienation made by the deceased daughter The deed of partition operates as a transfer by way of relinquishment of her estate by each of the daughters to the other in case she predeceased her sister 24 C 339, 42 M 855, 22 M 522 followed (*Oldfield and Venkatasubba Rao, JJ*) AMMANIAMMAL v PERIA SAMI UDAYAN

45 M L J 1 (1923) M. W N 652

74 I C. 58 (2) 32 M. L T 323 (H C)

1924 Mad 75

— — — Reversioner—Proof of relationship See (1922) DIG COL 661 BHIMMA SINGH v MT SUNDAR 26 O C. 109 69 I C 421.

— — — Reversioner—Rights of

During the tenure of a widow's estate, a Hindu reversioner has a mere *spes successionis* which he cannot sell, assign or surrender or make the subject of a settlement In the case of a minor reversioner, his guardian cannot in any way bargain away with his rights to his prejudice. (*Bucknill and Ross, JJ*) RAM BAHADUR SEN v GANESH BAGAT 2 Pat 554 73 I C 542.

1924 P 49

— — — Reversioner—Right to sue for declaration during widow's life—Alienation by prior owner

Where a Hindu widow during the period when the estate is vested in her deliberately refuses to impeach a transaction made by the prior estate holder or makes it impossible for her to do so, the reversioners without waiting for her death can sue for declaration that the transaction was not binding on the estate (*Stuart and Ryves, JJ*) SURAJ MAL v. NATHWA 45 A 255 21 A L J 50

L R 4 A 66 1923 A 161 (2)

— — — Reversioner—Tenancy beyond lifetime by limited owner

There are more ways than one by which a tenancy may determine The limited owner has no power to grant a tenancy beyond his own life



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as against the reversioner and once the reversioner elects to treat the interest granted to the tenant as an interest extending only for the life time of the grantor, then in such a case a termination upon the death of the grantor and there is therefore nothing more to be done to terminate the tenancy. The tenant becomes a trespasser if he refuses to turn out and the reversioner is entitled to bring a suit in ejectment without giving any notice whatever. (*Dawson Miller, C J and Mullick J*) *RAGHUBIR SINGH v JETHU MAHTON*  
2 Pat 171 4 Pat L. T. 396 70 I C 290  
1923 P 130

—*Schools of Law—Family in Bengal claiming to follow Mitakshara—What is proved*  
Where a family in Bengal claimed to be governed by the Mitakshara school and proved its immigration from a Province where such law prevails and also a practice consistent with such law, the proof is sufficient. Immigration after the establishment of the Dayabhaga system need not be proved. (*Halsley and Suhrawardy, JJ.*) *RAMESH CHANDRA SINHA v MAHOMED ELAHI BUKSH*  
50 Cal 898

—*Stridhan—Daughter—Post-nuptial gift—Devolution—Mitakshara—Miyukha*  
Where there is a post-nuptial gift made by a father to a daughter in Berar, the property gifted with its accretion becomes her anuvacheyak stridhanam and on her death it passes equally to her son and daughter surviving her. In Berar wherever the mitakshara and Miyukha differ, the latter predominates. 4 N L R 11, 5 N L R, 13, 9 N L R 102, 10 N L R 24 followed. (*Kolval, A J C*) *SHRIRAM v RA'A RAY*  
19 N L R 193

—*Stridhan—Succession—Daughter's son or daughter's daughter.*

Under the Mitakshara school of law the daughter's daughter has the preference over the daughter's son in the matter of succession to stridhanam.

It is only the Stridhan heirs of the female in whose hands the property was held as Stridhan that have to be ascertained. (*Mears, C J, and Piggott, J*) *SHAM BEHARI LAL v RAM KALI*  
45 A 715 L. R. 4 A 601 21 A L J 656  
74 I. C 495 1924 A 15

—*Stridhanam—Unmarried female—Succession—Sister.* See (1922) Dig. Col. 663 *MADHO v SAMPAT.* 69 I C 758

—*Widow—Acquisitions—Nature of*

As pointed out in 28 Mad 1 there is no necessary connection between the limited nature of the estate which a widow takes in her husband's property and the interest accruing to her in the income derived by her as such limited owner. That which becomes vested in her own right and which she can dispose of at pleasure is her own property, not limited but absolute, exclusive and separate in every sense of the term and devolves as such. There is no presumption that savings or purchases with savings effected by a widow are increments to the corpus of the husband's estate and pass together with it. (*Scott Smith and Brasher, JJ.*) *MT. MALAN v KISHORE CHAND*  
71 I. C. 833 1923 Lah 17,

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—*Widow—Acquisition of occupancy holding—Right to*

Where a Hindu widow sets aside a surrender of the occupancy holding made by her son by payment of her own money, the interest of the widow in the holding is in the nature of stridhanam property. Consequently on the death of the widow the holding passes to her heir. (*Kolwal, A J. C.*) *PREMLAL v BHAG CHAND,*  
19 N. L. R. 4 69 I C 669 1923 Nag. 34

—*Widow—Alienation—Adoption*

A widow who became absolute owner of the property under her husband's will has power to dispose of it as she pleased as she was not restricted by what was stated about her selling it and having a *ahamsala* built, which was nothing more than the expression of a wish on the part of her husband which she was not under any legal obligation to carry out. It is not correct to say that because by the will the widow was authorised to adopt a son she would take the property as absolute owner only in the contingency of her not adopting. (*Martineau and Campbell, J. C.*) *SHEO NARAIN v SHRIMATI ARYANAI SAKB*  
5 L L J 214 70 I C 1006  
(1923) Lah 398

—*Widow—Alienation—Consent of reversioner—Effect of—Suit to set aside alienation by reversioner while retaining benefit—Estoppel*

Where a widow alienates property with the consent of the next reversioner who gets a substantial benefit from the transaction it is not open to that reversioner or his descendants to impugn the alienation while retaining the benefit. (*MacLeod C J and Crump, J*) *BHAUSAHEB SHIDGAUDA v RAMGAUDA ANNAGAUDA,*  
25 Bom. L. R. 818 1923 Bom 471

—*Widow—Alienation—Consent of reversioners—Presumption as to validity*

The consent of the whole body of next reversioners to a gift by a Hindu female owner for life is as presumptive evidence of that gift having been made for purposes or in circumstances which would validate it after the donor's death in the way in which such consent was held in 42 Mad 523 (P. C.) to be presumptive evidence of the legal necessity for an alienation for consideration. The consent of the people interested in quarrelling with an alienation would be equally strong proof of its being justifiable whether it was a gift or a sale or a mortgage. The donee gets an absolute estate, though the consenting reversioners are themselves life tenants. (*Batten, J C and Halfax, A. J. C.*) *MT KUSHI BAI v MANRAKHAN.*  
1923 Nag 265

—*Widow—Alienation—Daughter's marriage—Gift*

A Hindu widow being under a duty to marry her daughter is competent to make a gift of a reasonable part of the property to the son-in-law—What is reasonable will depend on the extent of the estate in her hands. (*Mears, C J and Stuart J*) *BHAGWATI SHUKUL v RAM JATAN TEWARI*  
45 A, 297 L. R. 4 A 386 73 I C. 648 (2).  
21 A L J. 232 : 1923 A 23.

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## —Widow—Alienation—Gift—Consent of reversioner Effect of

Where a reversioner consents to an alienation by way of gift by a Hindu widow his consent does not estop him from subsequently impeaching the alienation. The consent of the body of the reversioners would not validate a gift which is a transfer without a consideration. Nor could the transaction be viewed as a relinquishment by the reversioner for he had no vested interest which he could validly relinquish. 42 M 523 referred to (*Gokul Prasad, J*) *RAM DAYAL v MITHOO LAL* 71 I C 287 1923 A 410

—Widow—Alienation—Gift to son-in-law of entire property to induce him to marry—Validity. See (1922) DIG COL 66 BHAGWATI SHUKUL *v* RAM JATAN TEWARI 21 A L J 232 70 I C 419

## —Widow—Alienation—Gift—If challenged by reversioners—Strangers if can—impeach—Nature of the transaction

A sale, mortgage or gift by a Hindu widow which purports to pass the absolute title is valid against every one except the reversioners and unless the reversioners elect to treat it as a nullity it subsists as against every one else. A Hindu widow is not a tenant for life, but owner of her husband's property subject to certain restrictions on alienation and subject to its devolving upon her husband's heirs upon her death. But she may alienate it subject to certain conditions being complied with her alienation is not therefore absolutely void but is *prima facie* voidable at the election of the reversionary heir. He may think fit to affirm it, or he may at his pleasure, treat it as a nullity without the intervention of any court, and he might show his election to do the latter by commencing an action to recover possession of the property. Consequently a gift of the whole of her husband's property made by a Hindu widow not challenged by the reversioner during her life time and acquiesced in by those who would take a vested interest after her death cannot be challenged by any one else. It is the reversioners and the reversioners alone who can dispute the gift. If they choose to allow the property to which they are entitled to remain in the possession of the donee that is their affair and no one else can object. If the donee remains in possession under a claim of right for 12 years he will acquire an indefeasible title even against the reversioner (*Miller, C J and Mullick, J*) *MAHARAJAH KESHO PRASAD SINGH v CHANDRIKA PRASAD SINGH*, 2 Pat. 217 1923 P 122

## —Widow—Alienation—Legal necessity, partially proved—Conversion of sale into mortgage.

The sale of immoveable property by a limited owner ought not to be converted into a mortgage merely because a trifling portion of the consideration was paid in cash for current expenses and was not proved to have been for necessity. 130 P R 1906 and 8 P R 1908 foll (*Scott Smith and Brasher, JJ*) *HASSAN MUHAMMAD v. MAHANDA* 5 Lah. L. J. 292 1923 Lah. 245.

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## —Widow—Alienation—Mortgage—Improvements by mortgagee—Rights of reversioners

Where a mortgagee with possession from a Hindu widow spends money in improving the property and a reversioner sues to set aside the mortgage on the death of the widow, the mortgagee is entitled to be reimbursed for improvement. In any event the mortgagee is entitled to remove what he has placed on the property at his own expense (*Mitchell, C J and Crump, J*) *SIDDAPPA MAHALINGAPPA v. PANDURING VASUDEO* 47 Bom 696 25 Bom L. R. 395 72 I C 626 1923 Bom 385

## —Widow—Alienation—Necessity—Inquiry as to—Recitals in document—Effect

A recital in a mortgage effected by a Hindu widow as to necessity is clear evidence of representation and if there is some proof of inquiry, all these taken together are sufficient to support the deed (*Ghose and Panton, JJ*) *BANBU BEHARY DE v BISSESVAP LAL MARWARI* 1923 Cal 575.

## —Widow—Alienation—Necessity—Just debt—Sale of equity of redemption

The plaintiffs sued for a declaration that a sale of ancestral property by the widow of one J would not affect their reversionary rights, J originally mortgaged, the land for Rs. 1,500 in 1903. The mortgage was converted into a sale by the widow in 1910, the consideration being Rs. 1,500 due on the mortgage, Rs. 1,221-13 due as interest and Rs. 24 spent on repairing a well and due from the mortgagor under the terms of the deed of mortgage. *Held* that the widow had no necessity to sell the equity of redemption, the debt being a charge only on the mortgaged land and not being recoverable from the person or other property of the mortgagor, and that the interest due under the mortgage was not a just debt, as held in 65 P R 1900, F B (*Scott-Smith, J.*) *BODH RAJ v RAJA SINGH* 1923 Lah 668

## —Widow—Alienation—Necessity—Liability to pay Revenue—Rebuttal

Where an estate in the hands of a widow has to pay arrears of government revenue that constitutes proof of necessity for an alienation even if govt has not taken any steps to realise it by sale. But this can be related by showing that at that time she had other funds in her lands for paying the same (*Ryves and Daniels, JJ*) *LALTA PRASAD v DARSHAN SINGH* 74 I. C. 839.

## —Widow—Alienation—Necessity—Proof of—Recitals in deeds

Recitals in deeds cannot by themselves be relied upon for the purpose of proving the ascertainment of facts which they contain, for it is obvious, that if such proof were permitted, the rights of reversioners could always be defeated by the insertion of carefully prepared recitals. Where all the original parties to the transaction are dead, all those who could have given evidence on the relevant points have grown old, or passed away, a recital consistent with the probability and circumstances of the case has greater importance and cannot be lightly set aside. But where the person in whose favour the sale was effected

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was alive and was examined and disclosed by the courts below, the recitals ought not to carry much weight (*Kanhaya Lal J C*) QAMAR JEHAN BEGAM *v*, BANSIDAR  
90 & L, R 341 72 I C 1046

—Widow—Alienation—Necessity—Proof of—Recitals—Value of.

Where a Hindu widow executed a sale more than 40 years ago and the sale was recited to be for legal necessity and the transaction was not impeached by the then reversioners during the widow's life time held that the presumption was in favour of the existence of a legal necessity as recited in the deed in question and that it was not competent to any person other than the nearest reversioner to avoid the sale, (*Walmstey and Ghose, JJ*) JABEDALI SHEKH *v* PRASANNA KUMAR NAG 27 C W N 433 75 I C 281 1923 Cal 423

—Widow—Alienation—Necessity—Religious or charitable purposes—When it is gift of a small portion of the estate to deity for the spiritual welfare of her deceased husband—Validity of See (1922) DIG COL 669 BARDAR SINGH *v* KUNJ BEHARI LAL 44 M L J 766 37 C L J 383 27 C W, N 653 25 Bom L R 648 (P C.)

—Widow—Alienation—Necessity—Proof of—Recitals in deed—Language—Burden of proof—Lapse of time.

When a person claims title under an alienation effected by a Hindu widow in respect of the estate of her husband, the burden lies on him to establish either that there was legal necessity in fact which justified the alienation or that he made proper and *bona fide* enquiries and did all that was reasonable to satisfy himself as to the existence of such necessity 35 C 420 16 A 420 35 C L J 116 Ref In the application of this primary rule, it is to be borne in mind that recitals in conveyances or mortgages of the existence of legal necessity are not by themselves evidence of the fact and there must ordinarily be some evidence to substantiate the allegations aliunde 36 A 187, 37 A 369 Ref Though lapse of time does not affect the question of onus of proof regarding legal necessity, it may give rise to a presumption of acquiescence or save the alienee from adverse inference arising from the scantiness of the evidence offered on his behalf To put the matter in another way, when by efflux of time, direct evidence independent of the recital becomes unavailable, a recital of necessity consistent with probability and the circumstances assumes greater importance, it is clear evidence of a representation to the purchaser and when evidence of actual enquiry by him has become impossible the recital coupled with circumstances which justify a reasonable belief that an enquiry would have confirmed its truth, is sufficient evidence to support the transaction

Where there is pressure on the estate it is not necessary to determine whether the estate might have been kept free from debts by prudent management 23 G 766, 189 This is so especially where the lender acted *bona fide* and enquired

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into the necessity for the loan 6 C 843; 20 C L 23 30 C L J, 56 19 C W N 80 Ref

Where the transaction was in the main for legal necessity it would not be impeachable on the ground that smaller sum would have been sufficient to remove pressure at the time 27 C W N 365 (P C) Ref (*Mookerjee and Rankin, JJ*) CHANDRA KISOR DATTA MAJUMDAR *v* KUMAR UPENDRA CHANDRA CHOUDHURY 37 C L J 319 74 I C 612 1923 Cal, 563

—Widow—Alienation—Necessity—Small portion not applied for necessity—Effect of See (1922) DIG COL, 669, MEDAI DALAVOI THIRU-MALAIYAPPA MUDALIAR *v* NAINAR TEVAN 21 A L J, 182 (P. C.)

—Widow—Alienation—Necessity—Test of, See (1922) DIG COL, 670 RAM SUMRAM PRASAD *v* SHYAM KUMARI 44 M L J 751 37 C L J 356 21 A L J 18 27 C W N 269 1 Pat 741 L R 4 P C, 17 25 Bom L R 634 90 & A. L R 175 (P C.)

—Widow—Alienation—Necessity—What is

The mere fact that the occasion for borrowing by a widow was her daughter's marriage will not show there was in law necessity for the loan. There must be evidence to show the state of her finances were such that the loan was necessary, (*Dawson Miller, C J and Mullick, J*) AJTI CHAUDHURI *v* JANAK LAL CHAUDHURI (1923) Pat 332

—Widow—Alienation—Necessity—When liable to be set aside

Where a part of the consideration for an alienation by a Hindu widow is for necessity, and there is not much disparity between the actual sale price and the true value of the lands, the alienation is valid (*Shah, A C. J and Coyajee, J*) CHANBASAPPA *v* CHANBASAPPA 25 Bom L R 1078

—Widow—Alienation—Reversioners joining in lease—Right to sue

A Hindu widow and her presumptive reversioners granted a lease of the estate jointly and subsequently one of them predeceased the widow In a suit by the surviving reversioners after the death of the widow Held that the deceased reversioner had merely a contingent interest, that he had no interest at the time of the death of the widow and that his heirs were not necessary parties to the suit (*Chatterjee and Cuming, JJ*) MAHLANDRA NATH BOSE *v* ABINAS CHANDRA 27 C. W, N 521 1923 Cal 615

—Alienation—Reversioners—Right of, to set aside—Limitation

An alienation of an absolute estate by a Hindu widow by way of gift is not binding on the reversioner and he can elect to treat it as a nullity and sue for possession at any time within 12 years of his interest becoming vested without first suing to have it set aside notwithstanding Art 91 of the Lim Act. (*Miller, C J and Mullick, J*) MAHARAJAH KESHO PRASAD SINGH *v* CHANDRIKA PRASAD SINGH, 2 Pat 217 1923 P 122,

## HINDU LAW—WIDOW.

———*Widow—Alienation—Right of reversioner to set aside—Election to abide by transfers—Effect of*

Where a widow makes a transfer without justifying necessity it is open to a reversioner to elect to hold good the deed of alienation even before the succession has opened. Once having made an election, he cannot afterwards make a claim inconsistent with his own solemn Act (*Mears, C J, Banerji, Piggott, Walsh and Ryves, JJ*) *FATEH SINGH v. RUKMINI RAWANJI*

45 A 339 21 A L J 235 72 I C 8  
L R 4 A 392 1923 A. 387 (F B)

———*Widow—Alienation—Setting aside—Equities—Duty to refund of consideration*

If it has been proved that a sale by a widow having a limited interest, has benefited the estate by the payment of debts which were binding on it, although the amount paid may not amount to the whole of the consideration money received for the property sold, the Court, when it sets aside the sale, will direct payment to the alienee to the extent of the benefit received by the estate, and it must follow that if the consideration money for the sale is found intact at the death of the widow, the estate has benefited to that extent. So that if the reversioner after the widow's death wishes to have the sale by her set aside, he can only succeed if he restores the money. It would be different if it could not be proved that the purchase money was still intact in the estate (*Macleod, C. J and Coysasjee, J.*) *SOMESHWAR JETHABAI DAVE v SOMESHWAR GOVINDRAM.*

47 Bom. 1  
1923 Bom. 16 (2)

———*Widow—Alienation—Settlement in favour of daughter—Family arrangement—Rights of alienee from daughters—Mesne profits—Liability of.*

In the absence of a bona fide dispute relating to the estate by an independent person a widow cannot parcel out the estate of her husband under the guise of a family arrangement. Consequently a settlement by a Hindu widow in favour of her two daughters giving each of them a moiety of the estate absolutely is not binding on the reversioner. 13 L W, 436, 27 M L J, 149 22 C L J 52 Dist.

An alienee from a limited owner without necessity is liable for mesne profits from the death of the limited owner (*Spencer and Devadoss, JJ*) *JOGA VEERAYYA v NAKINA SALLEYYA.*

69 I C 389 1923 Mad 168.

———*Widow—Alienation—Surrender—Distinction between*

Surrenders of life estates under Hindu Law are simply cases of accelerating succession to the next heir which means that the female life tenant effaces herself and succession of the whole estate goes on to the next heir just as if the life tenant had died. A surrender can only be in favour of the nearest reversioners. Transfer in favour of remote reversioners can only be regarded as alienations of the estate. Such alienations can be made only subject to certain conditions being complied with, but, even if the alienation be made without necessity, it is not absolutely void but merely voidable at the election of the heir, who may think fit to affirm it or may at his pleasure

## HINDU LAW—WIDOW

treat it as a nullity and may take action to recover it on the death of the female life tenant 34 C 329 31 C. 698, 14 P R 1902 159 P W R. 1910 referred to (*Chevis and Harrison JJ*) *WAZIRI MAL v GANGA RAM* 69 I C 573

———*Widow—Alienation—Validity challenged—Decree for possession after widow's death—Who can execute*

In a suit by a reversioner challenging the alienation by a Hindu widow, a decree for possession after the widow's death was given. Held, it was in substance one of a declaratory nature and would enure to the nearest reversioner in existence at the death of the widow (*Chandrasekhara Aiyar C J and Subbanna, J.*) *GANGAMMA v NARASIMHA* 1 Mys. L J. 103.

———*Widow—Compromise—Powers of—Necessity—Test of* See (1922) DIG COL. 672 *RAM SUMRAN PRASAD v SHYAM KUMARI*

44 M L J 751 21 A L J 18 27 C W N 269  
1 Pat 741 37 C L J 356 L R 4 P. C 17  
25 Bom L. R 634 90 & A. L. R 175 (P C)

———*Widow—Decree against—Binding on reversion—Fraud—Collusion* See (1922) DIG COL. 673. *JAI NARAIN SINGH v GITA PRASAD* 70 I C 862.

———*Widow—Execution sale—What passes—Purchaser in possession*

Assuming that in a sale for arrears of revenue due by a Hindu widow, it is the widow's interest alone that passes to the purchaser it is not open to a remote reversioner while nearer reversioner is alive to take possession of the property from the purchaser after the death of the widow. It is only the nearest reversioner, male or female that can claim possession on the death of the widow 45 Bom 105, 2 Pat 217 Rel (*Ryves and Daniels, JJ*) *JHARI KOERI v BHAJI SINGH* 45 A 613 21 A L J. 563 74 I. C 865

———*Widow Gift for—Spiritual welfare—When binding*

A gift by a Hindu widow of a moderate portion of her husband's estate if expressly made for the spiritual welfare of her husband is valid. It is enough if it is for a pious or meritorious purpose, but must be made with the object of the husband's spiritual welfare

*Per Fforde, J. Quære* whether  $\frac{1}{2}$  of the whole estate can be said to be a moderate portion? (*Abdul Raoof and Fforde, JJ*) *MUNSHI LAL v MT SHIV DEVI* 4 Lah 336.

———*Widow—Gift of whole estate—Consent of nearest reversioner who is insolvent—Effect.*

A gift by a Hindu widow of the whole estate with the consent of the nearest reversioner who happened to be an insolvent is not a surrender of the whole estate in favour of the nearest reversioner and can be supported only if necessity is proved. If the Hindu Law theory is based on the notion that there is first a surrender to the nearest reversioner and an immediate conveyance by him, then as soon as the estate vests in him, it enures to the benefit of the Receiver in

## HINDU LAW—WIDOW

insolvency and hence cannot afterwards be conveyed to another (*Piggott and Walsh, JJ*) *HARI HAR PRASAD v UDAI NATH SAH*

45 A. 260 21 A L J 77 74 I C 13  
L R 4 A 70 1923 A 190

—Widow—Gift of whole estate to daughter on marriage—Effect—Death of daughter

Where a widow on the occasion of her daughter's marriage makes a gift of her whole estate, it amounts in law to an acceleration of the daughters' estate. The fact that it purported to be a gift on marriage does not affect the question.

Where the daughter predeceased the mother, the latter does not succeed and the cause of action for the next reversioner begins to run from that date and when he allows possession to remain with another for more than 12 years, his rights are barred (*Banerji, A C J. and Ryves J*) *SARFAJ v RAMJAS*

21 A L J 796  
L R 4 A 505 90 & A. L R. 1013

—Widow—Gift with consent of reversioner—Consideration—Effect.

Where a widow makes a gift of her husband's estate with the consent of her reversioners, and agrees to pay them a sum of money for their consent, the transaction is not a bona fide one, but one to divide the estate between them and as such is invalid. (*Ayling and Odgers, JJ*) *KOKUMANU KOTAYYA v. PEDDI VELRAYYA.*

(1923) M. W N 679

—Widow—Joint family—Nature of possession.

Where the widow of a member of a joint family is in possession of family property, her possession is adverse and she will acquire an absolute title after 12 years, unless it is shown she entered into possession as limited owner. (*Lindsay and Sulaiman, JJ*) *UMAN SHANKAR v. MT. AISHA KHATUN*

45 A 729 74 I C 869

—Widow—Legal necessity—Presumption from consent by reversioner.

The consent of reversioners to an alienation merely affords evidence that the alienation was made under the circumstances which render it lawful and valid. In other words the consent of the reversioners is evidence of legal necessity. It will depend upon the circumstances of the case whether it is sufficient evidence or insufficient evidence (*Stuart and Sulaiman, JJ*) *UDAI BHAN SINGH v GAJENDRA SINGH.*

70 I. C 815  
1923 A. 28.

—Widow—Maintenance.

Where a will directed that the second wife of testator will be maintained out of the estate and will have the right to reside in his house

*Held*, that this is not a mere enunciation of the rights of maintenance and residence of the widow under the Hindu Law. In such a case, the lady claims maintenance under the terms of the will as the widow of the deceased testator, and not a right of maintenance as against her step son or even against her own son under the rules of Hindu Law. (*Manekjee and Chotzner, JJ.*) *PULIN BEHARI DEY v SATYA CHAKAN.*

70 I. C 548  
1923 Cal. 79

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—Widow—Mortgage right—Usufructuary mortgage—Execution sale—Rights of reversioner, Sec (1922) DIG COL 673 *BAIJADI v PURSHOTTAM NAROTIAM DAVE*

70 I C. 959

—Widow—Nature of estate—Alienation—Rights of reversioners (1922) DIG COL 674 *MIRZA SADIQ HUSAIN v MAHAMED KARIM*

70 I C 53

—Widow—Possession against—When adverse to reversioners—Decree against when binding See ADVERSE POSSESSION. 1923 All. 448

—Widow—Remarriage—Succession to estate of son by former marriage See (1922) DIG, COL 675 *HAR KISHORE SEAL v THAKUR DHAN BAISHNAB*

70 I. C 479.

—Widow—Residence—Right of—Purchaser of property—Right if enforceable against him.

A Hindu widow is entitled to reside in the family house and this right cannot be denied to her by a purchaser of the house with notice of her right. Even a purchaser without notice cannot evict her unless she is provided with another residence. But where the sale is effected by her husband or is for discharging a debt due by him, she has no such right (*Pipon, J C*) *BHAGAT SINGH v RAM PARKASH*

69 I. C 602.

—Widow—Surrender.

A deed of release in favour of a reversioner mentioned that all immoveable properties were released. With reference to the moveable properties the widow declared that she would retain the same in her possession and that after her demise the said release would be the owner of the same. *Held*, the terms of the deed of release were not sufficient to pass the entirety of the estate left by the last male owner, to release and that being so the surrender is not valid (*Ghose and Panton, JJ*) *JARI LAL PAI v. LAL BEHARI HAZRA*

75 I C 625 1923 Cal 499.

—Widow—Surrender—Gift—Invalid gift when operative as surrender

It cannot be said that a gift by a widow to a daughter or more generally a gift by a widow to another reversioner should be regarded as a surrender of the estate whatever be the terms of the gift. The question depends on the terms of the gift in question 11 A 253, 32 A 582 foll (*Oldfield and Devadoss, JJ*) *KARUMURI RAMA-LAKSHMI v BODA NAGARATNAM.*

(1923) M W N 172 44 M L J 677.  
17 L W 11 71 I C 343 (1923) Mad. 335

—Widow—Surrender—Provision for maintenance.

A gift of an estate by a widow in possession in favour of the next reversioner which operates as an acceleration of the estate to the latter is not vitiated by its containing a provision for the maintenance of the widow 46 I A 259, 42 M 523 Ref (*Ryves and Daniels, JJ.*) *RAM ADHAR SINGH v. RAM MANOHAR SINGH*

45 A 610, 21 A L J 548, L. R. 4 A. 289.  
73 I C. 990.

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## ———Widow—Surrender—Validity.

A relinquishment by a Hindu widow becomes operative only when the widow acts upon her declaration and withdraws herself from the estates. If notwithstanding her declaration, she continues to be in possession, there is no effacement founded on fact and she is free to rescind from it. (*Das and Kulwant Sahay, JJ*) RAO BHADUR MAN SINGH v MAHARANI NAWALAKHBAI

2 Pat 607 4 Pat L T 335  
73 I. C. 335 1923 P. 492

## ———Widow—Surrender—Validity of—Reservation of provision for maintenance—Effect of—Subsequent adoption—Rights of adoptee.

Where a Hindu widow surrenders her whole estate in favour of her daughter, who was her next reversioner at the time in consideration of the daughter's husband undertaking to maintain her, the surrender is good. A person who is adopted by the widow after surrendering her estate is not entitled to question the surrender. 47 I A 233, 44 B. 255 Ref.

*Per Macleod, C J*—The surrender by a Hindu widow of her life estate to the next reversioner gives him a title which is not dependent on the continuance of the life estate but results from its extinction and cannot be questioned by the subsequently adopted son. It follows that the title of one claiming either by purchase or by inheritance from the next reversioner is equally indeleasable (*Macleod, C J and Crump, J*) RAMA NANA BABAR v. DHONDI MURARI 47 Bom 678  
25 Bom L R 361 1923 Bom. 432.

## ———Widow—Surrender—Validity of—Widow's surrender to her daughter—Right of reversioner to question surrender

Where a Hindu widow surrenders her whole estate bona fide to her only daughter the surrender is valid and the daughter gets an absolute estate. It is not open to the reversioners next to the daughter to sue for possession of the estate after the death of the daughter. 46 I. A. 72, 47 I A, 233 Ref. (*Shah, A C J. and Crump, J.*) BAI PARVATHI v THE NADIAD MUNICIPALITY.

47 Bom 315 25 Bom L. R. 63  
1923 Bom. 459

## ———Will—Alienation by widow contrary to intention of testator

According to a Hindu will the income of a shop was set apart or ear-marked to be paid after the expiration of each month to a *Thakardawara*. No *Thakardawara* was specified in it and the provision that the rent was to be paid after the expiration of each month clearly signified the object of the testator to be that the shop should remain under the management and under control of his successors. The alienation of the shop by the widow of the testator in favour of the charity funds was challenged by reversioners. *Held* the widows had to carry out the wishes of the testator in the way ordained by him and not in contravention of it (*Broadway and Jafar Ali, JJ*) BHAGAT RAM v. RAM SARUP CHRLA.

5 Lah. L. J. 332. 1923 Lah. 352

## ———Will—Bequest to relative's prospective wife,

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There is nothing in Hindu Law to invalidate a legacy to the prospective wife of a relation, if she was in existence at the time of the testator's death (*Batten, O. J. C*) RAMDULAKI v BISHESHWAR DAYAL. 69 I C 876 1923 Nag 105

## ———Will—Bequest to widow—Nature of estate taken.

A bequest of immoveable property by a husband to his wife in the absence of words giving an absolute estate with power of alienation confers only a limited estate upon her (*Ghose and Panton, JJ*) BANKU BEHARY DE v BISSESWAR LAL MARWARI 1923 Cal 575

## ———Will—Construction—Bequest to Hindu widow—Limited or absolute estate—Presumption against intestacy

A Hindu testator directed the residue of his estate after payment of certain legacies to be delivered over to his wife P. after she attained the age of 20 years. *Held*, that there was a valid disposition of the property after the payment of legacies and that the wife took an absolute estate under the will, 42 M 283, 44 M 447, 30 A 84 Ref.

There is a presumption against intestacy. Courts are not to presume that a testator who set up to write a will has not cared to say what is to become of the bulk of the property (*Coutts Trotter and Ramesam, JJ.*) KANAKAMMAL v. BAKTAVATSULU NAIDU. 44 M. L. J. 23. (1923) M W N. 70 70 I C 321 1923 Mad 207.

## ———Will—Construction—Bequest under certain events—If deed necessary

Under a Hindu will, one brother was to give certain properties to another if the latter resided respectably with the former. He did so and then transferred his share. *Held*, even in the absence of a deed of transfer of share among the brothers, title passed to the vendee, though it is open to the joint brother to show that the event contemplated in the will had not happened. (*Macleod C J. and Crump, J*) SHANKAR MAHALESHPWAR BHATT v MANJUNATH SUBBA BALGYA.

74 I C. 298.

## ———Will—Construction—Devise to wife—Absolute estate—Gift over to son—Nature of estate taken

A Hindu by his will bequeathed his property as follows: "After my death my wife is to take my property into her possession with full authority and is to perform the funeral and obsequial ceremonies with respect to my death. And after doing the same my wife is to consume, enjoy or do what she likes with respect to what remains out of my property and after the death of my wife, my son is the owner of my estate, the said son may do what he likes with respect to my property." The son predeceased the widow who continued in possession. The reversioners sued to restrain the widow from wasting the estate. *Held* granting the injunction that the will did not confer an absolute estate on the widow. (*Macleod, C- J and Crump, J*) MULCHAND JELI SONDAS v. BAI RUKHMANI. 25 Bom L. R. 159  
72 I C 262 1923 Bom. 216 (2)

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Will—Construction—Gift to adopted son by name—Adoption invalid—*Persona designata* See (1922) DIG COL. 670 BAI DHONDUBAI v. LAAMANRAO 47 Bom. 65

Will—Construction—Gift to unborn children—Validity—*Hindu Transfers and Bequests Act* (8 of 1921) Ss 2 and 3—Effect of

A Hindu testator who died in 1912 left a will containing the following provision in favour of his descendants—The building valued at Rs. 2,000 shall be taken by my third daughter and the rental income derived therefrom shall be enjoyed by her. She has no power to make sale, gift, mortgage, etc. After her issue shall use and enjoy it from son to grandson with power of gift, mortgage and sale. The testator's daughter had a son born in September 1918 but he died the next day after his birth and the daughter herself died a few days later. She left her surviving her husband and two sisters. On a question arising as to the rights of the parties under the will held that the daughter took only a life estate in the property bequeathed and that she did not acquire an absolute interest by reason of her son having pre-deceased her. The Hindu Transfers and Bequests Act operates retrospectively and therefore applied to the case and the property became vested in the son as soon as he was born. Consequently the succession was to be traced to the son, though he was not alive at the period of distribution 31 M L J 33, 40 M 818 followed (*Kumaraswami Sastri, J.*) PERIANAYAGI AMMAL v. RATNAVELU MUDALIAR. 18 L. W 625 32 M L T. 137 (H C)

Will—Construction—Gift to wife—Malik—Absolute owner

The fact that the beneficiary under a will is a female in no way affects the interpretation to be put upon the words used by the testator, but every case of this sort has to be decided on its own merits and its peculiar circumstances. The mere use of the word, "Malik" qualified by the surrounding contexts does not preclude the possibility of merely a life estate being conferred. A Hindu testator bequeathed his property to his widow and provided that she would be malik and that after her death her two daughters were to inherit in equal shares. Held that the intention of the testator was that his widow should have a life-estate and that after her death the two daughters should succeed 2 Lah 175, 30 A 84; 65 P. R 1917 referred to (*Harrison, J.*) RAMKISHEN v. MT. BHAGIRATHI 71 I C 748 1923 Lah 304

Will—Construction—Principles—Estate given to sister—Malik—Meaning of

The will of a Hindu provided that his properties should go to his only heir, his sister as malik and provided that in case she predeceased him a trust should be created in favour of a temple, but if she survived him she could use the income for life and dispose of the corpus at her pleasure. Nobody could sell or mortgage the property. If there was nothing to indicate she got a limited estate under Hindu Law and the use of the word malik indicated the conferring of an absolute estate.

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Principles of construing Hindu wills referred to (*Hallifax, A J C.*) SUNDRA BAI v. JAGANNATH 69 I, C 286 (1923) Nag 56

Will—Construction—Provision for idols—Absence of gift—Effect—Scheme. See (1922) DIG COL 679 GOPAL LAL SETT v. PURNA CHANDRA BASAK 27 C W N 174 37 C. L J 469

Will—Construction—undisposed of property—Devolution

If a will fails to make any effectual and complete disposition of the whole of the testator's real and personal estate, of course the undisposed of interest, whether legal or equitable, devolves to the person or persons on whom the law, in the absence of disposition, casts that species of property.

Wherever there is a partial intestacy either on account of no person being alive to claim under the will or by reason of a bequest being void or otherwise ineffectual, there is always a resulting trust in favour of the heir-at-law.

No person can prevent his property or any part of it or any interest in it from devolving upon the heirs constituted by law after his death, except by a valid disposition giving it to some other person. He can only defeat the rights of his natural heirs by making a valid device in favour of some person but not otherwise, for he cannot make it the property of no one, the property must vest in some one and cannot remain in abeyance or suspense without an owner (*Dalal and Simpson, A J C.*) RUP KISHORE v. KANHAYA LAL 26 O C 266 9 O & A, L R 384 74 I, C 563 10 O L J 141 1923 Oudh 227

Will—Gift to unborn person—Power of appointment—Rule in the Tagore case,

There can be no question that in a case to which the rule in the Tagore Case applies, a gift which cannot be made directly cannot be made indirectly by means of a power conferred by the testator on his executor 24 I. A. 93 followed. The rule in the Tagore case is a general rule to which there may be exceptions. Property cannot be made inheritable otherwise than as the law allows, but there may be exceptional cases in which Hindu Law sanctions a departure from the rule that the donee must be in existence. The Hindu Law allows the founder of a religious trust or institution to lay down a general rule of succession to the managership and a power given by the founder to his widow to appoint a successor to the shebaitship cannot be said to be improperly or invalidly exercised if the widow appoints a person who was not in existence at the date of the death of the testator, as shebait. A trusteeship with power to appoint a successor is well known to and recognised by Hindu Law (*Sanderson C J and Richardson, J.*) MATHURANATH MUKERJEE v. LAKHI NARAIN GANGULY 50 C 426 75 I C 435 1924 Cal 68

Will—Joint family—Brothers sole surviving co-parceners—Powers of

If a Hindu is the absolute owner of property whether ancestral or self acquired he can bequeath it by will and in principle there is no objection to some power being given to two Hindu

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brothers, provided they together have the entire ownership of the whole co-parcenary property. Such a document can also be looked upon as embodying a mutual bargain, consideration being such party giving up the possibility of gaining by survivorship (*Mears, C J and Banerjee, J*)  
**LAKSHMI CHAND v ANANDI**

45 A 245 L. R. 4 A. 306 21 A L J 73  
 1923 A. 109 71 I. C 574.

—Will—Life estate to wife if husband died childless—Reversion to a stranger. See (1922) DIG. COL 838. **ALLAH DIA v, ABDUL GAIUR**  
 69 I C 848

—Will—Right to question—Reversioner—Genuineness See (1922) DIG. COL 679. **PALCHUR SANKARA REDDI v P MAHALAKSHMAMA**  
 17 L W 1 27 C W N 414  
 70 I C 949 (P C)

**HINDU TRANSFERS AND REQUESTS ACT (8 of 1921) Ss 2 and 3 Applicability of—Retrospective operation, See HINDU LAW WILL,**  
 32 M L T 135 (H C)

**HINDU WIDOW'S REMARRIAGE ACT (XV of 1886)—Scope of.**

It is not the object of the Act to deprive a Hindu widow upon her re-marriage of any right or interest which she had not at the time of her re-marriage—When after the re-marriage of a widow, her son dies and the question is of her right of succeeding to him, the Act must be held not to affect her rights (*Das and Ross, JJ*)  
**MT PATI v NIRDHAN GOPE** 1 Pat L. R. 390  
 4 Pat L T 650. 74 I C 815.

—S 1—Hindu widow—Remarriage—Subsequent death of her son—Inheritance See (1922) DIG. COL 680 **HAR KISHORE SEAL v. THAKUR DHAN BAISHNAB.** 70 I. C 479

—S 2—Hindu widow—Conversion to Mahomedanism—Remarriage thereafter—Forfeiture of estate. See (1922) DIG. COL 680 **MT SURAJ JOTE KUER v MT ATTAR SINGH**  
 1 Pat. 706

—S. 2—Scope of.

S. 2 of Act XV of 1856 applies not only to widows who could not re-marry before the passing of the Act, but also to those who were not so precluded from re-marrying either by law or custom. In either case the widow forfeits the estate inherited by her from her former husband (*Ghose and Panton, JJ*) **SANTALA BEWA v BADASWARI DAS.** 50 Cal 727 27 C W N. 669  
 75 I C 11

**HINDU WILLS ACT (XXI of 1870) S 216—Will—Executor—Power to carry on business—No direction in will—Discretion of Court—Debt incurred in carrying on business—Indemnity See (1922) DIG. COL. 680, **SUDHIR CHANDRA DAS v RASHESWARI CHAUDHURI.** 69 I C 796.**

**INCOME-TAX—New Zealand—Expenses for preventing extinction of business—If a deduction.**

Under the Income Tax-law of New Zealand it is not permissible to deduct expenditure incurred for rousing up public opinion against the propos-

**INCOME-TAX, (1918), S 3**

ed extinction of a business, as it cannot be said to be expenses for the production of profit (*Viscount Cave*) **WARD & CO LTD v COMMISSIONER OF TAXES** 33 M L T. 225 (P C).

**INCOME TAX ACT, VII of 1918—S 2—Forest income—If agricultural income See (1922) DIG. COL 684, SECRETARY TO THE CHIEF COMMISSIONER OF INCOME TAX v ZEMINDAR OF SINGAMPATTI.** 70 I C 504

—S 2—Income—Income of Mutual Benefit Societies

Interest paid by shareholders of a Mutual Benefit Fund on loans advanced by them or on subscriptions overdue is not liable to income-tax as income of the fund

Income, to be taxable, must come in from outside and not from within (*Ayling, Coutts Trotter and Ramesam, JJ*) **THE SECRETARY BOARD OF REVENUE INCOME TAX MADRAS v THE MYLAPORE HINDU PERMANENT FUND MYLAPORL** (1923) M W N 409 1923 Mad 684

—S 2 (12)—Joint Hindu family—Members of a joint Hindu family registered as a firm under S 4 (12) of the Income Tax Act VII of 1918—In what cases assessable as an undivided family to supertax on the income of the firm

The registration of the brothers, the members of a joint family as from defined under S. 2 (12) of Act VII of 1918 precludes the assessment of the family as an undivided family to supertax on the income derived from the business of that firm, unless the firm so registered has been shown to carry on its business on behalf of and for the benefit of the joint family.

Mere constitution of the partnership between some members of the family will not preclude the assessment in cases where the partnership is carried on behalf of and for the benefit of the joint family (*Ayling, Coutts Trotter and Ramesam, JJ*) **SECRETARY TO THE CHIEF COMMISSIONER OF THE INCOME TAX, MADRAS v. DURAI-SWAMI AIYANGAR.** 45 M L J 150

18 L. W 96 (1923) M W N 413  
 46 Mad 673 74 I C 22 1923 Mad 682

—Ss. 3 and 10—Income, what is—Interest Not realised See (1922) DIG. COL 684, **BOARD OF REVENUE (INCOME TAX) MADRAS v PYDAH VENKATACHALAPATHY GARU**

69 I C. 405

—S. 3 (1)—Income "accruing or arising or received in British India or deemed to accrue or arise, or to be received in British India"—Meaning—Company—Profits earned outside British India—Liability to assessment—Same sum of money cannot be received qua income twice over once outside British India and once inside it.

A Company carried on a factory at Raichur in the territory of the Nizam of Hyderabad At that factory material was pressed Against persons who brought the material to the factory a charge was made, and the charge was received wholly in Hyderabad The Company's head office was in Bellary. There were directors there



## INCOME TAX, S 3

and they controlled the business carried on at Raichur by directing its policy fixing the rates to be charged for the work done there, examining its accounts and issuing dividend warrants in respect of the profits earned. The only other thing done in British India was the receipt of some money for the purpose of the office expenditure at Bellary, and possibly the receipt of some money which was occasionally used for the payment of dividend warrant at Bellary, though, by the terms of the dividend warrants, they were payable only at the office of the treasury at Raichur.

*Held*, that the Company could not be assessed to income tax under the Income Tax Act VII of 1918 on the whole of its profits for the year. There was no income which accrued, or arose or was received in British India or which could be deemed to have accrued or arisen or to have been received in British India within the meaning of S 3 (1) of the Act.

*The Chief Justice* — *Semble* — Even the small amounts received by the Company as stated above in Bellary are not themselves liable to taxation.

*Per Coult's Trotter, J.* — The same sum of money cannot be received *qua* income twice over once outside British India and once inside it (*Sir Walter Schwabe & Co Chief Justice, Oldfield and Coult's Trotter, J.*) THE SECRETARY, BOARD OF REVENUE (INCOME-TAX) MADRAS v RIFON PRESS AND SUGAR MILLS COMPANY, LTD 46 Mad 706 44 M L J 523 17 L W 584 (1923) M W N 321 31 M L T (H C) 306 1923 Mad 574

— S 3 (2) viii — Profits made by money lender out of exchange fluctuations — If assessable

A money lender in Madras by sending money to Penang to purchase dollars and reconverting them into rupees whenever exchange fluctuated favourably to him earned large profits. *Held* the receipts were not of a casual and non-recurring nature and as they arose in the pursuit of business as banker and money lender they were liable to tax (*Schwabe, C. J., and Coult's Trotter, J.*) THE SECRETARY, BOARD OF REVENUE v ARUNACHALAM CHETTY 45 M L J 707 18 L W 776 33 M L T 119 (H C)

— S 3 (3) — Agricultural income — Permanently settled estate — Exemption from further tax — Forest and fishery income — Effect of *See* (1922) DIG, COL 685, SECRETARY TO THE CHIEF COMMISSIONER OF INCOME TAX, MADRAS v ZEMINDAR OF SINGAMPATTI, 70 I. C 504

— Ss. 8, 5 and 33 — French Resident — Profit made through branch or agent in Br India — If taxable

The profits made by a Resident in France having a branch or agent in British India, and which are received and retained in France are not liable to income tax in Br India (*Schwabe, C J and Wallage, J.*) THE SECRETARY, BOARD OF REVENUE, MADRAS v THE MADRAS EXPORT COMPANY 44 M L J 290 46 Mad 360 32 M L T (H C) 37 17 L W 161 71 I. C. 756 1923 Mad 422

## INCOME TAX, S 19

— S. 9 — Firm carrying on business in partnership with other firms — Losses if a deduction — Expenses on accountants and lawyers can be deducted

Where a firm carrying on business in piece goods is also a major partner in another firm carrying on the same business the other partner of which was found to be only a partner with a small share as to encourage him to take a real interest in the management the share of the losses in the second concern can be deducted for purposes of assessment from the profits of the first firm.

Moneys spent in engaging accountants and lawyers for representing their case before the income tax authorities are not spent for earning profits and do not form a deduction (*Schwabe, C J and Coult's Trotter, J.*) THE SECRETARY BOARD OF REVENUE v MUNISAMY CHETTY & SON 45 M L J 711 18 L W 792 33 M L T 122 (H C)

— S 9 (2) (iii) — Business profits — Company managing by or on behalf of Secretary of State — Computation of profits — Deduction of guaranteed interest — Interest on borrowed Capital (1922) DIG COL 686 BENGAL NAGPUR BY v SECRETARY OF STATE FOR INDIA 70 I C 46

— S 10 (2) (III) — Business profits — Deductions — Interest taken by partners.

The objectors were being assessed to income tax for the financial year 1922, 1923 on the basis of the profits disclosed by their accounts for the calendar year 1921. In those accounts a total sum of Rs 42,882 was shown as interest paid on account of money advanced during the year by the partners in the firm for the purpose of carrying on business. The objectors claimed that this interest should be treated as an allowance admissible under S 10 (2) (iii) of the Indian Income Tax Act, and should therefore be deducted from the net profits of the year before these are assessed to Income-Tax.

*Held* that such interest represented merely an assignment of a part of the net profits for the year in favour of partners who were regarded as entitled to such assignment by reason of special advances of capital made by them in the course of the year.

The question whether there has been an advance of capital by particular partners, or *bona fide* borrowing of money by the firm in which the lender happens to be a partner must be treated as one of fact in each case. (*Bancroft and Piggott, JJ.*) LALLA MAL HARDEO DAS COTTON SPINNING MILLS In the Matter of. 21 A. L. J. 703.

— S. 12 (a) — Firm — Husband and wife — Husband's option to take in fresh partner or determine her Share — Partnership *See* CONTRACT ACT, S. 239. 25 Bom L. R. 1225

— S. 19 — Adjustments — Registered firm — Registration after the year of account — Effect of.

An adjustment can be made during a financial year in which the Collector's certificate of Registration under S. 12 (a) is in force in respect of income of a firm for the previous year in which the

## INCOME-TAX (1918), S 31

firm was not registered (*Schwabe, C J, Oliffeld and Coulters Trotter, JJ*) SECRETARY TO THE BOARD OF REVENUE v MISSKS MAHOMED SHIKIFI HUSSAIN MEAN SAHIB & CO., MADRAS

1923 Mad 34

—Ss 31, 33 and 34—Scope of—Agent—Assessment of, on behalf of non-resident principal—Receipt of income See (1922) DIG COL 687 IMPERIAL TOBACCO COMPANY OF INDIA v THE SECRETARY OF STATE FOR INDIA

37 C L J 257

—S 33—Scope of

Per *Schwabe, C J* S. 33 (1) is not a charging section at all but a machinery section and is not intended to impose any taxation upon any income which would not otherwise be liable to tax, but to point to the method of collecting the tax, where a person whose income is to be taxed is not himself available

Per *Wallace, J* The object of S 33 (1) is merely to provide for an agent being the assessee in the place of his non-resident principal The section is governed and controlled by S 5 (*Sir Walter Schwabe, C J and Wallace, J*) THE SECRETARY BOARD OF REVENUE MADRAS v THE MADRAS EXPORT COMPANY

46 Mad 360

44 M L J. 290 32 M L T (H C) 37  
17 L W 161 71 I C 756 1923 Mad. 422

—S 46, Cls 3 and 4—Arrears of Income-tax—Mode of realisation—Distress warrant

Arrears of Income-tax can be realized like an arrear of land revenue under S 46 of Income-tax Act and if orders are passed by the Commissioner like an arrear of Municipal tax of local rate, in the absence of the Commissioner's order under S. 46, Cl 3 & 4 of the Income-tax Act the Collector has no power to issue a distress warrant for realisation of arrears of Income tax Moreover the Collector has no authority to issue such a distress warrant to an officer of the Police nor is a police officer executing such a warrant acting in execution of his duty as a Police-officer Consequently resistance to him does not constitute an offence under, S 353 I P C (*Ross, J*) JAIRAM SAHU v. EMPEROR

4 Pat L. T 171

(1923) Pat 111 1 Pat L R (Cr) 68

72 I C 954, 24 Cr L J 490

1923 P. 338

—S. 51—Appeal to Privy Council—General right discussed,

No statute, Imperial or Indian, is to be found giving expressly, or by implication, a right of appeal either with or without the leave of the High Court to His Majesty in Council from a decision or order made, or judgment given under S. 51 of the Indian Income Tax Act of 1918, Neither can any such statute be found giving a general right of appeal to His Majesty in Council from the Orders or judgments of any class of Courts as the 3rd Section of the English Appellate Jurisdiction Act, 1876, gives a general right of appeal to the House of Lords from the judgments or orders of the Courts therein mentioned.

Clause 39 of the Letters Patent of the High Court of Bombay considered,

## INCOME TAX (1918), S 51

The words "original jurisdiction" are only used in contradistinction to the words "made on appeal" mentioned earlier in the clause

A decision under S 51 of the Income Tax Act to be appealable must be either a final judgment or final decree or a final order A final judgment as understood in English litigation is nothing more than that there should be a proper *litis contestatio* and a final adjudication between the parties to it on the merits

The fact that the functionary who states a special case for the opinion of the Court is or is not bound to act upon it does not necessarily determine whether the order and decision of the court is or is not merely advisory In order to determine whether an order made by a Court on a case stated is final or merely advisory, it is necessary to examine closely the language of the enactment, whether statute rule or order, giving the power to state a case

When a case is stated for the "opinion" of the Court, that word would serve *prima facie* to indicate that the order made by the Court was only advisory Where the case is referred for the "decision" or "determination" of a question, there is a *prima facie* difficulty in holding that the order embodying this determination or decision is advisory, but the use of these words or one of them is not decisive.

A decision, judgment or order made by the High Court under S 51 of the Income Tax Act is merely advisory and not in the proper and legal sense of the term final and the appeal is incompetent. (*Lord Atkinson*), TATA IRON AND STEEL CO. LTD v. THE CHIEF REVENUE AUTHORITY OF BOMBAY

45 M L J 295 25 Bom L R 908

21 A. L J. 675 18 L W 372

(1923) M W N 603 33 M L T 301 (P C)

47 Bom 724 9 O & A L R 783

L R 4 P C. 170 74 I C 469, 50 I A. 212.

1923 P C 148 (P C).

—S 51—Chief Revenue Authority can be compelled to state a case.

If an assessee applies for a case, the Revenue authority must state it, unless he can say that it is frivolous or unnecessary He is not to wait for the Court to order him to do it, it will be a misfeasance and a breach of the statutory duty if he does not do it. The word, "may" in the section does not mean "shall" Neither are the words "it shall be lawful" those of compulsion Only the capacity or power is given to the authority. But when a capacity or power is given to public authority there may be circumstances which couple with the power a duty to exercise it *Julius v Bishop of Oxford*. 5 A. C 214, 222 Foll.

Always supposing that there is a serious point of law to be considered, there does lie a duty upon the Chief Revenue Authority to state a case for the opinion of the Court, and if he does not appreciate that there is such a serious point, it is in the power of the Court to control him and to order him to state a case If there is a point of law it ought to be decided in a regular manner and upon proper materials Ordering a case to be stated does not depend upon the question whether the Chief Revenue Authority had reasonable grounds for being satisfied that a reference was unnecessary.

## INCOME TAX (1918), S. 51

The question whether capital placed in a particular investment was capital employed in the business or not was not a pure question of fact, upon which the decision of the Income Tax Commissioners would be conclusive but was a question of law or of mixed law and fact, the decision of the Revenue Authority upon which would be open to review.

An important question of law upon the construction of the statute is involved. This may be most tersely expressed by asking the question what are the interest bearing securities which form part of the assets of the business and are therefore to be treated as part of the capital and one guide in arriving at this conclusion may well be the difference of language between the later Indian and the earlier English Act (*Lord Phillimore*) *ALCOCK ASHDOWN & CO LTD v THE CHIEF REVENUE AUTHORITY OF BOMBAY*

25 Bom L R 920 33 M L T (P C), 267  
45 M L J 592 47 Bom. 742  
L R, 4 P. C. 188 18 L W 918 75 I C 392.  
21 A. L. J. 689 (1923) M W N 557  
50 I A. 227 (1923) P, C 138

—S 51—*Leave to appeal—If can be granted.*

Where a question is referred by the commissioner of Income Tax for decision to the High Court, there is an appeal to the Privy Council open to the defeated party if the provisions of Ss. 109 and 110 C P C are complied with (*Schwabe, C J and Counts Trotter J*) *SECRETARY, BOARD OF REVENUE v. MADRAS EXPORT COMPANY* 18 L. W 392 1924 Mad 63

This view is no longer law *See*  
50 I. A. 212 45 M L J. 295 (P C.)

—S 51—Reference by Board of Revenue—Reference made on a mandamus by Board of Revenue—Objection to—Reference is permissible *See* (1921) DIG COL 772 *SECRETARY TO THE CHIEF COMMISSIONER, INCOMETAX, MADRAS v. HAJEE ABDULLA SAHIB & Co MADRAS* 70 I C 30

INCOME TAX ACT (XI OF 1922) S 2—*Registered firm—Assessment—Mode of—Registration in the year*

Where the partners had lost their right to be dealt with as a 'registered firm' for the financial year 1922-1923, for the simple reason that they had failed even to provide themselves with an instrument of partnership within the extended period allowed them for the presentation of their return of income, they could not be dealt with as such retrospectively the next year. The obvious intention of the rules, as shown by the wording of the prescribed form of certificate, is that such applications for registration should ordinarily be presented in the month of April the first month of the financial year. Where the period for making a return of income has been extended, there can be no objection to a certificate being issued bearing the correct date of some other month. It will take effect from the date specified therein. When the assessment comes to be made, the officer charged with that duty will have to determine simply whether the firm with whose return, or with whose accounts he is dealing, is

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or is not a 'registered firm' within the meaning of the definition. Where the objectors had been plainly told that they would be dealt with for the year 1922-1923 as an 'unregistered firm' their attempt to escape from this position by going to the Income-Tax Officer at the beginning of January, 1923 is wholly futile (*Banery and Piggott, JJ*) *LALLA MAL HARDEO DAS COTTON SPINNING MILLS In the Matter of*

21 A L J 703  
L R 4 A 451 75 I C. 339.

—S 18—*Fax on salaries*

The deduction of income tax from salaries under S 18 at the time of the payment of the salary must be made at the rate applicable to the estimated income for the year of assessment, (*Robinson, C J and Maung Oung, J*) *CHALMERS v GOVERNMENT* 1 Rang. 335 1924 Rang 30

—S 22 (2)—*Verified statement denying income—Onus on Income Tax authorities to rebut,*

Where an assessee in a verified return under S 22 (2) of the I T Act declared he had no income from a particular source, if the authorities disbelieve it, the onus is on them to prove there was income from that source and what it was (*Sanderson, C J and Richardson, J*) *IN THE MATTER OF BISHNU PRIYA CHOWDHURANI* 50 Cal 907

INDEMNITY—*Breach—Cause of action—Covenant to discharge mortgage by vendee—Default—Damages—Liability.*

The plaintiff who owned a house and certain lands mortgaged it to the first defendant. Subsequently the plaintiff sold the lands to the 2nd defendant the arrangement being that the 2nd defendant should pay the consideration money for the sale to the first defendant and thus discharge the mortgage. The plaintiff also executed a mortgage on the house to the 2nd defendant for the purpose of securing the additional amount required to discharge the mortgage due to the first defendant. The 2nd defendant failed to discharge the mortgage with the result that the first defendant obtained a decree on the mortgage and brought the properties to sale. At this stage the 2nd defendant paid a portion of the mortgage decree and by an arrangement with the mortgagee got the lands alone released. The house was brought to sale and was purchased by the 2nd defendant himself in the name of another person who ejected the plaintiff therefrom. Plaintiff brought a suit for possession of the house and damages *Held*, that the cause of action for the suit for damages arose on the date when he suffered a loss by being ejected from the house. 2nd defendant was in a fiduciary position of relationship to the plaintiff and having purchased the house as a result of his own breach of duty, was bound to convey the house to the plaintiff with mesne profits, subject however to the mortgage in his favour for Rs 1,000. 29 M L J. 551, 44 Cal 573 referred to. (*Schwabe C J and Wallace, J.*) *VENKATANARAYANIAN v SUBRAMANI AYYER.* 17 L W. 453

74 I. C 209 1923 Mad. 492.

## INDIAN SOLDIERS ACT (IX OF 1918), S 10.

INDIAN SOLDIERS (LITIGATION) ACT (IX OF 1918) S 10—*Compromise—Signed by some of the agents—Application to set aside—C P Code, O 47, R 1*

An Indian soldier before going abroad to serve in the war executed a power of attorney to his four brothers. A partition suit filed against him was compromised by one of the brothers without the knowledge and consent of the others. On his return the soldier made an application to set aside the compromise decree. *Held*, that the High Court had power to do so under O 47, R 1 C. P. Code or S 10 of Act IX of 1918 (*Chatterjee and Chotzner, JJ*) S. M. HAIMABATI DIVI v. PRAN KRISHNA BANERJEE, 27 C W N. 193. 75 I C 262.

S 11—*Applicability of.*

S 11 of Act IX of 1918 under which the period during which a plaintiff has been serving under war conditions is to be excluded, applies only where the plaintiff is an Indian Soldier at the time when the action was brought. The Section has no application to the case of a plaintiff who was a soldier before the date of suit but who has ceased to be such on that date (*Martineau, J*) BARKHURDAR v. KARAM DIN 72 I C 107. 1923 Lah 465.

S. 11—*Applicability of*

S. 11 of the Act IX of 1918 applies only where the plaintiff is an Indian Soldier and it does not become applicable by the mere fact that he was a soldier at the time when the cause of action arose (*Martineau, J*) MULA MAL v. PIARA SINGH 71 I. C 323

S 11—*Applicability of—Soldier on active service.*

S 11 of Act IX of 1918 does not apply to the case of a plaintiff who has formerly been a soldier but has ceased to be one at the time when he brings his suit. The time during which the plaintiff was serving under war conditions cannot be excluded (*Martineau, J*) MAHOMED DIN v. ILAM DIN 5 Lah L J, 174. 73 I, C 817 (1) 1923 Lah. 455

INDIAN TARIFF ACT (VIII OF 1894) AS AMENDED BY ACT (IV OF 1916) —*Tariff duty—S. 10 Sale of goods ex godown—Reduction of tariff value by Government notification—Consequent reduction of duty—Whether buyer entitled to deduct from the contract price—Duty in S 10 of the Tariff Act, meaning of—Payment under duress—Recovery of.*

The plaintiff entered into a contract in December 1922 for the purchase by him from the defendant of certain Java sugar to arrive by a named ship due about the end of the year at about Rs 20 to cwt. "ex godown." Duty was payable on sugar at 25 per cent. On the "tariff value" which was fixed annually at the average of the market prices ruling during the previous 12 months ending with September, the practice being to bring the new tariff valuation into operation from the beginning of January. When the goods in the case arrived the tariff valuation was reduced and the amount of duty payable was consequently less. In a suit by the plaintiff to recover the excess, where he had paid the full contract amount in order to get

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the goods, *held*, that the plaintiff was entitled to succeed.

The purchaser is entitled under the circumstances to deduct from the cost price so much as will be equivalent to the decrease of duty consequent on the reduction of tariff value under S 10 of the Tariff Act VIII of 1894 as amended by Act IV of 1916.

The word 'duty' in S 10 refers to the amount payable and arrived at by taking into account the tariff value and the rate of duty.

The excess payment made by the plaintiff as a condition of his getting the goods is a payment made under duress and not a voluntary payment and can therefore be got back (*Schwabe, C J. and Krishnan, J*) HAJEE SHAKOOR GANI v. SABAPATHY PILLAI 45 M. L J 749. 18 L. W 796 32 M L T 152 (H. C.)

INHERENT POWER—See C P C CODE, S 151.

INJUNCTION — Breach of — Sale *held* in contravention of—Validity See C P CODE, S 151. 45 M L J, 312.

—*Easement—Obstruction to light and air—Proposed building—Form of order.*

Where the plaintiff brings a suit to restrain the defendant from interfering with the access of light and air to his building by a construction proposed by the defendant the form of decree is not always that contained in form 15 of Appendix B of C P Code. It is quite true that it is the form prescribed for a decree in a *quia timet* action asking for an injunction against a building higher than the old level. That form is the common form of injunction which has been used in England ever since the cases of *Yates v Jack* (1866) L R 1 Ch 295, but it is obvious, when reference is made to the Easements Act that this form is appropriate as expressing what the Court should direct if the plaintiff succeeds in a *quia timet* action. Though the plaintiff may have an easement of light and air for all the windows which obtained light over the defendant's old buildings, he has no cause of action against the defendant unless he threatens to disturb his enjoyment of his easement. Therefore, if he succeeds in proving that, he is entitled to an injunction restraining the defendant from disturbing the easement, to the enjoyment of which he has been held to be entitled. By S. 32 of the Easements Act the owner of a dominant heritage is entitled to enjoy an easement without disturbance by any other person. What amounts to an actionable disturbance is defined in S. 33 of the Act. When the defendant is so enjoined, it will depend upon the future character of his building whether he has disobeyed the injunction in such a way as to give rise to a right of action. An injunction was issued in the case by "perpetually restraining the defendants from disturbing the easements to which the plaintiff is entitled in respect of the windows of the south wall of the premises mentioned in the plaint which were held to be ancient windows save in so far as they were obstructed by the defendant's old building." (*Macleod, C. J. and Crump, J*) BAIKASHI BAI v. PURSHOTAM KESHAVJI. 25 Bom L. R 239. 72 I, C 406: 1923 Bom. 196.

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—General injunction—Mention of particular acts unnecessary.

It is always undesirable that an order should be made for bidding a party enjoined generally from doing particular acts. If once the Court enjoins the defendant against particular acts there is no limit to the number of acts which might have to be mentioned. The general injunction is sufficient. (*Macleod C J and Crump J*) KASHINATH HARI BONDALE v VISHWANATH BHIKO 1923 Bom 409.

—Jurisdiction—Defendant resident outside jurisdiction—Acts within jurisdiction—Acts of religious worship—Injunction when granted. See C. P. CODE, O, 39, R, 1

4 Pat. L. T. 48

—Nuisance—Declaratory suit—Septic tank—Preventive remedy.

The principles on which a Court acts in granting an injunction in preventing a nuisance likely to be committed, are these.—The Court will not in general interfere until an actual nuisance has been committed, but it may, by virtue of its jurisdiction to restrain acts which, when complied will result in a ground of action, interfere before any actual nuisance have been committed where it is satisfied that the Act complained of will inevitably result in a nuisance. The plaintiff, however, must show a strong case of probability that the apprehended mischief will in fact arise in order to induce the Court to interfere. There are at least two necessary ingredients for a *quia timet* action. There must, if no actual damage is proved, be proof of imminent danger, and there must also be proof that the apprehended damage will if it comes be very substantial.

Plaintiffs were the owners of certain houses and a temple frequented by worshippers on one side of the road. On the opposite side the defendants had a jute mill in which there were several septic tanks from which it was alleged that offensive smells emanated and complaints had been made from time to time by the plaintiff. In July 1919 the plaintiffs wrote to the defendants stating that they had been informed that the defendants were about to erect another tank opposite to the plaintiff's premises and alleging that nuisance and inconvenience were likely to arise therefrom and asking them to abstain from erecting the septic tank at that particular place. The defendants did not reply to the latter with the result that in August 1919 the plaintiffs brought a suit for an injunction restraining the defendants from constructing the tank. An interim injunction was issued pending the trial and it was established by the evidence that the use of the septic tank had been approved by proper authority and by qualified scientific men as a proper system in the neighbourhood and that the new septic tank, if properly kept would emit no smell and cause no nuisance. Held that no injunction could be granted as it was quite possible by the use of due care to prevent offensive smell emanating from the new tank. The Court however declared that the granting of suit was without pre-judice to the right of the plaintiff to take such further proceedings as might be necessary in case the new septic tank proved to be a nuisance in the future.

## INSOLVENCY

(*Sanderson, C J and Richardson, J*) AMARENDRA NATH DEY v BARANAGORE JUTE FACTORY CO., LTD 49 Cal. 1059 70 I C 939 1923 Cal 271

INSOLVENCY—Claim of a person to property of insolvent disallowed by insolvency Court—Suit

A person who claims rights to property taken possession of by the official receiver as belonging to an insolvent and whose claim has been disallowed by the insolvency Court may bring a regular suit to establish his rights. (*Martineau, J.*) SHANCHI KHAN v KARAM CHAND 73 I C. 705 1923 Lah 150 (2)

—Official Receiver—Duties of—Challenging alienation in fraud of creditors

When a creditor challenges an alienation as being in fraud of creditors, it is the official Receiver's duty to give notice to such creditor and ask him to substantiate his allegation. A general notice asking creditors to prove their claim will not suffice. A date should be fixed for inquiring into the *bona fides* of the transactions impugned, and notice of the same given to creditors to come and object. There must be an examination of the insolvent and creditors if any, and if he finds an alienation to be fraudulent, he must move the court to set it aside. Even if he finds it not fraudulent but a creditor wants it to be taken to court, he must do so taking an indemnity for costs if necessary. (*Spencer and Devadoss, JJ*) PANNAI ANANTANARAYANA AIYAR v RAMASUBBA AIYAR 18 L W 857

—Official Receiver—Status

The status of an Official Receiver is that of an officer of the Court (*Le Rossignol and Abdul Qadir, JJ*) PIRTHI NATH v BASHESHAIR NATH 69 I C. 403

—Practice Objection by son of insolvent—Court to decide

When on the insolvency of a Hindu father, all the family properties are taken possession of by the Receiver and the minor son objects to their interest being taken on the ground the father's debts were illegal and immoral the judge ought to decide such questions himself and not merely call for a report from the Receiver (*Das and Kulwant Sahay, JJ.*) SANT PRASAD SINGH v. SHEODUT SINGH 2 Pat. 724.

—Procedure—Burden of proof.

Where an official assignee applies against a garnishee to set aside a transaction as a fraudulent preference it should be tried practically as if it were an action. The case should be opened on behalf of the official assignee and his report read as if it were a pleading. He must then call in his evidence, and make out his case like any plaintiff. Then the case for the other side should be opened and the matter tried. The court cannot call upon the garnishee before he knows what is the case he has to meet (*Schwabe C J. and Wallace, J*) SAMU PATTAR v. WILSON. 18 L W 696 73 I C. 532.

—Sale order confirming—Appeal—Parties

When an appeal is filed against the order of a District Judge confirming a sale effected in insolvency proceedings, the auction purchaser and

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Official Receiver are necessary parties and the omission to make them parties is fatal to the appeal. (*Martineau, J.*, MT TARLOK DEVI v JOLI RAM 1923 Lah. 58 (1))

**INSURANCE—Condition in policy that if claim is not brought within a certain time policy would be forfeited—Validity.**

A clause in a policy of insurance that if on a claim being rejected, a suit is not filed within 3 months, the benefit under the policy would be forfeited does not offend against Ss 28 and 23 of the Contract Act and hence is perfectly valid (*Greaves and Buckland, J.J.*) GIRIDHARILAL HANUMANBUX v EAGLE STAR AND BRITISH DOMINIONS INSURANCE CO LTD 27 C W. N. 955.

**Fire — Arbitration clause — Condition precedent to suit—Rejection of claim by Insurance company—Right to sue.**

A policy of fire-insurance provided that if a claim was made under the policy and rejected by the insurance company and a suit was not commenced within three months after such rejection all benefit under the policy would be forfeited. There was also a clause to the effect that if any difference arose as to the amount of any loss or damage such difference should independently of all other questions be referred to arbitration and that it should be a condition precedent to any right of action upon the policy. Plaintiffs sued for damages from the insurance company in respect of the destruction of their goods by fire. The trial Court found that the defendant Company had rejected the claim and that the suit was therefore competent. The Court also stayed the suit and referred the parties to arbitration. Held that the rejection of the claim by the company gave the plaintiffs a right of action within three months after the date of rejection. The plaintiffs had a right to sue to have the question of the propriety of the rejection decided and it was only in the event of that question being decided in favour of the plaintiffs that the amount of loss or damage should be ascertained. The suit should therefore be heard in the ordinary course. (*Macleod, C J and Crump, J.*) THE EAGLE STAR AND BRITISH DOMINIONS INSURANCE CO. v. DINANATH 47 Bom 509 25 Bom. L R 184 72 I. C. 266 : 1923 Bom 249

**Naming of beneficiary in the policy—Effect of See (1922) DIG COL 690 ABDUL MAJID MAJID v. MAHOMED MATIN 69 I. C 788.**

**Mortgage of insured property—Liability of insurer to mortgagee—Notice**

Where the owner of a mill insures it against fire, and subsequently mortgages it to a third person and the mill and the premises are destroyed by fire, the insurance company is not liable to indemnify the mortgagees against the loss. The contract is one to indemnify the insured and not any other person between whom and the company there was no privity of contract. To entitle the mortgagees to any claim on the policy there must be a covenant not only to insure but to insure for the benefit of the mortgagees or to apply the policy money in reinstatement or otherwise for the benefit of the mortgage or an assignment of the policy taken. In the absence of any such

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covenant or assignment of the policy the mortgagee cannot claim anything against the insurer. The right of the mortgagee was to bring the mortgaged property to sale or in the event of its alienation by the mortgagor to follow it into the hands of a purchaser. If the insurance company sold the remnants of the machinery, etc., after the fire under the terms of the policy, then, the contract of insurance being one of indemnity, any salvage belonging to the insurers is presumed under such circumstances, to have been abandoned and any thing that remains of the property belonging to the insurers to reimburse themselves so far as they can by selling the salvage for what it will fetch. (*Robinson, C J and Maung Lun, J.*) P. V CHETTY FIRM v. MOTOR UNION INSURANCE COMPANY 1923 Bur. 8.

**Policy—Conditions of — Disclosure of particulars—Omission—Estoppel by conduct—Prejudice.**

In a policy of insurance against fire there were two conditions to the effect that the assured should submit within a particular time full particulars of the loss sustained and that the company should have a right to take over possession and management of the insured property and sell or do any other act with regard to it. A loss by fire having occurred notice of claim was preferred but the insurance company took over and kept possession of the assured's property. Subsequently the company pleaded that the particulars required were not given by the insurer and therefore set up immunity. Held that the company having taken advantage of the salvage clause and assumed possession of the property to the detriment of the owners were estopped by their conduct from objecting that the full particulars were not given (*Lord Atkinson*) THE YORKSHIRE INSURANCE CO v. THOMAS CRAINE. 32 M. L. T. (P. C.) 25.

**INTEREST—Damages—Interest by way of damages**

Interest could not be awarded by way of damages apart from the special provisions of the Interest Act (*Fawcett J.*) ALICE M CAMPBELL v. WILLIAMS CHARD AND CO. 25 Bom L R. 337.

**Money borrowed left in deposit with lender—Effect—Interest if payable**

If a person takes a loan on interest and leaves the amount borrowed with the lender as a deposit without interest, to be drawn on as he may require, the interest payable on the agreement of loan does not cease to run. The mere fact that a borrower does not require the money and, therefore, does not demand it for a long time and that the lender is himself able to use it during that time can make no difference on the lender's right to charge interest. (*Kotwal, A J. C.*) BAPU LINGHAPPA v. RATAN LAL 69 I. C. 205 . 1923 Nag. 85.

**Post diem interest—Mortgage by conditional sale.**

In the case of mortgages comprising a stipulation of conditional sale, a covenant to pay *post diem* interest up to the date of redemption must be implied unless there are very strong reasons to the contrary. (*Shadi Lal, C. J and Lumsden, J.*) RAM SARAN DOSS v MULA 4 Lah 346 : 1923 Lah. 648.

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—Post *disem*—Mortgage—No provision for payment of interest after due date—Effect of

In the mortgage sued no mention was made about the payment of interest year by year but after the clause relating to the payment of principal and interest after due date there was no stipulation that interest should be payable at the contract rate. The penalty of not paying at the end of two years was stated to be the right of the mortgagee to recover principal and interest when he liked. There was no stipulation that if the money was not paid on the due date interest at the contract rate would continue to run. Held that the contract was so onerous that the deed should be read as far as possible to favour the mortgagor, that there was no reason shown, such as insufficiency of security, why such an exorbitant rate of interest should be agreed upon and that the Court should fix a reasonable rate as payable after the due date (*Dalai, A.J.C*) RAZA HUSAIN KHAN *v* GANESH PRASAD.

100 I J 390

—Power of Court to mitigate against—Rules regarding

In a transaction of anterior date to the Usurious Loans Act of 1908, a defendant when sued upon his security bond can only escape payment of interest according to the contract rate by showing either that he is entitled to the relief under S. 16 (a) or (b) of the Contract Act or that there was no necessity for granting such a high rate. In transactions subsequent to 1918, he can avail himself of the Usurious Loans Act (*Walsh and Ryves, JJ*) GHANSHAM SINGH *v* BHOLA SINGH 45 A. 506 21 A. L. J 465 L. R. 4 A 265 74 I C. 411 1923 A 490 (2)

—Right to—Interest Act not applicable—Court's power to award interest—Equity—Money wrongfully received See (1922) DIG COL. 691 ARUNACHELAM CHETTIAR *v* RAJA RAMESWARA SETHUPATHI 71 I C 257

—Unconscionable rate—Court's duty See (1922) Dig Col 691 HOOKAMCHAND *v* NIDHAN SINGH 19 N L R. 114

INTEREST ACT (32 OF 1839)—Interest not to be allowed if no demand made

In the absence of an express agreement to pay interest or a written demand or notice that interest would be charged under the provisions of Act 32 of 1839, the claim as to interest cannot be entertained (*Moti Sagar, J.*) DES RAJ SAWHNEY *v* FRAYS MOTOR WORKS 75 I C 64 1923 Lah 302 (1).

INTERNATIONAL LAW — Proceedings for Criminal breach of trust in French territory —Execution of in French Territory of a promissory note payable in British India—Dropping of Criminal proceedings—Enforceability of the promissory note in British India

Where a principal served in French territory on his agent a process charging him with an offence corresponding to a criminal breach of trust under the Indian Penal Code for which under the French Law the accused had the option of meeting the demand thereby putting an end to the prosecution, though under the law of British India it is a non-compoundable offence, and cer-

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tain relations of the agent executed in the French territory a promissory note payable at Madras and the proceedings were consequently dropped, such a promissory note is one enforceable in British India and the consideration for it is not founded on a violation of the rule of the public policy or of natural justice, 4 M H C Reports 14 followed

The uncertainty of the law as laid down in the English cases pointed out and the case law on the subject reviewed, (*Coutts Trotter, J*) VENKATASUBRAMANIA Aiyar *v* SYED USUF 45 M. L. J 59 18 L W 314 74 I C 1006 1923 Mad 708

INTERPRETATION OF STATUTES—Amending Act—Intention of legislature, See (1922) DIG COL 692 KUER NAGESHAR SAHAI *v* KUAR MATHURA PRASAD

69 I C 730

—Amending Act—Vested right—Not affected See (1922) DIG COL 692 AJIT SINGH *v* BHAGABATI CHARAN MOOKERJEE 70 I C 370

—Byelaw—Rules framed by the Governor in Council—Validity of—Construction. See MAD DT. MUN ACT, S 303 (2)(B) AND (C). 45 M L J 156

—Intention of legislature—words to be looked to (1922) DIG COL 693, MIRZA SADIQ HUSAIN *v* MAHOMED KARIM, 70 I C 53

—Construction Statutes Courts cannot read into statutes provisions which are not there even if they think that anomalies cannot be avoided otherwise (*Campbell, J*) HADAYAT ULLAH *v* GHULAM MAHOMED BEG, 73 I C 444 1923 Lah 529

—Construction of statutes—Intention It is to be assumed that words are used in their popular meaning unless they have acquired a technical meaning and the legislature must be intended to mean what it has plainly expressed and consequently there is no reason for construction (*Kennedy, J C, Raymond and Kemp, A J C*) MT HURI *v* ROSHAN KHUDABU 1923 S 5 16 S L R 112 71 I C 161 (F B)

—Date of coming into force of statute—Date of publication—If to be included or excluded —Rules of construction

Under a rule framed by the Madras High court the institution fee for plaints on the Original side was raised by a notification in the Gazette and they were to come into force from the date of publication. The notification reached the High court at 5 P M on a certain day when the offices had just closed.

Held by the majority of the special Bench that the new rules applied to all plaints filed on that day, *Per Schwabe, C J* The word "from" proceeding a date may mean "or and after" or after. The context and circumstances of each case should be looked at to arrive at the true construction. Unless there are valid reasons to the contrary if the named date is at the beginning of a definite limited period i.e. where there is a *termines ad quem* as well as a *quo*, then *prima facie* the first day is excluded. If the named date is at the beginning of an indefinite period the first day is included.

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*Per Coutts Trotter, J*—Where a statute fixes only the terminus *a quo* of a state of things which is envisaged as to last indefinitely, the common law rule is that portions of a day ought to be neglected and the order takes effect from the first moment of the day on which it is enacted or passed, when the order limits the period marked both by a terminus *a quo* and a terminus *ad quem*, the former is to be excluded and the latter to be included in the reckoning.

*Per Kumarasami Sastry, J*—There is no hard and fast rule in construing the significance of the word "from." Each case must depend on its own facts. Justice and equity require that the date of notification ought to be excluded. (*Schwabe, C J*, *Coutts Trotter and Kumarasamy Sastry, JJ*) *In re COURT FEES*

45 M. L. J. 557 46 Mad. 685  
(1923) M. W. N. 883

———*Intention of Legislature—Language plain*

If the language of a statute is clear and unambiguous the Court must give effect to it and has no right to extend its operation in order to carry out the real or supposed intention of the legislature. It matters not in such a case, what the consequences may be. Where by the use of clear and unequivocal language capable of only one meaning anything is enacted by a legislature it must be enforced even though it must be absurd or mischievous (*Shadi Lal C J and Le Rossignol, J*) *PIARA SINGH v MULAMAL*. 4 Lah. 323

1923 Lah. 655.

———*Intention of the Legislature—Meaning of words used—Plain construction.*

A Court is not at liberty to speculate on the intention of the Legislature, and to construe them according to its own notions of what ought to have been enacted. Nothing could be more dangerous than to make such considerations the ground for constructing an enactment that is unambiguous in itself. To depart from the meaning on account of such view is, in truth, not to construe the Act, but to alter it. But the business of the interpreter is not to improve the statute, it is, to expound it. The question for him is not what the Legislature meant, but its language means, i.e., what the Act has said that it meant. To give a construction contrary to, or different from that which the words import or can possibly import, is not to interpret law, but to make it. (*Shadi Lal, C J and Martineau, J*) *GOBIND DAS v. RUP KISHORE* 4 Lah. 367

———*Marginal notes—When can be used.*

When the language of a section is not very clear, it is legitimate to look at the marginal note to see what the draft of the section is. (*Arishnan, J*) *SMITH, In re*, 45 M. L. J. 731

18 L. W. 879

———*New enactment—Effect on rights under the previous law—Common law*

It is a general rule of construction that statutes which limit or extend common law rights must be expressed in clear and unambiguous language, and that general words are not to be so construed as to alter the common law, or the previous policy of the law, if a sense or meaning can be

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applied to them consistent with the intention of preserving the existing policy untouched (*Fawcett, J*) *NADERSHAW v SHIRINBAI*

25 Bom. L. R. 839.

———*Maxim—Expressio unius exclusio alterius—Scope of the rule in modern legislation*

A general rule of construction of acts of the legislature is *expressio unius exclusio alterius* (The express mention of one thing implies exclusion of another). But the method of construction summarised in the maxim cannot be applied without limitation, for a failure to make an expression complete may easily arise from the accidents of legislative procedure, and it is common to find provisions put into statutes *ex abundanti cautela* and at the instance of parties interested. Consequently provisions sometimes found in statutes, enacting imperfectly or for particular cases only, that which was already and more widely the law have occasionally furnished ground for argument based on the maxim, that an intention to alter the general law was to be inferred from the partial or limited enactment. But the maxim is plainly inapplicable to such cases. The only interference which a Court can draw from such superfluous provisions (which often find a place in Acts to meet unfounded objections and idle doubts) is that the legislature was either ignorant or unmindful of the real state of the law or that it acted under the influence of excessive caution. (*Mookerjee and Rankin, JJ*) *KRISHNA KAMINI DAS v NILMADHAB SAHA*

73 I. C. 312 1923 Cal. 66.

———*Proceedings of the Legislature—Reference to, not permissible*

In interpreting a statute reference is not permissible to the proceedings of the legislature which result in the provisions of an Act. 22 C. 768 21 C. 732 Ref. (*Mookerjee and Chotzner, JJ*) *DINA NATH PAL v RAJA SATI PRASAD*

72 I. C. 663 1923 Cal. 74

———*Repealing enactment—Retrospective operation.*

A repealing enactment cannot be given a retrospective operation so as to impose an impossible condition on pain of forfeiture of a vested right. 17 C. L. J. 316, 18 C. L. J. 274, 39 M. 645 Ref. (*Mookerjee and Chotzner, JJ*) *MAKARATI v SARFADDIN* 27 C. W. N. 183

50 Cal. 115 70 I. C. 608 1923 Cal. 85

———*Statute conferring jurisdiction—Means of exercising jurisdiction impliedly conferred* See (1922) DIG. COL. 625. *YASIN ALI MIRDHA v RADHAGOBINDA CHOWDHURY*, 69 I. C. 814.

———*Statement of objects and reasons—If to be referred to.* See (1922) DIG. COL. 694 *RUP KISHORE v BHAGAT GOVINDA DAS*

69 I. C. 748.

———*Plain meaning*

*Per Crump, J*—Courts are bound to construe a section of an Act according to the plain meaning of the language unless either in the section itself, or in any part of the Act anything is found to modify, qualify or alter the statutory language even if absurdity or anomaly be the result of



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such interpretation. The proper course in interpreting an Act intended to codify a particular branch of the law is first to examine its language for its natural meaning uninfluenced by any considerations derived from the previous state of the law and to start with enquiring how the law previously stood and then assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view, (*Macleod, C.J. and Crump, J.*) *ALFRED WILKINSON v WILKINSON*, 47 Bom 843

25 Bom L R 945 1923 Bom 321

—*Proceedings of the legislature*

Proceedings of the Legislature in passing a statute are excluded from consideration of the judicial construction of Indian, as well as of British Statutes (*Brusher and Scott Smith, JJ*) *GHULAM MAHOMED v Panna Ram*, 72 I C 433

—*Restriction on rights of the subjects—Strict interpretation*

A statute imposing restrictions upon the rights of the subjects should be strictly construed and such restriction should not be extended beyond what the words used actually cover (*Abdul Raoof and Mohi Sagar, JJ*) *THE ZAMINDARA BANK SHERPUR KALAN v SUBA* 71 I C 722

—*Retrospective operation—Intention to take away vested rights.*

It is an established axiom of construction that though procedure may be regulated by the Act for the time being in force, still the intention to take away a vested right, without compensation or any saving is not to be imputed to the Legislature unless it is expressed in unequivocal terms. It is not a fair reading of an enactment to hold that it was intended to impose an impossible condition under pain of the forfeiture of a vested right and an amending act should be construed as not applying to cases where its provisions cannot be obeyed. The law, as amended, may regulate the procedure in suits in which the plaintiff could comply with its provision but cannot govern suits where such compliance was from the first impossible 41 C. 1125, Rel (*Ross, J*) *GOCHARAN PRASAD SINGH v WARIS ALI*.

1 Pat. L. R 285 71 I C 957

—*Retrospective operation—When given*

It is a general rule that all statutes are to be construed to operate in future, unless from the language a retrospective effect is clearly intended. It is chiefly when the enactment would prejudicially affect vested rights of the legal character of the past transactions that the rule in question operates. Every statute which takes away or impairs vested right acquired under existing laws, or creates a new obligation or imposes a new duty or attaches a new disability in respect of transactions or considerations already passed, must be presumed out of respect to Legislature to be intended not to be have a retrospective operation.

As a general rule, mere alterations in forms of procedure are retrospective in effect and apply to pending proceedings, but where a change in procedure is complicated with a change of exist-

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ing rights the rule could not be held to apply (*Batten, J C*) *HINDU SINGH v. MANGAL*.

19 N L R 110 6 N L J 227  
72 I C 438 1923 Nag. 237

—*Words—clear—Qualification not to be imported*

Where the words of an enactment are clear and definite, the court cannot import qualifying words on conjectural grounds as to the intention of the legislature (*Chandrasekhara Aiyar, C.J. and Ramaswamy Iyengar, J*) *BHARAMAIA v CHANDRAGUPTIAH* 1 Mys L, J. 141

*JAGIR—Nature of tenure—Life estate—Assertion of higher right—Effect of*

Jagirs are to be considered as life tenures only and with all other life tenures are to expire with the life of the grantee unless otherwise expressed in the grant. The mere assertion of a Jagirdari right acquiesced in by the superior landlord cannot be taken to import a claim to or an acknowledgment of a larger interest than that of life estate 36 M L J 347, 3 B 186 followed (*Miller, C.J. and Jwala Prasad, J.*) *MAHARAJAH PRATAB UDAI NATH SHA DEO, v. GANESH NARAYAN SAHI* 70 I C 232

—*Resumable grants—Circumstances leading to the inference that grant is resumable—Service tenures—Resumption*

Where the jagir was specifically mentioned as a service tenure involving the performance of police and other duties and the settlement with the Taluqdar showed the rent was increased four villages were taken out of the Pargana and set apart for the maintenance of the widows of the previous holder and a new patta was granted to him by the Maharaja and a new Purnava was issued to him at the zemindar's instance for possession of the jagir.

Held, the settlement with the talukdar was not a continuance of the old tenure. Had the talukdar succeeded to the jagir by right of inheritance the maintenance of the widows, would have had no concern with it or the right to take away any part of the property to provide for their maintenance.

Resumption in connection with these service tenures does not mean that on failure of the direct male line it "escheats to the zemindar and becomes what is called his Sir or Khas property, the jagir retains its character, but the zemindar becomes entitled to make a new settlement with the knowledge and sanction of the authorities, (*Mr Ameer Ali*) *RAJA SRINATH RAY v UDAI NATH* 28 C W N 145 33 M. L T. 408 (P C) (1923) M W N 702 1923 P C 217 (P C)

*JALKAR—Right of—fishery—Grant of a sheet of water.*

A jalkar may mean either a grant of a mere right of fishery or it may mean the grant of a sheet of water together with the subsoil 1 W R 78, 31 C 937. The question whether what was intended to be granted in a particular case was restricted to a right of fishery or included in a grant of a sheet of a water together with the subsoil must depend on the construction of the original grant if available or must be determined with

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regard to the subsequent history of the property (*Mukerjee and Chotner, JJ*) PRAN KISHORE TARAFDAR *v* SARODA PRASAD PAKRASI  
37 C L J 580 72 I C 55 1923 Cal 358

## JUDGMENT—Decree—Loss by fire—Proof of contents

If any credible witness who read the judgment or the part of the judgment which contained the decision can depose to what he read, a decree can be drawn up. There is nothing in the C P Code to prevent them (*Maccoll, A, J C*) MAUNG CHIT *v* MAUNG THA KU. 1923 Rang, 113

See also under S. 151, C P. Code,

## Dependent Judgments—Reversal of main Judgment—Effect of.

Money recovered under a decree or judgment cannot be recovered back in a fresh suit or action whilst the decree or judgment under which it was recovered remains in force, but this rule of law rests upon this ground, that the original decree or judgment must be taken to be subsisting and valid until it has been reversed or superseded by some ulterior proceeding. If it has been reversed or superseded the money recovered under it ought certainly to be refunded and it is recoverable either by a summary process or by a new suit or action. The true question therefore in such cases is, whether the decree or judgment under which the money decree was originally recovered has been reversed or superseded? In other cases there is no right to a refund of money paid under a decree which has not been reversed on appeal (*Lord Carson*) SRI RAJA BOMMADEVARA NAGANNA NAIDU BAHADUR *v* RAVI VENKATAPPAYYA. 45 M. L J 657

L. R. 4 P C, 7 18 L W 913.  
25 Bom L R 1290 50 I. A 301 46 Mad. 895  
(1923) M W N 554 21 A L J 726  
33 M L T. 262 (1923) P C 167 (P C),

## Events after suit

Events after suit can be taken into consideration and an injunction which would have been useless can be refused (*Shadi Lal C J and Campbell J*) THE FIRM OF NARAIN DAS JAINI LAL OF DELHI *v* THE FIRM OF JAI NARAIN BANI LAL OF DELHI 5 L L J. 210 (1923) Lah 24

## JURISDICTION—Agreement of parties—Effect.

Litigants cannot by agreement inter se divest a court of its inherent jurisdiction over the subject matter of a suit any more than they can confer jurisdiction on it by its consent where it has none (*Shadi Lal, C. J. and Bafar Ali, J*) KIDRI PRASAD *v* KHOSALA. 1923 Lah 425 (2).

## Civil Court Construction of decree of Revenue Court—

A civil court has no jurisdiction to grant a declaration that under a decree of a Revenue Court such and such rights passed to the parties—*Case law reviewed.* (*Dalal, J.C. and Wazir Hasan A J.C*) BISHUNATH SARAN SINGH *v* SITLA BAKSH SINGH. 100 L J 315.

Civil court—Corporation—Meeting—Resolution—Invalid votes—Suit by minority—Powers of Civil Court. See BOM CITY MUN ACT, S 36. 25 Bom. L. R 689

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## Civil Court—Declaration of title Trees on grove land

In a suit for possession of grove land a Civil Court can grant declaration that the plaintiff though not owner of the land is still the owner of the trees in the grove (*Lindsay and Daniels, JJ*) RAJA LALTA PRASAD *v* RAM BAHADUR L. R. 4 A 169 (Rev.).

## Civil Courts—Order of Board of Revenue—Darkhast Case

Where in Darkhast Cases, the Board of Revenue can interfere with the order of the Revenue authorities only on the ground the order was passed through misrepresentation or fraud a Civil Court has no power to examine facts afresh and decide for itself whether the order of the Board was correct (*Ayling and Odgers, JJ*) SRINIVASA RAO *v* RANGASWAMY 18 L. W 523

## Civil Court—Saranjam grant—Resumption

Right of the Government to resume the subject of a Sarajam grant cannot be questioned in the Civil Courts (*Lord Salvesen*) THE SECRETARY OF STATE FOR INDIA IN COUNCIL *v* LAXMI BAI 47 Bom 327 44 M L J 471 17 L W 405  
28 C W N 449 72 I. C 898  
32 M. L T (P C) 111 32 C L J 464  
25 Bom L. R 527 50 I. A. 49 1923 P. C 6

## Civil and Criminal Courts—Acquittal on charge of embezzlement—Effect.

The acquittal of a person in a criminal trial on a charge of embezzlement does not prevent the Civil Court from trying the question whether he took the money in an action for the same (*Miller, C J, and Adams, J*) RAGHUNATH PRASAD *v* BANK OF BENGAL. 69 I. C 212.

## Civil or Revenue court—Appeal—Forum

An ejectment suit was filed in a Revenue Court which declined jurisdiction. In appeal the District Judge reversed the decision and remanded the suit for disposal. *Held*, the forum of appeal after the case has been disposed of on the merits is the District Court and not the appellate Revenue Court (*Rafique J.*) ELAHI BAKSH *v* LALA SURAJ NARAYAN, 1923 All. 464 (1).

## Civil and Revenue Court—Decree for profits granted by Revenue Court—Power of Civil Court to set aside.

A person sued for pre-emption and obtained a decree. He deposited the decree amount and took possession privately without reference to Court. The vendee continued to be recorded in the khat and no mutation was affected. The vendee taking advantage of this sued in the revenue Court for profits from the vendor and obtained a decree subsequently the pre-emptor brought a suit for a declaration that the decree of the revenue court was based on a mistake and that it did not bind the parties. *Held* that the decree for profits was only solely within the cognizance of the revenue Court and having been made by a competent Court of exclusive jurisdiction could not be set aside by the civil Court (*Gokul Prasad, J.*) SYED SHAEBIR HUSAIN *v* GHULAM HUSAIN 71 I C 276 90, & A L R 498 1923 A. 437

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*Civil or Revenue Court—Ejectment*

Where a tenant sues to eject his subtenant in a Revenue Court and the latter sets up his claim to the tenancy the Revenue Court has jurisdiction and must determine the question at issue (*Fremantle S. M. and Burn, J. M.*) *RAM SARUP OJHA v ANANT OJHA*  
L B 4 A 204 (Rev.)

*Civil or Revenue Court—Ejectment—Denial of relationship of landlord and tenant—Claim of Khudkash*

Where a Zemindar desires to eject and the person in possession claims the land to be his Khudkash and denies the relationship of landlord and tenant it is optional for the Zemindar to have recourse to either a Civil or Revenue Court (*Burn, J. M.*) *LAL SINGH v SUJAN SINGH*  
L B 4 A, 122 (Rev.)

*Civil and Revenue courts—Finding as to heritable gusare rights—*

Where the Revenue court finds that a person had a heritable gusare right that can be set aside by a Civil court, but the latter cannot consider the question whether he had any tenancy rights superior to those of an ordinary tenant (*Burn, J. M.*) *RAJA UDAY NARAIN SINGH v SHEO RATAN SINGH*  
L B 4 A, 326 (Rev.) 90 & A L R 1081

*Civil or Revenue Court—Occupancy holding—Rival claimants—Usufructuary mortgage*

Where the successors of the mortgagor who mortgaged an occupancy holding under a usufructuary mortgage sought to redeem the mortgaged property from the successors of the mortgagee who somehow got their names entered in the revenue papers as occupancy tenants and set up adverse possession held no question of jurisdiction arises because the suit so far as the defendants appellants are concerned is virtually between rival claimants to an occupancy holding (*Kanhaya Lal, J.*) *MT DURGA DEVI v GIRWAR SINGH*  
70 I C 958 1923 A 11 (2).

*Civil or Revenue Court—Occupancy holding—Suit for possession*

A suit for possession of an occupancy holding on the ground that the defendant who had been entrusted with the same refused to return it on demand, is not cognisable by a Civil court (*Ryves, J.*) *JOKHU GODARIA v. DEKINANDAN PANDEY*  
1923 All 489

*Civil and Revenue Courts—Partition of Bazar in U. P.*

It is only the Civil Courts that have jurisdiction to partition a bazaar in the event if the bazaar forms part of a Zemindari property, (*Burn S. M.*) *RAM DULARI v KANAUNI LAL*  
90 & A. L. R 329

*Civil and Revenue Court—Partition of Mahal—Right to share in a Mahal.*

A discussion as to the power of willingness of a Revenue Court to partition a Mahal is beyond jurisdiction of the Civil Court. The Civil Court has authority to decide that a particular person is owner of a certain share in a Mahal but can not direct a Revenue Court to separate that share by partition. Similarly the Civil Court cannot prevent partition of a share even if the proceeding of

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the Revenue Court be contrary to the rules and regulations laid down for its guidance. The question of stay of partition proceedings for want of sanction by the Local Government can be agitated only in a Revenue Court (*Dalai, J. C. and Neave, A. J. C.*) *MAHOMED AHSAN ALI v MASUDALI*  
100 L J 339

*Civil and Revenue Court—Proceedings of Revenue Court—When can be impeached for want of jurisdiction in a Civil Court.*

The exercise of jurisdiction with which we can here interfere must relate to the subject-matter, pecuniary value, locality of the parties these are matters which form the foundation of a Court's jurisdiction, and if a court wrongly assumes that the foundation exists when in fact it does not exist then and then only it is wrongly exercising jurisdiction. But jurisdiction in its wider sense is sometimes understood to mean the power to do certain specific things which are ordained by statute.

If the Court has assumed jurisdiction correctly, that is to say, if by reason of its local situation or pecuniary authority, or by reason of the subject-matter, or the portion of the parties the Revenue Court had power under the statute to entertain the partition proceeding, then, every error made in carrying out the partition in accordance with the terms of the law would not necessarily invalidate the proceeding and render it null and void. As has been often observed a Court has jurisdiction to decide wrongly as well as rightly.

Where the foundation of jurisdiction does not exist as in cases where a Revenue sale is held though there is no arrear of revenue at all, or a certificate sale is held in execution of a certificate issued without authority, a Civil Court has an undoubted right to declare the sale to be a nullity and to restore the property to the owner. So again where a property such as a burial ground which the Estates Partition Act forbids the Deputy Collector to partition, is partitioned a suit will lie to declare that the partition so far as the burial ground is concerned is null and void, but if the Deputy Collector merely commits an error of law, it would be contrary to the principle to hold that a Civil Court can interfere for the purpose of readjusting the arrangement and making a fresh partition (*Mullick and Ross, JJ.*) *RADHAKANTO PARHI v. MATHURA MOHAN PARHI*  
2 Pat 403

*Civil and Revenue courts—Revenue decree attached by Civil Court—Powers of Court.*

When a Revenue Court decree is attached by a civil court while it is being executed, the former has no jurisdiction to deal with the decree further. But when the attachment is released the Court can proceed with the execution (*Burn, J. M.*) *CHIRANJI LAL v BOHRA GIRWAR SINGH*  
L B 4 A, 370 (Rev.)

*Civil and Revenue courts—Splitting up of relief.*

It is open to a Court to split up the relief claimed and hold one relief is triable by a civil court and the other not (*Daniels, J.*) *GHSWA v. DEO NARAIN*  
L B 4 A 450 (Rev.) :  
1923 A 568 73 I C 947

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———*Civil or Revenue Court—Suit for crops raised by third person introduced into land by the landlord.*

Where a landlord dispossessed the defendant a tenant and put the plaintiff in possession who raised crops on the land *Held*, that the plff, was entitled to the crop and a suit for the recovery of the same could be brought in a Civil Court (*Banerji and Gokul Prasad JJ*) *MIR SINGH v MAKKHAN* 45 A 404 21 A L J 300

L B 4 A 134 (Rev) . 74 I C 88 (2)  
1923 A 421

———*Civil and Revenue Courts — Suit for declaration of title and joint possession*

A suit for a declaration that plaintiff is a joint tenant with defendant and entitled to possession is cognisable exclusively by a Civil Court As to whether the relation of landlord and tenant exists the Revenue Court is a proper tribunal and if it is decided one way or the other a Civil Court cannot go behind it (*Sulaiman, J.*) *NOHAR AHIR v PARTAB AHIR* 21 A L J 899

———*Civil and Revenue Court—Tenancy—Rival claims suit*

The plaintiff's claimed as occupancy tenants to eject the defendants as their sub-tenants The defendants had instituted a suit in the Civil Court against the plaintiff for a declaration that their position was that of a co-sharer in the occupancy rights The Munsiff dismissed the suit but in appeal the Sub Judge decreed it. An appeal was pending in the High Court and a suit was instituted in the Revenue Court for ejectment In that suit the Zamindar had also been made a party, while he was no party in the Civil Court *Held* that the suit in the Revenue Court need not be stayed pending the decision of the High Court As between the defendants in this case and the Zamindar it is only the Revenue Court which can decide the question (*Fremantle, S M and (Burn, J M.) KALLU v KASHI* L B. 4 A 232 (Rev) )

———*Civil or Revenue Court—Title to crop on the land*

Where the parties were in dispute as to the value of a sugarcane crop and what the plaintiff claimed was a declaration to the effect that he was entitled to the value of the crop *Held* that there was no question of title to the land on which the crop existed and that the suit could be brought in the Civil Court 37 A, 47 distinguished (*Banerji and Gokul Prasad, JJ*) *MIR SINGH v MAKKHAN* 45 A. 404 21 A L J 300 L B 4 A 134 (Rev)

74 I C 88 (2) 1923 A 421,

———*Consent of parties—Eject*

No amount of consent of parties can confer jurisdiction on a Court where no jurisdiction exists A distinction must be drawn between cases of want of jurisdiction and when having jurisdiction it passes an order which it cannot Such an order can only be challenged by way of appeal or review, (*Kumaraswamy Sastry, J.*) *ABDUL WAHAB SAHIB v ROKIA BIBI SAHIBA* 73 I C 903 (2)

———*Consent of parties—If creates*

Parties to a suit cannot confer jurisdiction upon any court by a mutual agreement, which it otherwise would not have (*Pipon, J C.*) *PUNNU LAL v BHOJA RAM* 73 I C 760,

Y. D.—52

## JURISDICTION

———*Criminal court—Power to break open door*

Where a person who is the tenant of a house locks the same and goes away a criminal court has no jurisdiction to direct the breaking open of the door at the instance of a person whose goods are kept locked up in the room The remedy of the aggrieved person in such a case is by way of a civil suit and not by appealing against the order of the criminal court (*Stuart, J*) *Ov D v SETH CHANDRA BHAN* 1923 All 473 (1)

———*Forum—suit to set aside award*

A suit to set aside an award must be filed in a court which has got pecuniary jurisdiction to the extent of the liability which plaintiff is trying to set aside (*Venkalasabba Rao J*) *VENKATACHALAM PILLAY v SRINIVASA IYER* 18 L W 399 (1923) M W N 747 75 I. C 115

———*High Court — Bombay—Trust property —Power to sanction sale — Beneficiaries — Variation of mode of investment*

The High Court of Bombay has power in the exercise of its extraordinary civil jurisdiction to sanction a sale of the trust property by trustees where no power of sale is given by the trust deed But this jurisdiction is of an extremely delicate character and has to be exercised with the greatest caution The Court will not in the exercise of its extraordinary jurisdiction sanction an unauthorised change of investment proposed on the mere ground that it will be to the advantage of the beneficiaries (1903) 1 Ch D, 956 Ref, (*Mulla, J*) *PAULO DAVID DE SOUZA v DAPHTARY* 25 Bom, L R 610

———*High Court—Power to declare case pending in another Province not triable there—Stay of proceedings* See HIGH COURT, 73 I C 523 (1)

———*How determined—Redemption suit—Allegations in the plaint. See (1922) DIG. COL. 697, SHANKER BAKSH SINGH v RAM BAHADUR SINGH.* 70 I C. 311

———*Objection not raised—Effect*

Where a Court of original jurisdiction files on its small cause side a suit which ought to have been filed on the original side, but no objection is raised to it, it is not a matter for interference in revision. (*Subbanna, J.*) *NARASA v RANGA,* 1 Mys L J. 56

———*Objection to—Waiver—When confers jurisdiction on court—Express consent essential* See C P. CODE, SS 20 AND 21, 27 C W. N 542

———*Objection—When can be raised.*

When the judge has no inherent jurisdiction over the object matter of the suit, the parties cannot by their mutual consent convert it into a proper judicial process It is the settled practice of the Bombay High Court to entertain objections to the jurisdiction taken for the first time even in second appeal, and even in England the Court can raise the question of jurisdiction at any time in proceedings for divorce. (*Macleod C J Martin and Crump, JJ*) *ALFRED WILKINSON v. WILKINSON* 47 Bom, 843

25 Bom, L. R 945 1923 Bom, 321,

## JURISDICTION

—*Proceedings instituted in a Court having no jurisdiction—Transfer to a Court having jurisdiction—Defect not cured*

If a proceeding is instituted in a Court which has not got jurisdiction to entertain it the transfer of such proceeding to a Court which has jurisdiction will not cure the defect (*Lentaigne and Carr, JJ.*) *THE JUPITER GENERAL INSURANCE CO LTD v ABDUL AZIZ*

1 Rang 226  
1923 Rang 185

—*Revenue Court—Dispute as to tenancy—Forum*

The Revenue Court is the proper forum to decide disputes between rival claimants to a tenancy. The decision would bind the Zamindar only when he has been made a party (*Fremantle, S M.*) *MAHOMD ZAHID ALI v MAHOMED HUSAIN*

L R 4 A 211 (Rev)

—*Revenue court—Entry of names—Validity of adoption—Jurisdiction of Revenue court to decide*

Where in a suit for entry of names in the khatauni one party claimed as the adopted son of the last tenant and the other as his collateral and the Zamindar was made a party to the suit, the question whether the adoption was proved and was legal is one which the Revenue Court could adjudicate upon (*Fremantle, S M and Burn, J M*) *BRJ RAJ SINGH v LALTA PRASAD*

L R 4 A 238 (Rev)

—*Submission to—Court having jurisdiction—Absence of formality immaterial*

If there is submission to the jurisdiction of a Court and if there is no inherent lack of jurisdiction in that Court the absence of formality (e.g. asking leave of the High Court under Letters Patent which would confer complete jurisdiction on that Court) will not render the judgment of the Court null and void (*Das and Foster, JJ.*) *GANESH NARAIN SAHI DEO v MANIK LAI CHANDRA*

1923 P 562

—*Suit for accounts in British India Property situate in Native State—Hindu Law—Joint family*

When after the description of a joint Hindu family certain moveable and immoveable properties situate in a Native State (i.e. within the jurisdiction of a foreign Court) by agreement continued joint and this suit was instituted in a Court in British India for accounts—*Held* the British Courts had jurisdiction to deal with the suit as instituted including the immoveable property situated in the Native States. (*Broadway and Zafar Ali, JJ.*) *RAM KISHAN v RANSHAN*

1923 Lah 551

—*Suit for declaration—Cause of action—Jurisdiction of Court* See (1922) DIG COL 698  
*KANTA SIROMAN PRASAD SINGH v GAYA DIN PRASAD*

69 I C 201

—*Suit on default—of appearance* See (1922) DIG COL 696. *OPPHENHEIM AND CO v HAJJE MAHOMED HANIF SAHIB*

74 I C 616

## KHEWAT

—*Suit for profits—Portion of—Land compensation claims*

A lambardar had received a certain sum from Government as compensation for a small area acquired under the Land Acquisition Act. The amount instead of being paid to all the proprietors was for some reason paid to the lambardar who apparently had not given the plaintiff, a co-sharer, his share. *Held* that this could not properly be treated as *sewa* income recoverable in profits suit under the Tenancy Act (*Ryves and Daniels, JJ.*) *CHHAMMI LAL v MT SUKHRANI KUNWAR*

74 I C 19 1923 A 537

—*Suit to set aside attachment—Forum* See (1922) DIG COL 694 *SHANMUKA NADAN v ARI NACHELLA CHETTY*

69 I C 961

—*Territorial—Transfer of pending suit to proceedings—Effect of—Decision if a nullity* See (1922) DIG COL 698 *JYOTI PRAKAS CHATTERJEE v BAGAI KANTA CHOWDHURY*

70 I C 822

—*Test of*

The question of jurisdiction has to be determined with reference to the claim made and not to the decision on the claim. (*Martineau and Mohi Sagar, JJ.*) *UDHE RAM v NARAIN SINGH*

72 I C 389 1923 Lah 284 (1)

—*Want of—Irregularity in the exercise of—Distinction*

There is a clear distinction between 'jurisdiction' and 'exercise of jurisdiction'. Since jurisdiction is the power to hear and determine a case, it does not depend either upon the regularity of the exercise of that power or upon the correctness of the decision pronounced, for the power to decide necessarily carries with it the power to do wrongly as well as rightly.

The boundary between an error of judgment and the usurpation of power is thus, the former is reversible by an appellate court within a certain fixed time and is therefore only voidable, the latter is an absolute nullity. So far as the jurisdiction itself is concerned, it is wholly immaterial whether the decision upon the particular question be correct or incorrect. Where it held that a Court had jurisdiction to render only correct decisions, then each time it made an erroneous ruling or decision, the Court would be without jurisdiction and the ruling itself void (*Mookerjee and Chotzner, JJ.*) *KUMAR ARUN CHANDRA SINHA BHADUR v MANMOHAN SINHA ROY*

37 C L J 585 70 I C 784 (2)

**KARACHI RENT ACT, S 41 4 (6) and (b) —inter dependence**

The alteration in the standard rent can be made by the Controller only when there is a change of conditions in the premises that are leased but not otherwise. (*Kincaid and Raymond, A J C.*) *VELJI HIRJI v CHELLARAM COOVERJI*

73 I C 319 1923 Sind 15

**KHEWAT—Entry in—Prima facie evidence of title** See (1923) DIG COL 698. *SAIYAD GHULAM MUHAMMAD v SAIYAD SABIT ALI*

69 I C 821

# KNOWLEDGE OF PARTIES

## KNOWLEDGE OF PARTIES—*Question of law*

A representation as to a question of law cannot give rise to an estoppel (*Ayling and Odgers, JJ*) **RAJAMBAL AMMAL v. SHANMUGA**, 70 I C 653 1923 Mad 11

## LAND ACQUISITION—*Compensation—Measure of—Injury to property—Land Clauses Act, S 68—Canadian Law*

Compensation claims are statutory and depend on statutory provisions. No owner of lands expropriated by statute for public purposes is entitled to compensation, either for the value of the land taken, or for damage, on the ground that his land is injuriously affected unless he can establish a statutory right.

Where damage is occasioned to a proprietor A by what is done upon other land which has been compulsorily acquired by the Crown from another proprietor B, such damage would not have been actionable as against B, the original proprietor and could not be taken into account in awarding compensation to A. Where however the mischief is from land taken from A himself he is entitled to compensation for injury done to his other lands acquired. It is a matter of difficulty to assess the amount of compensation where the mischief complained of arises, not only on land which had been taken from the claimant but also on land over which he had no ownership claim. In awarding compensation regard must be had not merely to the actual user of the land acquired at the time when the compensation case is heard but also to such prospective or contemplated legal user as may injuriously affect other lands of the claimant (*Lord Parmoor*). **THE SISTERS CHARITY OF ROCKINGHAM v THE KING** 32 M. L. T. (P. C.) 62

## —*Compensation—Toka land—Compensation for interest of tenants—How fixed*

On a question arising as to the mode of valuation of the interest of the government in toka lands on a lease of 50 years which would expire in 1929, the court fixed four per cent as the rate of assessment on the present value of the land and six per cent as the rate at which the assessment should be capitalised (*Macleod, C J and Crump J*) **GOVERNMENT OF BOMBAY v KHANDERAO RAMCHANDRA** 25 Bom L R 794 1923 Bom 417

## LAND ACQUISITION ACT (I OF 1894)—*Applicability of—Commencement of proceedings—Private contract as to value—Binding nature of See (1922) Dig Col 699, THE FORT PRESS CO LTD v MUNICIPAL CORPORATION OF BOMBAY*

27 C. W. N. 418

## —*Timber—What comprises—Bamboos—Compensation—Landlord and tenant*

By the custom of the country bamboos are used in the building and repairing of houses and therefore fall within the definition of timber (*Das and Ross, JJ.*) **MAHARAJA SIR RAMESHWAR SINGH BAHADUR v. BASUDEV SINGH** 1923 P 95

## —*S. 6—Acquisition of land—Declaration of public purpose—Finality*

The language of S. 6 of the Land Acquisition Act is perfectly plain and clearly bars the court from

## LAND ACQUISITION ACT (I OF 1894), S 18

enquiring into the question whether the purpose for which land in respect of which a declaration under S 6 has been issued is public purpose or not (*Ryves and Daniels, JJ*) **SECRETARY OF STATE FOR INDIA v AKBER ALI**

45 A 443 21 A L J, 338 L R 4 A 198 74 I C 8 1923 A 523 (2)

## —*S 9—Notice—Non-service—Effect*

Although a notice under S 9 of the Land Acquisition Act is imperative non service of the notice is not fatal to the proceedings if the party complaining has notice of the same 43 Mad 280 (*Chatterjee and Pearson, JJ*) **BURN & CO LTD v SECY OF STATE FOR INDIA** 1923 Cal 513

## —*S 18—Collector—Refusal to make reference to the High Court as regards apportionment of compensation—Power of High Court to interfere in revision, See C P CODE, S 115.*

25 Bom. L R 398

## —*S 18—Failure of landlord to demand reference—Tenant obtaining extra—Rights of party*

Where on acquisition of land by the Government the landlord is satisfied with the award of the Collector, but the tenant gets a reference made under S 18 and then obtains some compensation for himself, the landlord cannot claim the same. (*Mookerjee and Newbould, JJ*) **MAHARAJA SASI KANTA ACHARYA v ABDUR RAHMAN SARKAR** 38 C L J 265 75 I C 203 (1)

## —*S 18—Reference by Collector—Application for—Formalities of*

Under S 18 a reference can only be made by a written application to the Collector requiring that the matter be referred for the determination of the Court. Where no such demand was made but an application simply mentioned the grounds on which an objection was taken to the compensation awarded by the Land Acquisition Officer and in substance asked him either to release the property in question or award proper compensation therefor or to face a suit for a declaration in the Civil Court to have the said acquisition adjudged null and void. Held there was no written demand for a reference of the question of compensation to the Tribunal's decision (*Kanharya Lal, J C*) **SAMUEL BURGE v THE IMPROVEMENT TRUST, LUCKNOW** 73 I C 127,

## —*S 18—Reference by Collector—Conditions precedent*

The conditions prescribed by S 18 of the Land Acquisition Act are the conditions to which the power of the Collector to make the reference is subject and those conditions must be fulfilled before the Court can have jurisdiction to entertain the reference. (*Kanharya Lal, J C*) **SAMUEL BURGE v. THE IMPROVEMENT TRUST, LUCKNOW** 260 C, 324 90 & A. L R 925 73 I C 127.

## —*S 18—Reference to Improvement Tribunal—Stay by High Court*

An application was made to stay the proceedings before the Improvement Tribunal on the grounds that certain persons who were entitled to the compensation are parties to the suit and

## LAND ACQUISITION ACT (I OF 1894), S 23

not to the reference and that they would not be bound thereby and that accordingly there might be conflicting decisions of the Tribunal and of the Court. It was further said that the Tribunal was wrong in holding that the reference was prior to the suit and it was urged that the suit was more comprehensive and that the Tribunal's proceedings would be useless as they will not operate between the parties as *res judicata*. Held that the plaintiff having made her election under S. 18 of the Act and applied to the Tribunal for stay which had been refused cannot even assuming that a civil suit was open to her, succeed on this application (*Greaves, J*) *SM SHUSHI MURHI DEBYA v KESHAB LAI MUKERJE*

27 C W N 809

—S 23 and 24 (5)—Acquisition of land for reclamation and building purposes—mode of valuation—Market value

*Per Venkatasubba Rao, J*—where land is acquired by Government, the owner is entitled to the value obtainable in open market for the land, if put to its most lucrative use. In assessing the compensation, the court may take into consideration not only the present purpose to which the land is applied but also any other more beneficial purpose to which, in the course of events, it might within a reasonable period be applied. The special adaptability for building purposes can be taken into consideration, where in the case of lands which are at the time of the acquisition agricultural in disposition—English and Indian law considered (*Phillips and Venkata Subba Rao, JJ*) *THAREESAMMA v DEPUTY COLLECTOR, COCHIN*

45 M L J 339

18 L W 356 (1923) M W N 682

33 M L T 48 (H C)

—S 23 and 24—Acquisition of land—Quarries—Compensation—Apportionment of—Interest of Government—Toka tenure See (1922) Dig COL, 701 GOVERNMENT OF BOMBAY *v* N H MOOS

47 Bom 218

—S 23 and 24—Building surrounded by garden land—Compulsory acquisition—Mode of valuation—Twenty times the net annual rental

Where property consisting of a building surrounded by 8½ acres of garden land had been let as a whole block for several years before the date of its acquisition by the Government and the Court below awarded twenty times the net annual rental (deducting Municipal taxes, revenue charges and costs of repairs) as compensation to the owner *Held*, that the amount awarded was reasonable and that it was not proper to value the land and building separately as independent items and award the aggregate value as compensation (*Krishnan and Ramesam, JJ*) *RATHNAMASARI SECRETARY OF STATE FOR INDIA*

44 M L J 132 17 L W 415

32 M L T, (H. C) 379 72 I C 214

1923 Mad 332

—S 23—Existence of right of way does not destroy ownership—Loss of frontage injures interests of police lines—Construction of police lines—Superior holders interests

Although there might be a public right of way over a portion of land it does not follow that the

## LAND ACQUISITION ACT (I OF 1894), S 23

claimant is entitled to no compensation at all for his rights as a proprietor

By reason of the Government acquiring a part of the frontage of the land belonging to the claimant, the land behind the plot acquired would by reason of such acquisition be injuriously affected

It is difficult to say because there will be some building occupied by the Police on that piece of land acquired by Government a purchaser wishing to buy the rest of the claimant's land would consider that the Police lines was a drawback, which would reduce its value

The value of the interest of the superior holder must be included in the award and not deducted from the value of the occupant's interest

(*Macleod, C.J. and Crump, J*) *GAJANAN VINAYAK v THE ASST. COLLECTOR OF SALSETTEE*

25 Bom. L R 480 1924 Bom 54

—S 23—Land acquisition—Amount of compensation—Mistake—Power of Court to reduce

A court has no power to reduce the amount of compensation awarded by the Collector even though there was a mistake in the calculation 22 M. L. J 379; 19 A. L. J 871 *Ref* (*Phillips and Devadoss, JJ*) *KATHISSABI v THE REVENUE DIVISIONAL OFFICER, CALCUT*

(1923) M W N 54 70 I C 82 1923 Mad 31

—S 23—Market value—Buildings and land—Valuation—Repairs—Allowance for

When a building and its appurtenant land cannot be valued separately and no attempt has been made to do so in the land acquisition proceedings the market value must be determined on the net rental value and when that is done the building cannot be separated from the land, for it is impossible to say what proportion of the rent is fixed on the building to that on the land 33 B 325, 2 C 123 *Ref*, 25 I C 393 not foll. The question as to what should be deducted for repairs in calculating the net rental is one of fact 25 I C 393 *Ref* (*Phillips and Devadoss, JJ*) *KATHISSABI v REVENUE DIVISIONAL OFFICER, CALCUT*

(1923) M W N 54

70 I C 82 1923 Mad 31

—S 23—Market value—What is—Considerations in fixing—Speculation

The market value of a plot of land is to be determined as a whole, having regard to the sales in the vicinity. The mere fact that it was purchased by a Speculator in land with the object of reselling it at a profit is no ground for disregarding the sale for assessing the compensation.

The expression "market value" means the value which a parcel of land would realise if sold in the market. The seller must be a willing seller, a forced sale affords no criterion of market value. The purchaser must be a prudent purchaser, i.e. one who makes his offer after making necessary enquiries as to the value of the land, an offer made by one who knows nothing of the value of the land in the locality and who makes no enquiries about it affords no test of market value. The state of the market at the material date is an important factor in determining the

## LAND ACQUISITION ACT (I OF 1894), S 23

market-value (*Mulla, J*) THE GOVERNMENT OF BOMBAY *v* MERWAR MOONDIGAR AGA

25 Bom L R. 1182

—S 23 (1)—Value—Calculation *See* (1922) DIG. COL. 702 RAI BAHADUR LALA NARASINGIA DAS *v* THE SECRETARY OF STATE FOR INDIA IN COUNCIL 70 I C. 573

—S 25—Sufficient reason—Failure to prefer claim

Where the correspondence showed that the applicants in a Land acquisition case, company, were fighting out the question of re-measurement, and were under the impression that the question of valuation would be taken after the question of measurement was finished and had no idea that the very next day after the measurement was completed in their presence, the Collector would make his award without any previous notice to them. *Held* there was sufficient reason for the applicant within S 25 for the omission to prefer claims before the Collector (*Chatterjee and Pearson, JJ.*) BURN AND CO LTD *v* SECY OF STATE FOR INDIA 1923 Cal 513

—S 29—Khot and occupant—Occupant in possession of specific area of warkas.

In the case of warkas or bhati land in Salsette, it has been a recognised custom to divide the compensation between the occupant and the Khot in the proportion of 2 to 1. But that has been due to the fact that in the case of such lands it is extremely difficult to define, and ascertain the value of the respective interests of the Khots and the occupants, with the result that a rough and ready method of division has been adopted for want of a better one. In many cases the claimants against the Khots can hardly be called occupants. The claims are based on the fact that they are occupants of certain defined plots of land for the purpose of cultivating them so that by reason of such rights as occupants, they are entitled to other rights over the adjacent lands either for the purposes of grazing or of gathering *rab* materials. It is not generally shown that in such cases the occupants of cultivated lands have any defined area of warkas or bhati lands allotted to them, and so in order to divide the compensation between the Khot and the persons who have the right of user, owing to their position as cultivators, it has been found a convenient compromise to divide the compensation between them in that proportion. But it is entirely different where you find a tenant in occupation of a defined area of land, and paying assessment for it. Then undoubtedly he has a right to possession of all that area. (*Macleod, C. J. and Crump, J.*) GAJANAN VINAYAK *v* ASSTT. COLLECTOR OF SALSETTE 25 Bom L R. 480 1924 Bom 54

—S 54—Appeal from decision of single Judge.

S 54 of the Land Acquisition Act does not affect the right of appeal from the judgment of a single Judge of the High Court to Division Bench under Cl. 10 of the Letters Patent. (*Shadi Lal, C. J. and Abdul Quadir, J.*) HAR DIAL SHAH *v* SECRETARY OF STATE FOR INDIA.

3 Lah 420 69 I. C. 428. 1923 Lah 275.

## LANDLORD AND TENANT

LANDLORD AND TENANT—*Abadi*—*Tenant at will*

When a non proprietor has occupied common land (generally *abadi*) for several years with the consent of the proprietary body he cannot be ejected so long as he uses that area for the purpose for which it was granted, but the case of tenants at will is different. Their possession has been on sufferance and they have no occupancy right in land (*Le Rossignol, J.*) NIHALA *v*. SHAHAB DIN 1923 Lah 413

—*Abandonment*—*Fixed rate*—*Tenancy*—*Simple mortgage*—*Dispossession by Zemindar*—*Rights of mortgagee*

A tenant made a mortgage of his fixed rate holding and died thereafter. Upon his death his nephew succeeded to the holding. The zamindar took forcible possession of the holding but the nephew took no steps to recover it from the zamindar. In a suit against the zamindar for recovery of the money held that the inaction as to the recovery of the possession of the holding was equivalent to a surrender by the tenant but that surrender did not affect the rights of the mortgagee to enforce his mortgage (*Mears, C. J. Banerji, J.*) RAM KHELAWAN *v* BRIJ LAL

21 A L J 296 L R 4 A. 169 (Rev.)

71 I C 991 (1) 1923 A 295 (1).

—*Abandonment*—*Joint tenancy*.

If a man claims rights as a joint tenant but has taken no steps to assert them for a long period, he must be held to have abandoned his rights (*Fremantle S M and Burn, J M*) MT. QADRI. BEGAM *v* BADRI PRASAD L R. 4 A 287 (Rev.)

—*Abandonment*—*Prior mortgage*—*Dwelling House*—*Right of zamindar*

A tenant of the zamindar in a village owned a dwelling house therein. He mortgaged the dwelling house to the predecessor in title of the defendant. After he had made the mortgage he was convicted for an offence and imprisoned. After his death for some years the house remained vacant and was practically abandoned. *Held*, that the property reverted to the zamindar and no right was left in the original tenant or his heirs which could be sold in execution of the mortgage decree (*Banerji, Gokul Prasad and Daniel, JJ.*) RUP SINGH *v*. MITHU SINGH.

21 A L J, 280 L R 4 A. 133 (Rev.)

1923 A 387 (2)

—*Abandonment*—*Squatter's land*—*Lease to tenant*—*Refusal to assess*—*Legality of*

Plaintiff occupied certain squatter's land and worked it either by himself or his tenant for 2 years and paid the revenue for those years. In the next year he leased the land to a tenant who failed to work it. The Revenue authority refused to assess the land in the name of the plaintiff and granted permission to the defendant to work. *Held* that the plaintiff had not abandoned the land and was entitled to have the land assessed in his name. (*Lentaigne, J.*) MAUNG PEIN *v* MAUNG PO MAUNG 2 Bur L J 15 1923 Rang 338

—*Abandonment of the tenancy*—*Ex parte decree against tenant's heir*



## LANDLORD AND TENANT

An *ex parte* decree obtained by a landlord against the heirs of the tenant is evidence to show that the tenancy was subsisting at that date and negatives a plea of abandonment of the tenancy (*Greaves and Pantou, JJ*) ANUKUL CHANDRA DHAR v. KAMALA KANTA ROY ) 1923 Cal 270

—Abandonment—If it constitutes—Payment of rent—Offer of payment—Effect of

Where there has all along been payment or offer of payment of rent by the tenant there can be no question of abandonment of the holding (*Woodroffe and Ghose, JJ*) SARAT CHANDRA DE v. MONORAMA DEBI ) 1923 Cal 181

—*Ala Malik*, and *adna maliks*—If either whether abandonment.

Even if *ala maliks* have not enforced their rights mere waiver does not imply—any abandonment. Mere failure to pay dues by *adna maliks* does not establish adversity, nor are the *ala maliks* bound to bring a suit to vindicate their rights so long as their rights remain duly recorded in the Revenue Records and they are able to succeed in the Revenue Courts (*Le Rossignol and Abdul Qadir, JJ*) LEKHU RAM v. MT. RAMZAN. ) 5 Lah L J 196 1923 Lah 122

—Alluvial accretion—Assessment

Under Board's circular 8 and R 11 of the Rules alluvial accretions to Mahals in permanently settled estates are liable to assessment of revenue (*Pearson, J M*) RAMANAND CHAUDHRI v. Emperor ) L R 4 A, 50 (Rev)

—Arrears of revenue—Sale—Default by proprietor.

On the failure of an owner to pay the Government assessment, his estate or interest in the land is forfeited or rather determined, and under a sale for arrears of revenue what is sold is not the interest of the defaulting owner but the interest of the Crown, subject to the payment of the Government assessment.

A person in adverse possession who occupies the disputed land without payment of rent to the defaulting proprietor, is bound to surrender possession of that land to the revenue sale purchaser when the sale is confirmed and if the land is not so surrendered, he renders himself liable for mesne profits, as he unlawfully keeps the purchaser out of possession.

A person is not a defaulting proprietor whose title was not perfected by adverse possession before the revenue sale. (*Mookerjee and Chotzner, JJ*) JOBEDA KHATUN v. TULSI CHARAN DAS ) 1923 Cal 82,

—Cess—*Artisan cess* *abad*.

A cess levied by the zemindar on the weavers at the rate of one rupee per hand-loom is not really a cess. It is really ground rent charged from the various artisans in the village according to the number of hand-loom they have kept and is really a ground rent of the occupation of the site of the *abad*. 1 A. L. J. 537, *Foll.* (*Gokul Prasad, J.*) MT. BAKSHI v. HYDER KHAN ) L R. 4 A 448 (Rev) 75 I C 270

1923 A 571

## LANDLORD AND TENANT

—Cesses—Zemindar—Haqi Chairum—Liability of vendee—Custom See (1922) Dig Cor, 705 KEDAR NATH v. DATTA PRASAD SINGH

44 A, 739

—Constructive possession—*Karinda*—Possession on behalf of rightful heirs

Where on the death of a proprietor or his *karinda* continues to realize the rents the possession of the *karinda* as well as that of the person to whom he pays the rents must be considered to be on behalf of the legal heirs of the deceased (*Freemantle, S M and Burn, J M*) MT JAMNA DEVI v. SHAMBHOO NATH ) L R 4 A, 274 (Rev) 90 & A L R 289

—Covenant for renewal—Assignee from tenant—Right to enforcement—Stipulation as to rent being increased—Vague and unenforceable

An assignee of the interest of a lessee is entitled to take the benefit of a covenant for renewal contained in the lease. The renewed lease can be claimed on the same terms and for the same rent as the original lease except for the covenant to renew. Where the covenant for renewal provides that the lessor could enhance the rent without any limit and without any objection on the part of the lessee the covenant is too vague and therefore unenforceable (*Ghose, J*) NAYAKISHORE DAS v. MADAN MOHAN DAS GOSWAMI ) 69 I, C 600

—Covenant running with the land—Liability of transferee

A covenant by the tenant not to transfer the land without the landlord's consent is a covenant which sufficiently attaches to and concerns the demised premises and consequently is a covenant running with the land consequently a transferee or the lessee is bound by such covenant (*Mookerjee and Chotzner, JJ*) SARADA KRIPA LALA v. BEPIN CHANDRA PAL ) 37 C L J 538 74 I C 555 1923 Cal 679.

—Customary rights—Right of tenants to *Khalihans*, to play *Ramlila* and to conduct marriage processions—Nature of the right

Where it is found that the villagers have, without interruption by the malik, been using the land for performing *Ramlilas*, for putting up marriage processions, for keeping *Kalihans* and for tying cattle from time immemorial, Held that their right did not amount to an easement but was a customary right. There was nothing to prevent the landlord from selling the land and developing it, so long as he did not interfere with the rights which the villagers had acquired. 23 B 667, 17 A 87, 8 C W, N 425 Ref (*Ross, J*) RAM DAS SAH v. DAMODAR PRASAD ) 4 Pat. L T 223 72 I C 218 1923 P. 346

—Determination of tenancy—Lease for specific purpose—Purpose not carried out.

In the case of a perpetual lease it is determined by the death of the lessee. The principles enunciated in 4 B 424 apply to a case like the present when the Company to whom the land was given for a specified purpose is defunct. Where a lessor has leased his land for a specific purpose and that condition is broken, the lessor had the right to claim his land back.

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Where land was given for the purpose of having a Factory on it, and it had no factory now standing on it the landlord is entitled to possession (*Prideaux, A J C*) GOWARDHANDAS v WAHIDKHAN 6 N, L J 170 73 I C, 24

— *Dispossession by landlord—Introduction of another tenant—Crops on the land—Right to*

A landlord forcibly dispossessed a tenant from his holding and put the plaintiff in possession. The plaintiff had planted sugar cane and raised a crop. On a question arising as to whether the plaintiff or the dispossessed tenant was entitled to the crop held that on every principle of law and equity the plaintiff was entitled to the crop or its value (*Banerjee and Gokul Prasad, JJ*) MIR SINGH v MAKHAN 45 A 404 21 A. L. J 300 L. R. 4 A, 134 (Rev) 74 I C 88 (2) 1923 A 421

— *Easement—If can be acquired by prescription*

A tenant cannot acquire by prescription an easement against his landlord, (*Daniels, J*) KARAN SINGH v DAL CHAND 74 I C 708 (2)

— *Ejectment—Demarcation*

Where a field cultivated by one tenant belongs to more than one mahal, but there is no record to show which part of it belongs to which mahal the ejectment cannot be ordered without previous demarcation (*Fremantle, S M*) MT, LAKHPATI v MT JUGRAJA L. R. 4 A 213 (Rev)

— *Ejectment—Grove—Custard apple trees*

— *Planting of* See (1922) DIG COL 706 MD BASHER KHAN v SUKHANANDAN LAI 90 & A L R. 11

— *Ejectment—Inam—Right to eject Inamdar—Burden of proof*

There is no presumption that an Inam grant by a Zamindar is a grant of both the warams or of the melwaram only. The nature of the grant must be determined from the evidence in the case 36 M L J 585, 41 M 1132, 37 M L J 42, 45, M 586 43, M L J 640 (P C.) Referred to

Where the Zamindar sues to eject an Inamdar he is bound to prove that he has a right to eject, and he can do that only by proving that he granted the land itself and is now entitled to resume it (*Phillips and Devadoss, JJ*) SRI RAJA VENKATARAMAIA APPARAO BAHADUR v MOKAMPUDI BAJIRAJI 45 M L J 238 (1923) M W N 755

— *Ejectment—Trespasser—Right of landlord to eject trespasser* See EJECTMENT

37 C L J 94,

— *Ejectment—Thikadar—Zamindar*

While there is a theka valid and subsisting, it is the Thekadar and not the zamindar who has not the right to eject the tenant in the absence of a contract to the contrary curtailing the powers of the Thekadar (*Burn J M*) CHET RAM v KASHI PRASAD L. R. 4 A 153 (Rev)

— *Ejectment—Zamindar—Effect of ejectment—Burden of proof*

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An ejectment suit brought by a Zamindar against a person has the effect of making that person a tenant of the zamindar and the burden of proving in subsequent proceedings that the land was not rented lies on the zamindar (*Fremantle, S M*) GANGA PRASAD PANDEY v LAKHAN CHAUBEY L. R. 4 A 241 (Rev).

— *Encumbrance—Dealing with land by tenant*

Anything which interferes with the unrestricted rights of the proprietor as they existed at the time of the creation of the tenancy would be an encumbrance upon the land. Even the granting of a lease of zaiat lands, that is to say the land which the landlord is entitled to hold in direct possession and to cultivate for his own purposes would be an encumbrance. A lease of such lands granted to an occupier in circumstances which would give him a right of occupancy over the land would amount to an encumbrance, (*Miller, C J and Jawala Prasad, JJ*) MAHADEO PERSAD SAHU v GAJADHAR SAHU 1 Pat L R 145 73 I C 359

— *Escheat—Onus of proof—Lands granted by zamindar—Right of the Crown*

The burden of establishing title by escheat is on him who asserts it

Lands belonging to Zamindar granted by the zamindar under an absolute hereditary *Mukarrari* tenure, do not, on the death of the grantee without heirs, revert to the zamindar but the Crown by the general prerogative will take the property by escheat (*Ross, J*) JAG SAH v SRI KANTA PRASAD 72 I C 401 (2),

— *Forfeiture—Denial of title—Overt act—necessity for*

It is a well established rule of law that the denial of a landlord's title in clear and unmistakable terms, whether by matters of record or by certain matters or pairs will operate to create a forfeiture of tenancy and enable the landlord to resume possession. This principle which has been embodied in S 111 (B) of the T. P. Act and though the section itself does not apply to the Punjab the principle therein enacted does. Denial in a suit will not work a forfeiture of which advantage can be taken in that suit because the forfeiture must have occurred before the suit was instituted. The denial therefore must not only be of a clear unambiguous nature but must be antecedent to the suit for possession. The suit must be founded upon the denial and the denial cannot be expected from the pleading in the suit itself, even if such denial by inference could be held to be made in clear unmistakable terms (*Shadi Lal, C J and Ffords, J*) KEWAL RAY v ABDUL HAJI 71 I C 779 1923 Lah 409

— *Forfeiture—Waiver—Institution of suit for rent for period subsequent to forfeiture* See (1921) DIG, COL 696 RAMAPPA v ABDULLA BEARI, 69 I C 282

— *Forfeiture—Waiver—Receipt of rent*

The contention that receipt of rent subsequent to the service of notice to quit operated as waiver is fallacious. Subsequent receipt of rent due

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prior to forfeiture is not waiver (*Mookerjee and Chotzner, JJ.*) PURNA CHANDRA DAS v ALI MAHOMED, 37 C. L. J. 548 70 I C 999

—Grove—Abandonment—Evidence of—Land left vacant for 12 years

There was a grove, some 11 years ago on land properly in the possession of the ancestors of the defendants as grove holders. Those trees were cut down and the grove holders abandoned the land which thereupon reverted to the zemindars. For upwards of 12 years the land remained as waste there were neither trees nor cultivation upon it. Some three years before the suit the defendants planted certain trees on the grove. *Held*, that after the abandonment of the land by their predecessors in title the defendant had no right to come upon the land and plant trees without permission of the zemindar (*Mears, C. J. and Banerjee, J.*) HAZARI LAL v NIMAR

45 A 386 21 A L J 277 71 I C 1038  
L R 4 A 147 (Rev) 1923 A 295 (2).

—Grove—Consent of Zemindar

Where a grove has been growing up for some years and the zamindar has taken no action his consent to the planting of the grove is implied and the plaintiff acquires the right of a grove-holder, that is he cannot be ejected as long as the trees stand (*Fremantle S. M.*) SAHIBZADA RABI PRATAB NARAIN v KHAMAI

L R 4 A. 252 (Rev)

—Grove—Ejectment

In a suit to eject a grove holder where it appears that there are still trees in the grove its character as grove is not lost and there is no right to eject (*Burn, J. M.*) BIRBAL SHARMA v BHAGWAN SAHAI

L R 4 All. 386 (Rev)

—Grove—Lands capable of demarculation—Ejectment

Where the plots in a grove are capable of being demarcated, there is no bar to a suit in ejectment (*Fremantle S. M. and Burn, J. M.*) SRI THAKURJI MAHARAJ v BHAGWAN DAS

L R 4 A. 344 (Rev)

—Grove—Ownership—Jurisdiction of Civil Court.

Where the tenant claimed ownership of a grove and damages for loss caused to the trees *held* the suit was triable by Civil Court as no question of determination of tenancy was raised by the plaint. (*Mears, C. J. and Stuart, J.*) RAM PRASAD v. SUMER NATH PANDE

21 A. L. J. 33 90 & A L R 277 1923 All 134

—Grove—Right to replant trees

An entry in the *wajib ul-az* stated that the zemindar's permission was necessary to plant a new grove and require the tenants to replace trees cut. *Held*, it applies both to cases of trees cut as well as where they decay naturally (*Burn J. M.*) ARVAD HUSAIN KHAN v MT JANMA

L R 4 A 180 (Rev)

—Grove—Right to trees

The planting of a grove with the permission of the zemindar even on occupancy land changes the status of a tenant into that of a grove holder

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and he has a transferable right in the trees, in the absence of a custom to the contrary (*Daniels, J.*) BAIJNATH SINGH v CHANDRAPAL SINGH  
21 A L J 457 L R 4 A 366  
73 I C 529 1923 A 553

—Grove—Tenants—Right of transfer

There is a general custom by which the tenants of a grove have the right of transfer in it which exists independently of any rights or liabilities which a grove holder may have as a tenant. He cannot after transfer claim possession as an agricultural tenant (*Fremantle, S. M. and Burn, J. M.*) RAM RATAN LAL v DWARKA PRASAD

L R 4 All 361 (Rev)

—Holding over—Tenant subletting premises at higher rental and for a premium—Liability to account.

The first defendant held over after notice was given to vacate the suit property which was let out to him by the plaintiff. He sub let the premises and in addition to the rent received a premium of Rs 250. In a suit by the landlord for mesne profits *Held* that he was entitled to a decree for the premium as well as the rent due (*MacLeod, C. J. and Crump, J.*) GULAM MOHI UD DIN v DAYABHAI

25 Bom L R 447  
73 I C 442 (1) 1923 Bom 398

—House sites—Proprietorship

The site under the house of a non proprietor in a village ordinarily belongs to the proprietors and its sale without the consent of the proprietary body is voidable (*Scott Smith, J.*) AZIMKHAN v KARIM

71 I C 822

—House site—Transferability—Presumption—Towns and villages

There is no presumption against the transferability of house sites in towns as there is in villages (*Ryces and Daniels, JJ.*) SAHU GOVIND PRASAD v KUNDAN

L R 4 A 191 74 I C 760 (1)

—Improvements—Compensation for—Custom of South Canara

Under the Customary Law of South Canara a tenant is entitled to the value of improvements effected by him on ejectment by the landlord. 24 M L J 397 followed (*Ayling and Coutts Trotter, JJ.*) RAMAPPA v ABDULLA BEARI

69 I C, 282

—Kabuliyat—Joint tenants—Acceptance of lease by some—Effect on others See (1922) DIG COL. 707.

UDEYRAM v MT PARBATI

90 & A L R 428

—Lessee for a term of years whether can create tenancy extending his term See DIG COL 713 JOGENDRA SINGH v MAHARAJAH KESHO PRASAD SINGH

1 Pat 764, (1923) Pat 118

—Nature of tenancy—Bila lagan—Muafi,

Where land is entered as 'bila lagan' there is no presumption that it was meant to be equivalent to *muafi* (*Fremantle, S. M. and Burn, J. M.*) THAKUR RAGHURAJ SINGH v LALLA

L R 4 A 115 (Rev.)

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*Nature of tenancy—Muafi Khanati—Different kinds of tenancy*

A Muafi Khanati tenant may be exempt from paying rent for services to be rendered to the Malguzar or for services to be rendered to the village. The distinction between the two classes is clear. A man may be entitled to hold certain land free of rent as long as he performs certain services, both tenure and exemption being dependent on the services and ending with them. This is one class. If the other persons are entitled to hold land as tenants with an added condition that they shall pay no rent so long as they perform certain services, the exemption but not the tenure being dependent on the services and ending with them (*Hallifax, A J C* BED PRASAD v, KANGALU 1923 Nag 163)

*Non transferable holding—Transferee Fraudulent decree enhancing rent—If can be set aside*

Where a landlord, obtains a decree enhancing rent in collusion with his tenant, a suit cannot be maintained by the transferee of the holding to have it set aside till he suffers loss or damage (*Miller, C. J and Mullick, J*) SM GARABINI KUMARI v SURJA NARAIN SINGH (1923) Pat 361 75 I C 177

*Notice to quit—Forfeiture*

8 Where the tenants were three years in arrears with their rent and the lease had determined by forfeiture, the tenants were not entitled to any notice to quit (*Chandarasekhara Aiyer C J, and Plumer J*) SRI DHARMASTHALA SRI MANJANATHADEVARU BHANDARA v SUBBA BHATTA 1 Mys L J 3.

*Notice to quit—Waiver—Tenant continuing in possession—Non payment of rent—Effect of.*

Where after the service of valid notice to quit the tenant continues in possession without payment of rent and without the consent or permission of the landlord, held that there was no waiver of the notice to quit and that the possession of the tenant was adverse thereafter (*Dhobley, A J C*) YESHWANT v SHIWAPPA 1923 Nag 129 (2)

*Notice—Waiver of—Receipt of rent*

By receiving an increment of rent for a period of 6 months in advance after termination of the tenancy by notice to quit, the landlord waives notice. A landlord may recover rent of the statutory tenant without waiving the notice to quit. But to collect 6 months' rent in advance is conduct inconsistent with an intention to enforce the notice (*Pratt, J.*) MADHAVI VIRJI v LAKSHMIDAS MULJI & Co 25 Bom. L R 1178

*Occupancy holding—Usufructuary mortgage—Right of Mortgagee—Dispossession by Landlord.*

Where there is a transfer of an occupancy holding not by way of sale the landlord though he has not consented, is not ordinarily entitled to recover possession of the holding unless there has been an abandonment. Where therefore an occupancy tenant usufructually mortgages his holding and delivers possession to the mortgagee who was dispossessed by the landlord, in a suit by the mortgagee for possession against the landlord

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held, that the plaintiff was entitled to possession in view of the finding that there was no abandonment of the holding by the tenant (*Greaves and Ghose, JJ*) AMBICA DEBI v. SWARNAMAYI DAS 49 C 989

*Occupancy Right—Abadi—Non-payment of rent—Consent of Zemindar*

Where certain small plots of land recorded at settlement as abadi were held without payment of rent the Court is justified in holding that they were held without the consent of the Zemindar and occupancy right could not be claimed in them (*Pearson, J M*) PHUCHAI SINGH v RAM-CHANDRA L R 4 A 35 (Rev)

Occupancy right—Inference from facts—Prescription—Evidence of See (1922) DIG COL 709 SRI CHIDAMBARA SIVAPRAKASA PANDARA SANNADHIGAI v VEERARAMA REDDI, 27 C W N 245 37 C L J 199

Occupancy tenant—Rights of—Permanent construction See (1922) DIG COL 710 SAINA v SETH BEHARI LAL 69 I C 795.

*Partition of proprietary rights—Effect, on tenant*

Where as a result of partition proceedings a holding has been divided the tenants rights cannot be affected as he is not a party to the same and the landholder remains the same (*Fremantle S M*) DAULAT v SAMARATH SINGH L R 4 All 420 (Rev)

Permanent lease—Renewal—Effect of Where the original lease conferred permanent rights on the lessee, subsequent leases, by way of renewal, on succession of new taluqdars does not detract from its terms. (*Fremantle, S M*) MAHANT RAM DAS v. JANGI SINGH L R. 4 A 281 (Rev).

*Permanent tenancy*

Long possession and uniform payment of rent are not by themselves sufficient to justify a finding that a tenancy was permanent from its inception (*Mookerjee and Chotzner, JJ.*) KEDAR NATH SADHUKHAN v MADHU SUDAN DAS. 37 C L J. 478 75 I C. 105 1923 Cal, 682.

*Permanent tenancy—Alteration of rent—Effect of*

Where the original nature of the tenancy is not known, the fact that the rent has been altered once, negatives the hypothesis that the rent had been fixed in perpetuity (*Mookerjee and Chotzner JJ.*) NURUL HUQ v. MAHARAJA BIRENDRA KISHORE MANIKYA 38 C. L J 121 72 I. C. 979

*Permanent tenancy—Evidence of—Long possession—Non-payment of rent—Effect of*

Where the origin of a tenant's possession of certain land used as a house-site is shown to be permissive and derivative from the land the tenant cannot acquire by prescription a title adverse to the landlord unless he openly asserts his permanent right and definitely challenged the right of the landlord to evict him. Mere non-payment of rent is in these cases of very little

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value as showing any right to permanent residence. In many cases no actual right is placed by tenants of this class except such incorporeal rent as is illustrated by a general position of dependence upon the ground landlord as one of the village proprietors. It is not sufficient for a tenant to show that he has not actually delivered cash or even manure or has not rendered certain definite and specified services, as his position as a temporary tenant may equally well be illustrated by the mere fact of recognising a certain feudal dependency upon the landlord (*Pipon, J. C.*) **RAHIMUDDIN v SHAHBAZ KHAN**

71 I C 812

—Permanent tenancy—Evidence of—Origin unknown—Inference from circumstances.

In a case in which there was no direct evidence as to what the original tenancy was, it appeared that a *pucca* house was erected on the premises in question at least 50 years before suit, that from that date the rent fixed and paid for the premises in question had never varied that the tenant from time to time had disposed of his interest, and that during that period the value of the land had risen. *Held* that the proper inference to be drawn on the facts was that the tenancy was a permanent tenancy and not one from month to month (*Sir Walter Schwabe, C J and Wallace, J.*) **ABDUR SALAM SAHIB v M KANDASWAMI CHETTIAR.**

71 I C 330  
1923 Mad 54

—Permanent tenancy—Origin of tenancy unknown—Uniform payment of rent—Erection of buildings

Where the origin of tenancy was unknown, but the original tenant and his successor had been in occupation of the land for over sixty years on payment of rent which was never varied, and the tenancy was treated by the landlord as heritable and the land was set out for residential purposes, the inference may well be drawn that the tenancy was in its inception permanent. The presence of a permanent structure on the land is not essential to establish that the tenancy in its inception was of a permanent character.

A dwelling-house need not be brick built in order to indicate that the tenancy was intended in its inception to be of a permanent character, (*Mookerjee and Chotzner, JJ.*) **MAKHAN LAL DE v. ARUN BALA DEVI**

73 I C 2

—Permanent tenancy—Proof of estoppel—Building of *pucca* structures

Where the document creating the tenancy is not forthcoming the nature of the tenancy can only be proved by the mode of using the land, the acts and conduct of the parties. If there were a series of successions and recognitions and the rent continued uniform for a long series of years permanency can be inferred. The mere fact that there are *pucca* buildings without proof of landlord's belief and standing by will not do. (*Ghose and Panton, JJ.*) **SYED ALI KAZEMINI v MANIK CHANDRA PRAMANIK**

27 C W N 969

—Permanent tenancy—Proof—Mere assertion by tenant—Value of. See (1921) DIG COL. 700. **PORNALAGU KONAN v SINNIAM ODAYAN**

70 I C. 27

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—Permanent tenancy—Proof of—Inference from facts

The Court below found (1) that the origin of the tenancy and its terms were unknown but it was certain that the tenancies were created more than 30 years and possibly 50 or 60 years ago, (2) that the land was let for building purposes and the lessees constructed houses on the parcels of land in dispute at considerable expense, (3) that the tenancies in dispute were transferred from time to time and that the landlord acquiesced in these transactions and (4) in all other cases brought by the landlord against other tenants in respect of the same tenure on the ground that they were tenancies at will had been dismissed on the finding that the tenancies were permanent. *Held*, that the only legitimate inference from these facts was that the land originally was let for building purposes on a permanent tenancy. **28 C 738 50 I C 749 Ref to (Ryves, J.) NOBIN CHANDRA v. BANDI.**

71 I C 370  
1923 A 486

—Plea not open to tenant

In an ordinary action between landlord and tenant it is not open to the latter to rely upon subsequent transactions between the lessor and third parties and raise a defence which would have the effect of impeaching the identity of boundaries which it was their clear duty to preserve (*Das and Foster, JJ.*) **LINTON MOLESWORTH AND CO v JAGANNATH SUPAKAR**

1 Pat L R 377.

—Purchaser of share of landlord's interest—Effect of

The purchase by tenants of a fractional share in their landlord's interests does not put an end to their tenancy nor would a partition thereafter affect the tenancy interest (*Kanhaya Lal, J.*) **MATA GHULAM v SHEO MANGAL**

L R 4 A 341 (Rev)

—Relationship—Acceptance of rent—Effect of—Ejection

The plaintiff sued to eject the defendant as trespassers in possession of a non-transferable occupancy holding. The defendants proved that in 1919 and 1920 the plaintiff accepted rent from them for the lands in suit in the name of the deceased riots. *Held* that the effect of this acceptance of rent was to constitute the defendant's tenants, consequently at the date of suit, the plaintiff was not competent to eject the defendant as trespassers. (*Mukerjee and Rankin, JJ.*) **BALI MOHAMMED SAHA v. JANAKI NATH.**

72 I C 311

—Relationship—Adverse possession claimed by tenant—Burden of proof. See BURDEN OF PROOF.

69 I. C 363,

—Relationship between—Agreement—Payment of rent

The question whether the defendant is a tenant of the plaintiff depends upon the original agreement between the parties.

The question of tenancy or otherwise must be decided on the evidence in consideration of the law on the subject. (*Batten, J C.*) **MANOHARLAL v. RAM RATAN.**

72 I. C 1012.

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———*Relationship between — Agreement to settle land—Payment of—Salami.*

Plff was occupying land belonging to the deft and obtained a settlement of the land from him on condition of paying a fixed *Salami* and executing a *Kabuliyat* within 15 days. The *Salami* was being regularly paid but no *Kabuliyat* was executed till some time after. Subsequently the deft cancelled the plff's lease and gave the lands to another person. Held that there was a valid and subsisting tenancy between the plff and the deft and that the deft was not entitled to cancel the tenancy. (*Mookerjee and Chotener, JJ*)  
BHAGU SINGH v MOHESWAR BARIK 73 I C 291

———*Relationship—If affected by partition among zemindars*

In a case of private of partition where the zamindars divide the tenants among themselves or realize each his share of the rent, the original tenancy is not interfered with (*Fremantle, S M*)  
SHEO NARAIN v MADHO PARSHAD  
L R. 4 All. 310 (Rev.).

———*Relationship—Burden of proof*

Where in a suit in ejectment, the defendants denied the relationship of landlord and tenant but did not claim proprietary rights, the onus is on them to prove it (*Burn, J. M.*)  
BHOLA NATH v KANHAIYA LAL  
L R 4 A 190 (Rev.).

———*Relationship—Entry in khasra if sufficient evidence*

An entry in the *khasra* that the zemindar had agreed to entering a person's name as occupancy tenant is not sufficient evidence of the relationship of landlord and tenant (*Burn, J M*)  
SUMERA v LALA MADAN LAL  
L R 4 All. 389 (Rev.).

———*Relationship — Estoppel — Grant of receipts—Effect. See ESTOPPEL,*

L R. 4 A. 174 (Rev.).

———*Relationship—How created—Tenancy not in writing but possession given*

Per *Mookerjee, J* —When in pursuance of an agreement to transfer property, the intended transferee has taken possession, though the requisite legal documents have not been executed and registered, the position is the same as if the documents had been executed, provided that specific performance can be obtained between the parties to the agreement in the same court and at the same time as the subsequent legal question falls to be determined (*Mookerjee and Buckland, JJ.*)  
JOGENDRA KRISHNA ROY v KURPAL HARSHI & Co 1923 Cal 63

———*Relationship—Onus of proof*

Where a person is not recorded as a tenant and the landlord does not admit he is one, the onus is on the person setting up a claim to tenancy to prove that he was a tenant (*Batten, J C*)  
ALAMSINGH v SETH GOPALDAS.  
1923 Nag 7 (1)

———*Relationship—Recorded tenant—When a representative of the tenure*

So far as tenures are concerned, the Bengal Tenancy Act makes it obligatory upon the tenants to have their names recorded in the landlord's

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*sherista* whenever they become entitled to them by succession. In the case of a tenure, therefore, where only one tenant takes the trouble to have his name recorded in the landlord's *sherista*, and the others, either by design or negligence fail to do so, it may be presumed that the tenants who failed to have their names recorded in the landlord's *sherista* consented to the tenant who had his name recorded representing them both in transactions and in suits affecting the landlord and the tenants. But other principles arise where the Court has to deal with the case of the sale of a holding, as to which there is nothing in the Bengal Tenancy Act compelling raiyats to have their names recorded in the landlord's *sherista*. It is a question of fact in each case whether the recorded tenant does in fact represent the holding in dispute and that the fact that only one tenant is registered is an item in the evidence upon the question whether he is or is not the representative tenant *qua* the landlord (*Das and Adami, JJ*)  
JAIDEB THAKUR v JAMAHIR MISIR.  
(1923) Pat 57 69 I C 565  
1 Pat L R 47 1923 P. 206

———*Relationship—Road cess return*

A road cess return signed by the landlord is admissible against him to show that the relationship of landlord and tenant existed between the parties (*Adami, J*)  
SADHU SARAN v AMBIKA LAL.  
1923 P 163.

———*Relationship — Tenant becoming mortgagee—Effect,*

Where a tenant becomes a mortgagee of proprietary rights of a portion, it does not alter his status as tenant. Merger does not occur unless the whole of the proprietary rights become vested in the tenant (*Fremantle, S. M, and Burn, J M*)  
GANGA RAM v. SADHU SINGH  
L R. 4 A. 192 (Rev.)

———*Relationship — What constitutes—Demand for rent—Effect of.*

Where the evidence indicated that the plaintiff demanded rent from the defendant, with full knowledge that the latter was in possession as purchaser of the tenant's rights in the land, *prima facie* this is evidence of an intention, unless otherwise explained, to recognise the title of the purchaser and unless repudiated, would constitute the relationship of landlord tenant. Where the defendant purchased the holdings on the assumption that they were transferable and professed to be the tenant in occupation, in such circumstances, demand by the plaintiff for rent is good evidence of mutual consent to the creation of a tenancy, unless the plaintiff is able to explain that the demand was not unqualified and should be differently interpreted (*Mookerjee and Rankin, JJ*)  
MANMATHA NATH KAR v PROBODH CHANDAR  
37 C L J 52 - 73 I C 416  
1923 Cal 102

———*Rent—Abatement of—Ouster by title paramount*

The Government wrongfully purported to resume portion of the lands comprised in a tenure in a diar proceeding and formed it into a separate estate. The Government subsequently settled it with the tenure holder and realised the rent from

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him in respect of the same. The landlord did not object to the redemption but accepted *malikana*. In a suit for rent by the landlord against the tenure holder *held*, that the act of that Government was an ouster of the defendant by a title paramount and such title having been admitted by the landlord, the tenant was entitled to an abatement of rent in respect of the tenure to the extent of the amount payable by him to the Government (*Walmsley and Ghose, JJ*)  
**JITENDRANATH ROY v. ASHUTOSH GOSWAMI,**  
 27 C. W. N. 381 70 I C 828 1923 Cal 429

———*Rent—Abatement—Right of tenant—Limitation—Acquiescence*

Where a tenant did not obtain possession of a portion of the land leased he is entitled to abatement of rent to that extent and although no question of limitation may arise, the tenant might forfeit that right by long acquiescence 2 C L. R. 5 foll (*Chatterjee and Panton, JJ*) **RAJ KUMAR BOSE v. SURENDRA NATH GUHA CHOWDHURY**  
 27 C. W. N. 166

———*Rent—Abatement—Uniform abatement for 53 years*

Where it has found that the abatement claimed by the deft. had not been fluctuating but was uniform throughout, and had been uniformly allowed every year since 1868, that it was not a deduction allowed to the tenants personally but allowed to particular holdings *Held*, a legal origin has been made out and the apportionment among the lands was proper (*Marien and Fawcett, JJ*) **KRISHNALAL CHUNILAL MAJUMDAR v. DHIRAJLAL NAVNITLAL JHAVERI**

1923 Bom 359

———*Rent—Boundaries and extent—Claim to abatement*

Where in a lease the extent of the lands did not form an item of consideration at all in fixing the rent, but the lands were merely leased as villages for which a certain sum of money was to be paid as rent, the tenant cannot claim an abatement in the rent on the ground that the lands on measurement proved to be smaller in area (*Krishnan and Ramesam, JJ*) **UPPALAPATI SURYANARAYANA RAJU v. RAJA OF TEKKALI**

17 L W 94 (1923) M W N. 189  
 69 I C 517 1923 Mad 459.

———*Rent—Cesses—Liability of heirs of Original lessees* See CONTRACT ACT, S 44

27 C W N 521

———*Rent—Commuation—Detioration in irrigation system—Refusal of relief*

Where the tenant would not be able to maintain in proper order an elaborate and extensive system of irrigation works on which the cultivation of the lands depended, the collector exercises a wise and proper discretion in refusing to grant applications for commutation (*Maude, M. C*)  
**BULAKI MAHTON In re** 1 Pat L R 106 (Rev.).

———*Rent—Commuation—Elaborate system of irrigation*

Where the lands in respect of which an application for commutation of rent is made as well as other *bhuoli* lands in the village are irrigated

## LANDLORD AND TENANT

by elaborate and expensive system of irrigation, commutation would be refused for if commutation were allowed those irrigation works would be neglected to the ruinous loss of both parties (*Walsh, J*) **SHEO SARAN MAHTON v. RAM SARAN SINGH** 1 Pat. L R 88 (Rev.).

———*Rent decree—Death of some tenants prior to suit—Notice—Effect of decree*

Where a landlord obtains an ex parte decree against a number of tenants for rent and in execution it is objected that some of the tenants were dead long before the suit, but it was proved the heirs of the deceased tenant never got themselves recorded in the landlord's registers, and the landlord had no notice of the death, the liability of the tenure for arrears of rent is not affected and the decree is valid (*Mullick and Bucknill, JJ*) **BHAYA JAGDEO NATH SAH DEO v. PRATAP UDAI NATH SAH DEO**

(1923) Pat 374 75 I C. 321.

———*Rent—Decree for—Purchase in execution sale—Subsequent sale—Validity of—Estoppel.*

It is settled that after a holding has been once sold in execution of a rent decree and has passed out of the possession of the tenant it cannot ordinarily be again sold in execution of any other decree for rent due by the same tenant. An exception however, has been made in cases where execution Court, though irregularly, allows the holding to be sold subject to a liability to satisfy another outstanding decree, in such cases the auction purchaser is concluded by *res judicata* and the landlord is competent to proceed in the first instance against the holding and to call upon the auction purchaser to discharge the liability which he has undertaken. But that principle has no application where the decree-holder is himself the purchaser. The judgment debtor cannot resist the attachment of his other properties if after the sale the decree holder had changed his mind. The law gives the decree holder an option and there is no question of estoppel. In order to create an estoppel the representation must be a statement of fact and not of a proposition of law (*Mullick and Macpherson, JJ.*) **JUGALKISHORE NARAYAN SINGH v. BHATU MODI**

2 Pat 720 1 Pat. L R 311 (1923) Pat, 205  
 4 Pat. L T, 640 1923 F 517

———*Rent—Enhancement—Auction purchaser bound*

On the death of an occupancy tenant the rent of the holding was raised and a relation of the tenant, who had no right of succession, was admitted by the landholder as a joint tenant with the widow of the deceased. On a question arising as to whether an auction purchaser was bound by the enhancement

*Held* that the admission of the tenancy being for consideration was binding on the auction purchaser of the interest of the landholder (*Burn, J M*) **KHUSHALI RAM v. MAN SINGH**

L R 4 A 273 (Rev.).

———*Rent—Enhancement of—Scope of inquiry.*

In suits for enhancement of rent all that is necessary to determine is the class of the defts. tenancy. It is not necessary to make any further

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enquiry into his status e.g., whether or not he was an under-proprietor. (*Flemattle, S M*)  
JANKI BAKSHI SINGH v DEBI DAYAL.

L. R. 4 A 268 (Rev.)

-----Rent—Liability to pay—Failure to deliver possession of part.

Where the landlord fails to deliver possession of part of the lands demised, the tenant is only entitled to a remission of rent and not to refuse to pay any rent at all or to throw upon the landlord the burden of proving what rent was payable to him (*Krishnan and Ramsam, JJ*) UPPALAPATI SURYANARAYANA RAJU v RAJA OF TEKKALI, 17 L. W 94 (1923) M. W. N. 189 69 I C 517 1923 Mad 459

-----Rent—Payment to wrong person—Suit by rightful claimant

Where a person claiming to be entitled to the rent of certain property brought a suit therefor and obtained a decree for such rent he is liable to the rightful landlord to account for the rent so received (*Banerji and Gokal Prasad, JJ*) MAHABIR PRASAD v MT PARSANDI.

45 A 410 21 A L J 345 L R 4 A 519 74 I C 939 (2) 1923 A 532 (2)

-----Rent—Possession not given—Remedy of Lessee

Where a lessee of an agricultural land is not given possession of a portion of the demised land it is open to him to sue in the Civil Court for damages for breach of contract but there is no possible method by which he can obtain a reduction from his lease money from the Rent Court. The Rent Court can certainly not award him damages. It is not a question of set off because a set off must be an ascertained sum (*Stuart, J*) MUHAMMAD ALTAZ ALI KHAN v RANI PHOOL KUNWAR

71 I. C 400 1923 A 367 (1)

-----Rent—Right to sue for—Tenant repudiating liability—Effect of

Where a tenant has repudiated altogether his liability to pay rent to the landlord under the lease *Held*, on the analogy of a suit for damages based on a breach of contract that the right to sue for the rent for the entire period accrued on the repudiation by the tenant and that the landlord was entitled to claim the full amount of his rent as damages due to him on account of the breach which took place on the defendant's repudiating all liability and that he was not bound to wait until the end of the year or until the month in which the remainder of the rent was payable. (*Broadway and Harrison, JJ*) BUDHA MIL v SUBU DAYAL.

71 I C. 326

-----Rent—Suit by landlord for rent in respect of a portion of the holding See (1922) DIG COL. 714, MAHARAJA KESHAVA PRASAD SINGH v MATHURA KUAR.

69 I. C. 704

-----Rent—Suspension of—Dispossession from portion of holding

Dispossession of a tenant by the landlord from a portion of the holding causes suspension of the entire rent of the holding. (*Newbould and Pantou, JJ.*) RAMANI KANTA RAI v HARA CHANDRA DAS.

1923 Cal. 162.

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-----Revision.

When a tenant's house falls down, the site does not revert to the landlord. The tenant has a good title to the dilapidated premises (*Stuart, J*) MAHADEO v RAM BHAROSE.

75 I C 679 1923 All 365

-----Rights of—Excavating land

Tenants holding permanent heritable lands on payment of fixed rent are entitled to make excavations for making bricks, and in the absence of special reservations, the landlord's right is only to get the rent fixed. (*Walmsley and B B. Ghose, JJ.*) BARADA PRASAD BANERJEE v BHUPENDRA NATH MUKHERJEE

50 Cal 694 75 I C, 55

-----Rights of—extra compensation acquired by tenant—Effect See LAND ACQUISITION ACT, S 18 38 C L J 265

-----Tenant—Right of landlord—Surrender by tenant before expiry of period—Damages.

Where there was a tenancy for 3 years, the tenant cannot put an end to it before the expiry of the period by merely giving notice of relinquishment. Even where the landlord accepts the surrender by re-entry, he is entitled to damages for the breach of contract, but not for rent for the unexpired period, though the latter may form the basis for damages (*Mookerjee and Buckland, JJ*) JOGENDRA KRISHNA ROY v KURPAL HARSHI & Co

1923 Cal 63

-----Rights of—Prior litigation between tenants—Effect of

Where in a suit between two tenants of adjoining plots of land from the same landlord, relating to the actual extent of the holding of each tenant the landlord is actually made a party to the suit he is bound by the decision therein. (*Mookerjee and Rankin, JJ*) BHUPENDRA KUMAR CHAKRABUTTY v. SURJA KANTA RAI CHOWDHURY

38 C L. J. 291

-----Shamlat Delt—Partition of common land—Ejectment of plaintiff from his land in Deft's Thulla

The land in suit as well as 4 bighas 19 biswas cultivated by the plaintiffs formed part of the village common land, when this common land was partitioned according to Thullas, the land in suit was allotted to Thulla Surta and the other plot to Thulla Kanca. The plaintiffs were in possession (cultivating) of the latter plot and the defendants were similarly in possession of the land in suit, and although the ownership was changed at partition, the parties continued in possession of their respective plots.

When the Plaintiffs were ejected from the land in the Thulla of defendants which they were cultivating they sued for the possession of land in suit which was in their Thulla

*Held*, the arrangement was only for mutual convenience and the plaintiffs were entitled to get possession of the land in suit from defendants who had somehow got their names entered as its proprietors. (*Broadway, J*) MUGHLA v. ABHE RAM

1923 Lah. 172 (4),



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## —Status of tenant—Clause entitling—Landlord to realise rent summarily.

Where the tenancy of the plaintiffs was unquestionably a rayat's tenancy the status of the plaintiffs could not be elevated because a condition was annexed to the lease which entitled the landlord to realise rent by summary process. (*Mookerjee and Chotzner, JJ*) PURNA CHANDRA DAS v ALI MAHOMED. 37 C L J 548 70 I C 999.

## —Status of tenant—Entry in Jamabandi papers—Effect.

An order in a correction of records case directing the applicant's name to be entered as an occupancy tenant has the effect of defining his status until it is attacked by some other party or until he obtains under-proprietory-rights (*Fremantle, S M*) MAHANT RAM DAS v JANGI SINGH. I R 4 A. 281 (Rev.)

## —Status of tenant—Rayat—sub-tenant—Lease in favour of relations of Zemindar

The question for decision in the case was whether certain cultivators who had been hitherto recorded as sub-tenants in land included in a lease given by the zemindar to a female relation living with him had a right to record as tenants-in-chief with retrospective effect, the result of which would be that they would be given occupancy rights. Held that leases of this kind were fictitious and that the sub-tenants should be recorded as tenants-in-chief so that the occupancy rights were acquired.

Whatever private arrangements the zamindar might like to make with the members of his own family, their names should not appear in the record as intermediary between himself and his tenants or sub-tenants of his sir (*Fremantle, S M*) SAHDEO RAI v. MT BHAGWATI KLAR I R 4 A. 227 (Rev.)

## —Status of tenant—Transfer of tenancy—Rights of transferee

A person who was at one time holding as tenant paying rent could not degenerate into the status of a trespasser merely because the successor to the proprietary rights took no steps to levy rent on him (*Pearson J M*) ASHRAF ALI v. BAKHTAWAR I R 4 A 14 (Rev.)

## —Sub tenant—Ejection of head tenant—Effect of.

It is convenient that actions for possession based on forfeiture should be brought against all the parties interested in the premises. The effect of not making every sub-tenant a party is not to limit the right which the landlord would have, on obtaining his decree, to obtain possession of the premises by executing the decree against the tenant.

Once the owner obtained a decree in ejectment against the head lessees and that decree having been obtained by S. 115 of the Transfer of Property Act, all rights of sub-lessees who held under the head lessees were at an end, for the simple reason that a landlord cannot give to a tenant or sub-tenant something which he does not possess himself. If his rights are gone, those who claim under and through him lose their rights also. The effect of the decree was that

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the present defendants, who were the head landlords of the plots, were entitled to possession of these premises as against the plaintiffs and as against the plaintiffs' landlords (*Page, J*) RAMKISSEN DAS v. BINRAJ CHOWDHURY 50 Cal 419 1923 Cal 691.

## —Sub tenant—Stranger paying rent to Zemindar—Inference—Relationship

The mere fact that a person other than the tenant is cultivating the land and paying rent direct to the Zemindar does not deprive the tenant of his rights. It only suggests some private arrangement and a relation of landlord and sub-tenant (*Fremantle Dube S M and Burn, J M*) HAZARI DURA v. DUBE SHUKUL I R, 4 All 404 (Rev.)

## —Surrender—Effect on under tenancy.

When a tenant surrendered his tenancy, the subtenancy was also determined thereby (*Batten, J C*) GOPALA v SAKHARAM 6 N L J. 234 73 I C 15 1923 Nag 261

## —Surrender—Joint lessees—Surrender by one—Validity and effect of

Where there are two joint tenants under a lease though one joint tenant may be competent to surrender for the other joint tenants as well as for himself, he would only be entitled to do so if it was for the benefit of them all. Otherwise the other joint tenant is entitled to continue in sole possession (*Robinson, C J and May Oung, J*) MAUNG KYAW DUNZAN v MA SEIN 1 Rang 19 2 Bur L, J 50 74 I C 58 (1) 1923 Rang 15

## —Tenancy—Terms of—Inference from conduct.

Where the terms upon which a tenancy was created cannot be proved by direct evidence the subsequent conduct of the parties may be considered with a view to determine the nature of the tenancy 16 C L J 322 Ref (*Newbould, J*) ABHAIPADA SIRCAR v ATOR DOME 1923 Cal 294 (1)

## —Tenant holding over—Who is

A tenant holding over is a person who after his right to occupation under a lawful title is at an end continuing in possession without the agreement or disagreement of the landlord (*Hallifax A J. C*) NARAYAN v TUKARAM 74 I. C 93 1923 Nag 310

## —Termination of tenancy—Subsequent occupation by tenant—Damages—Rent—Right to.

Where the term of a tenancy, under which rent is payable periodically, is brought to a premature termination, the lessor is entitled to damages and to rent for unexpired term of the lease. Even the acceptance of surrender does not preclude the lessor from suing for damages for breach of the contract. It does not destroy the existing cause of action (*Mookerjee and Chotzner, JJ*) BEJOY CHANDRA SINHA v. HOWRAH AMTA LIGHT RAILWAY CO LTD 72 I C 98.

## —Thekadar—Power of creation of tenancy

Normally, and unless there is something against it in the terms of the theka a thekadar of pro-

## LANDLORD AND TENANT

prietary rights has all the powers and privileges that a landlord has under the Tenancy Act in respect of his tenants and in respect of creating tenants. But the powers of a thekadar may be limited by conditions in his *theke* that he should not lease out land or create new tenants. A distinct prohibition does not cease to be a prohibition because the person who acts against the terms of that prohibition is made liable for damages. (*Batten, J C*) *MULLOO v KUNDAN-LAL* 71 I C 863 1923 Nag 139 (2).

——— *Title—Demol of—Interpretation*

Where a tenant, in the memorandum of appeal in a Land Acquisition case described himself as the owner of the portion acquired and the question was whether that amounted to a disclaimer of landlord's title. *Held* it did not amount to "a distinct unequivocal renunciation of the tenancy" which is essential to constitute a disclaimer such as the law contemplates. The court has to bear in mind not only the nature of the document in which the expressions occur, but also to the nature of proceedings in regard to which the document was drafted. In considering whether what has taken place amounts in law to a denial of the landlord's title, the Court must have regard not only to the language used and the circumstances under which it came to be used, but must also consider what the tenant intended by using the particular words under the particular circumstances. (*Shadi Lal, C J and Ffoide, J.*) *ZIA-UD-DIN v FAKHR-UD-DIN AHMAD KHAN*, 4 Lah 160 73 I C 791 1923 Lah 454

——— *Transfer of holding—Fixed rate tenancy—Effect of transfer—Transferee an agricultural tenant* See (1922) DIG COL 717 *THAKURJI MAHARAJ v ANANT BHARTHI* L R 4 A 5 (Rev) 69 I C 834

——— *Transfer of portion of holding—Effect* See (1922) DIG, COL 717 *PRITHI MAHTON v JAMSHAD KHAN* 1 Pat 593

——— *Trees—Right to—Burden of proof—Record of rights—Entries in*

The landlord is under the general law entitled to the trees and the burden is on the tenant to prove the contrary. Where however the record of rights contains an entry in favour of the tenant the onus is shifted and the landlord must rebut by evidence the presumption raised by the entry. 61 I C. 420 foll. (*Ross, J*) *RAM PARICHAN SINGH v BIRANJI PRASAD SINGH*, 1923 Pat 269 4 Pat. L T 245 72 I C 157 1923 P. 295

——— *Trees—Right to enjoy, whether vests in the landlord or in the tenant.*

In the absence of a custom or a contract to the contrary an occupancy tenant is entitled to enjoy the fruits of all the trees on the holding. The presumption of law, and the general rule in the absence of custom, is that the property in timber on a tenant's holding vests in the zemindar, and that the tenant has no right to cut and remove such timber. But it appears to be clear that in the absence of a custom or of a contract to the contrary a Zemindar has no right to interfere with the enjoyment by his tenant of the trees

## LAND TENURES

upon his holding as long as the relation of landlord and tenant subsists (*Lindsay and Daniels, JJ*) *KAMPTA PRASAD v SHEO PRASAD* 45 A 361 21 A L J 292 L R 4 A 86 (Rev.) 71 I C 971 1923 A 408

——— *Trees—Right to—Trees planted by tenant*

Whatever view may have been formerly held the presumption now is that a tenant has a right to cut and sell trees planted by him, 43 A 606 followed (*Daniels, A J C*) *RAM NATH v MATA SAHAI* 90 & A L R. 479 1923 A 417 (2) 72 I C 108.

——— *Under proprietary right—Settlement records—Declaratory decree* See (1922) DIG COL 718 *PIRTHIPAL SINGH v GANESH DIN* 44 M L J 29 37 C L J 219 25 O C 396 90 L J 649 32 M L T (P C) 109 L R 4 P, C 7 18 L W 41 90 & A L R 541 71 I C 641 50 I A 210 (P. C.)

——— *Under proprietor—Right to eject*

Where a person is recorded as under proprietor in the revenue records and so long as his name is not removed therefrom by a civil court, he is entitled to receive rents and can issue notice of ejectment (*Fremantle, S M*) *MAULA KHAN v BINDESHRI BAKHSH SINGH* L R 4 All 317 (Rev)

——— *Vatandar Khot in Kolaba District—Right to Injali trees in Khoti nisbat lands*

Where in a suit by Vatandar Khot the question was whether the plaintiff or the defendants were the owners of certain injali trees standing upon lands which were in the occupation of the vendors of defendants who were not *dharekaris*, but held their lands since the introduction of the Survey Settlement as tenants of the Khot, subject to certain rights in the nature of the right of occupancy. *Held*, that by virtue of Dunlop's Proclamation of 1821, the Khoti became the owners of the *Injali* trees standing in Khoti *nisbat*, and there has been nothing to extinguish those rights or to transfer those rights to the present defendants.

*Held*, further that the mere failure on the part of the plaintiff to sign the annual *Kabuliyat* should have this result only, that he would not be entitled for the time being to the right of management of the village. That would not however, affect any other right which he might have independently of that right of management, such as the right to timber growing in Khoti *nisbat* lands 8 B H C Foll. (*Macleod, C J and Crump, J*) *AHMAD BABU DABIR v GANESH VISHNU PENDSE*, 26 Bom L R, 521 73 I C 1035 1923 Bom 462

LAND TENURES—*Arazis.*

*Arazi* lands are held on a distinct tenure from that of the mauza or mahal and their ownership conveys no title to any right or interest in other parts of the mauzas or mahals. (*Rafiq and Lindsay, JJ*) *SURWAN PRASAD TEWARI v BASDEO NARAIN SINGH*, 21 A L J 65 L R 4 A 57 (1923) A 129.

——— *Berar—Khatedar—Rights of alienation.*

## LAND TENURES.

At the time of the first settlement in Berar villages obtained on full survey assessment fields used for grazing cattle. One among them called khatedar was responsible for the whole assessment and the property was entered in his name though it belonged to the villagers as a body. The assessment was collected among them and through him paid to the Government—An alienation from such a khatedar who is aware of the real nature of the title gets nothing at all. (*Prideaux v. A. J. C.*) LAEIF v. PANDHARI. (1923) Nag. 214

## —Chukni Tenure

The term "Chukni" is used with regard to a particular sort of tenancy in Mymensingh and its incidents are governed by custom (*Walmsley and Ghose, JJ*) BHAIJI SHEIKH v. BAIJI SARKAR (1923) Cal 375

## —Fazendari tenures—What is

In its strict or proper meaning Fazendari tenure means an indefeasible right to hold in perpetuity on payment of a small quit or ground rent, in its loose sense, any kind of tenure agreed on between the parties.

The estate to be really Fazendari must be one approaching as near as possible an estate of absolute ownership. It must be of unlimited duration subject to such rights as escheat. There must be no rights of re entry or resumption on the part of the Government (*Fawcett, J*) RAHIMTULLA v. HASANALI 25 Bom L R 1192

## —Ghatwali tenure—Incidents of—Succession—Hindu Law relating impartible estates—Applicability or

The incidents that attach to the tenure known as Ghatwali are (1) that it is impartible and permanent, (2) that it descends by lineal primogeniture, and (3) that it is alienable at least with the consent of the Zamindar.

Where the family of a ghatwali is governed by the Mitakshara law the devolution of immovable property in the family must be governed by that law subject to the question of impartibility, unless either there be some special custom of the family in the contrary, or unless there be some peculiar feature inherent in ghatwali tenures, which prevents the operation of the Mitakshara rule of succession in the case of impartible property. The Ghatwali property is impartible and the sons and the other members of the family take no, immediate interest at birth entitling them to claim partition. But in a joint Mitakshara family the course of succession to ghatwali property is not different from that which regulates the succession of other impartible property. In a Mitakshara family living in commensality, the inheritance even of impartible estates is confined to male members to the exclusion of the females unless the estate itself is separate or self-acquired. (*Miller, C. J. and Foster, J*) THAKURAIN FULCATT KUMARI v. MAHARAJA KUMAR RAO MAHESHWARI, PRASAD SINGH 4 Pat L T 473

## —Mitasi—Incidents of—Hindu temple—

Elaborate Mirasdar See (1922) DIG Col 719  
SUDHAKAR CHARIAR v. EVALAPPA MUDALIAR.  
27 C. W. N. 317, 21 A. L. J. 250 (F. C.)

## —Palm tenure—Zemindar's possession when adverse

## LEASE

The possession of *Chaukidari* *Chakran* lands by a Zemindar may become adverse to the *putnidar* in a variety of ways e.g., when the lands are settled by the Zemindar with tenants or when the *putnidar* after being invited to come and take the lands does nothing and the Zemindar thereafter makes other arrangements either for holding the lands in *khas* or for setting the same with *ryamdars* or the like (*C. C. Ghose and Panton, JJ*) SRIMATI NAGENDRA BAB CHOUDHURANI v. MAHARAJA OF BURDWAN.  
28 C. W. N. 114 74 I C 153

## —Sir rights—Acquisition of

An occupancy tenant who becomes zamindar does not acquire sir rights in his occupancy land (*Fremantle, S. V.*) MT. SMIRKHA KUAR v. RAM TAJIB RAI L R 4 A 198 (Rev.).

## —Sir—Rights if transferable

Sir rights could be transferred before 1873. (*Fremantle, S. M.*) RIKHAI RAI v. MT. UMRAO BEGUM L R 4 All 416 (Rev.)

## —Under proprietary tenure—Shankalap

A Shankalap Koshist may or may not be an under-proprietary tenure and the expression is not a term of art with a definite meaning (*Hari Hasan, A. J. C.*) MANOHAR LAL v. ACHUANAND 90 L J 618 (1923) Oudh 27

Under raiyati holding—Transferability of holding—Custom See (1922) DIG Col 718  
TUKA MEAH NABIN CHANDRA MAJUMDAR (1923) Lah 292 (2).

## LEASE—B. each of covenant for quiet enjoyment—Eviction

It is settled law that any annoyance on the part of the lessor himself which prevents the lessee from enjoying the demised premises as per terms of the lease amounts to a breach of the covenant for quiet enjoyment. It is not necessary that there should be actual eviction, as the same can be inferred from acts like seizure of crops (*Prideaux, A. J. C.*) DEBOO v. JIWAN RAO 69 I C 234 1923 Nag 31

## —Construction—Bemayadi lease—Building purposes—Permanent tenancy

Under a bemayadi lease, no term was fixed for the lease to run and the purpose of the lease was to enable the lessee to erect a gola house. There was a stipulation that the lessee shall not construct any pucca building without the express and written permission of the lessor. The lessee had built a superstructure with the permission of the lessor. Held, that the lease was of a permanent character and not one from year to year. (*Jwala Prasad and Adam, JJ*) FORBES v. HANUMAN BHAGAT 2 Pat 452 4 Pat L T 414 1 Pat L R 190.

## —Construction—Boundary line—Settlement map—Misdescription

In the lease of the piff the land was thus described, "land lying within the boundaries as shown in the map which is in the settlement papers and appertaining to the Sadarkabs mahal, etc." and again in the schedule as "4 dunes, 14 kanis of land in dag No. 1742 13796 of the

## LEASE

present survey, etc. The dett land was similarly described in his lease, "Land lying within the boundaries as shown in the map which is in the settlement papers, etc." and in the Schedule as "1 drone 5 gandas of land in all covered by dag No 1742 13797 of the present survey, etc." It was admitted that the reference to the map in the leases had this effect, that it should be treated as incorporated in the leases and forming part of the documents. If things stood alone, there would have been no question that each party would be entitled to the dag as shown in the map as forming his parcel and the boundary line would have been the line drawn in the map. In the map however, at the place where the boundary line had been drawn a *gopath* had been depicted but as a matter of fact there was no *gopath* in the locality. There was however, actually a *gopath* in existence further to the south of the boundary line as drawn in the map. Held that the plaintiff was entitled to all the lands up to the line as drawn in the map, without reference to the actual site of the *gopath*.

The map was referred to in the leases not for the purpose of showing the site of the *gopath*, which is not mentioned at all, but for the purpose of showing the boundary lines, and the mistake in the drawing of the *gopath* at the place was immaterial.

As soon as there is an adequate and sufficient definition with convenient certainty, of what is intended to pass by a deed, any subsequent erroneous addition will not vitiate it (*Walmsley and Ghose, JJ*) DARAPALI SADAGAR v NAJIR AHAMED 50 Cal 394 1923 Cal 669

## Construction—Fixed rent

Where a lease deed provided for enjoyment at a certain fixed rent from son to grandson, permanent and heritable rights are conferred but not the maximum of rent leviable (*Richardson and Ghose, JJ*) RAJ MOHAN PODDER v TARAPROSANNA 1923 Cal 354

Construction—Kabuliat—Provision for payment of salami—Involuntary transfer covenant against alienation (1922) DIG COL 722 MONMATHA NATH MITRA v CHINU LAI GHOSE 70 I C 81

## Construction—Lease at fixed rent\*

The use of the words *putrapoutadi krame* indicates that it was intended to be a perpetual lease. In the body of the document there was in one place an undertaking by the tenant to pay fixed rent, and in another portion the tenant undertook to pay in addition to the fixed rent, certain other sums, i.e. road cess and public works Cess as assessed and any tax or additional amount that may be assessed or settled by the Government in future in respect of lands of the tenancy. Held the tenancy was intended to be a lease at a fixed rent. The restrictive clauses "the tenant undertakes not to excavate any ditch or tank, prepare bricks, construct pucca buildings and cut down trees etc., without taking a written order expressing consent from the landlord" do not modify the nature of the tenancy (*Mookenjee and Cholsner, JJ*) GOLAM RAHAMAN MISIRI v GURDAS KUNDU CHOUDHRI 38 C L J 350 1923 Cal. 505

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Construction—Lease for seven years—Provision for another lease with same conditions—Right of landlord to eject before the expiry of first lease

Under the terms of a *hikapatta* the lessee was to enjoy the property for seven years and that after the expiry of that period the lessor was to execute a fresh *patta* on the same conditions as before and with respect to the same lands. In a suit in ejectment by the landlord after the expiry of the first term of 7 years Held that the landlord was not entitled to eject. The lessee was in possession and since the time for the specific performance of the contract of lease for the second period of 7 years had not expired, the effect was the same as if a renewal had been granted (*Bucknill and Kulwant Sahay, JJ*) MOHIT NARAYAN v KAMAL NATH OJHA (1923) Pat 23 1 Pat L R 69 1923 P 236

Construction—Lease for specific purpose—Duration

A lease provided "under the rent note dated 2nd August 1890 executed by my Dadi, named Fundabi, the land, is in your possession for the purpose of your ginning factory. That khata holder died and the khata is transferred in my name as heir. Therefore I have fixed the rent of the field which is given to you by Fundabi for constructing a ginning factory and is in your possession, at Rs 120 per annum, and given it to you in order that you may keep it in your possession as long as you please. You should always keep this land in your possession for the use of your ginning factory. I will not ask it back." Held that it was an agreement with a particular company, the original lessees, that they should hold the land as long as they liked. A perpetual lease is determined by the death of the lessee, 4 Bom. 424, Ref., and on the same principle where the company to whom the land is given for a specified purpose is defunct, the lease comes to an end. The lease is a perpetual one in the sense that the lessees could do what they liked with the land and any diversion of use of the land from the purpose for which the lease was apparently granted would give the lessor a right of re entry and therefore in the present case the lease came to an end when the land was no longer used for ginning factory (*Prideaux, A J C*) GOVARDHAN DAS v WAHED KHAN 1923 Nag 243

Construction—Mireshorotto Janmaiya Meaning of

Held on construction of the lease that the lease was permanent and heritable and that by the use of the words *Mireshorotto Janmaiya* it was intended that the tenancy should be heritable and to be enjoyed by the grantee from generation to generation. The word *Mireshorotto* is a mis spelling (*Walmsley and Suhrawaray JJ*) AJIMANESSA BIBI v PANNA LAL SIL 27 C W N 1037 1923 Cal 705

Construction—Right to build—Boundaries and area—Conflict—Effect of.

The fact that the lessee was given possession of an area of land less than that granted by the lease does not justify his encroaching on other lands of the lessor outside the area specified in

## LEASE

the boundaries. The portion of a lease governing the lessee's right to build was as follows: "You shall not be competent to make big excavations but you shall be competent to construct pucca wall, pucca privy and pucca plinth of the tin ghur."

*Held*, that reading the clause as a whole, it was the intention of the parties that the lessee's right to erect permanent structures should be limited to those specified in the condition and that this condition amounted to a prohibition to build any other structures than those expressly mentioned. (*Newbould and Cuming, JJ*) **LINA-NATH DAS v GOPAL CHANDRA DAS**

1923 Cal 309

—Construction—'Thicca' 'Mokra'—Meaning of—Tenancy from generation to generation

The word "thicca" is used to indicate the creation of a tenancy and the word "mokra" is in reality 'Mokarari,' indicating that the rent was fixed in perpetuity. Consequently, if these two words are taken together, there is no escape for the inference that the rent was fixed in perpetuity, in other words, that the tenure was not only *maurasi* but *mokarari*. There is, however, a subsequent clause in the document which may militate against this view, namely, the clause which bars the alienation of the tenancy without the consent of the landlord. (*Mookerjee and Chotzner, JJ*) **RESHEE CASE LAW v BHUBAN MOHAN PAL**

72 I C 1047

—Determination at lessor's will—Lessee whether can be ejected

Where in a lease there is an express term that the lessee shall vacate the land in case he fails to pay the rent or whenever the lessor requires him to do so the lessee is liable to ejectment and the lease is an yearly lease though a longer period is mentioned in the lease. (*Gokul Prasad, J*) **GHASI RAM v MALOMY CLUB**

75 I C 603  
1923 A 382 (2)

—Forfeiture—Relief against clause—Nullity *See* (1922) DIG COL. 224 **HIRANANDHAN OJHA v RAMDHAR SINGH**

4 Pat L T 292

69 I C, 886,

—Mourasi Mokarari—Fixed rate of rent—Consent decree—agreeing to pay enhanced rate—Effect of *See* (1922) DIG COL. 724, **PRIYANATH GHOSH v. SURENDRA NATH DAS**

69 I C 992

—Premature termination—Damages

Where the term of a tenancy under which the rent is payable periodically is brought to a premature termination the lessee is entitled to damages and not to rent for the unexpired term of the lease. Even the acceptance of surrender does not preclude the lessee from suing for damages for breach of the contract, it does not destroy the existing cause of action. (*Mookerjee and Chotzner, JJ*) **BIJOI CHANDRA SINGH v HOWRA AKA LIGHT RY CO LTD,**

38 C L J 177  
1923 Cal 524

—Tenancy on sufferance,

There is no such thing as tenancy on sufferance in India. (*Sanderson, C J and Ghosi, J*) **REAU DIN PATWARI v SYED ABDUL JABBAR**

69 I C 504.

## LEGAL PRACTITIONER.

LEGAL PRACTITIONER—Admissions of question of law—Effect

Counsel cannot bind his client by an admission made purely as a point of law. (*Pipon, J C*) **HABIB GUL v SHAHDAD KHAN,**

73 I C 594

—Authority to compromise must be expressed

A pleader, who does not hold and has not held in the suit before the Court his client's general power of attorney authorising him generally to compromise suits on behalf of his clients, cannot be recognised by a Court as having any authority to compromise the suit unless he has filed in the suit his clients vakalatnama giving him authority to compromise the suit before the Court. (*Sir John Edge*) **SOURINDRA NATH MITTRA v HERIMBANATH BANDOPADHAYA**

45 M L J 453 (1923) M W N 734.  
33 M L T 294 (P C) L R 4 P C 138  
1923 P C 98

—Counsel—Duty of

It is incumbent on counsel to see that their clients are properly represented when their case is called on for hearing. If a counsel is unable to appear himself he should arrange for another counsel to take the brief for him. (*Abdul Raoof and Martineau, JJ*) **SAIF ALI v CHIRAGH ALI SHAH,**

1923 Lah 97 (1)

—Duties of—Officer of Court—Joining an association declared unlawful—Effect *See* **LETTERS PATENT (LAHORE), Cl 8**

4 Lah 271

—Duties of—Scandalous charges against judges—Professional misconduct

Members of the legal profession are under no duty to their clients to make grave and scandalous charges either against judges or the opposite party on the mere wish of their clients. They are not puppets compelled to obey the dictates of their client where matters of good faith and honourable conduct are concerned. They are agents, not of the man who pays them, but are acting in the administration of justice and are bound to exercise an independent judgment and to conduct themselves with a sense of personal responsibility. (*Mears, C J Walsh and Sulzmann, JJ*) *In the matter of* **DURGA PRASAD MITHAL**

21 A L J 893 L R 4 A 615

—Misconduct—Application for renewal of certificate—Suppression of facts—Discharge from Government Service.

A pleader who had been discharged from Government service for improper conduct in connection with a criminal case concealed the fact, and applied for renewal of the Pleadings certificate. *Held* that though the conduct of the pleader in relation to the criminal case was open to grave comment, yet it was not such as to justify the refusal of the application for renewal of the certificate. The High Court ordered the renewal of the certificate after six months. (*Mookerjee, C J and Fletcher, J*) **MUKUNDA LAL DHAR In the matter of**

27 C W N 528 37 C L J 391

—Perjury—Conviction for—Effect, Propriety of conviction if open to challenge—Matters to be considered—Removal by Benchers—Effect

## LEGAL PRACTITIONER

The conviction of a legal practitioner for perjury is good ground for striking off his name from the roll of practitioners. In deciding the question, the propriety of the conviction cannot be questioned, but the court can go into the facts to find out for itself the extent of the moral turpitude involved. Where the conviction is by a foreign court, but the law is the same as in India and there has been a fair trial, the same principles will apply.

An order of disbarment is not conclusive for all time. If circumstances change and the court is convinced that the delinquent has been brought to a higher sense of honour and duty, the order can be cancelled.

Where a long time has elapsed since the date of conviction and there is evidence that in the interval the practitioner has been leading a honourable life, that matter can be taken into consideration when the disciplinary powers of the court have been invoked.

Disbarment of a member of the English Bar by the Benchers of his Inn does not *ipso facto* lead to his being struck off the rolls of an Indian High Court. The matter would have to be decided under the discretion given by the Letters Patent (*Schwabe, C. J. Coutts Totter and Krishnan, JJ.*) *In the Matter of an Advocate of the High Court*. 46 Mad 903 45 M L J 639

18 L W 823 38 M L T 110 (H C)

—Pleader—Duty of—Non-payment of fees—Duty to act—Lien. See (1921) DIG. COL 905 *MUTHUKRISHNA YACHENDRA BHADUR v NURSE* 69 I C 695

—Professional misconduct—Defiance of law—Taking the law into his own hands—Misconduct. See LETTERS PATENT (PAT) cl 8 (1923) Pat 42

—Professional misconduct—False representation to client as regards possession of certain documents—Apprehension of professional unpopularity—Conduct improper—Expression of disapproval of pleader's conduct sufficient. See LEGAL PRACTITIONERS ACT, S. 13 (B) AND (F). 17 L W 358

—Professional misconduct—Insulting letter to Magistrate—Instructions—Conditional apology

A letter addressed by a pleader to a Magistrate with reference to a case disposed of by him containing improper and vulgar abuse of the magistrate and a demand for an apology followed by a threat of further proceedings, is highly objectionable and the pleader is guilty of professional misconduct. Instructions from client are no excuse whatever for a pleader exceeding what is his duty towards the Court. In cases like this an apology and much less a conditional apology, would be insufficient (*Maulead, C. J. and Crump, J.*) *THE GOVT PLEADER v. TATKE*

25 Bom. L R 264 72 I. C 353  
24 Cr. L J 353 1923 Bom 234

—Renewal of certificate—Refusal—Discharge from Government Service—Effect of. See PLEADER 27 C W N 528.

## LEGAL PRACTITIONER'S ACT (1879), S. 13

—When can act—Effect of accepting vakalat—Duties and obligations of. See (1922) DIG COL 726 *EMPEROR v. RAJANI KANTA BOSE* 71 I C 81 24 Cr. L J 33

## LEGAL PRACTITIONER'S ACT (1879), S. 13—Boycott of courts—Duties and obligations of pleaders

Per *Sanderson, C. J.*—If a pleader in pursuance of a concerted movement to boycott the courts, deliberately abstained from attending it he is guilty of a course of conduct which cannot be justified or tolerated.

Pleaders have duties and obligations to their clients in respect of the suits and matters entrusted to them. It is an equally important duty and obligation on them to co-operate with the court in the orderly and pure administration of Justice.

If a pleader has any complaint against any subordinate Judge, he has two courses open to him, i.e., to make a representation to the particular Judge or to the High Court (*Sanderson, C. J. Woodroffe and Mookerjee JJ.*) *IN THE MATTER OF TARINI MOHAN BARARI*. 69 I C 209 1923 Cal 212

—Ss 13, 14—Pleader, employing himself as professor without consent of Court—Expressing loss of faith in British Justice

A pleader who employs himself as a professor without the permission of the court renders himself liable to disciplinary action so also where a pleader states before a Court that he has lost all faith in British justice and owed no allegiance to British Courts. (*Mookerjee and Chotzner, JJ.*) *EMPEROR v. BIMALANAND DAS GUPTA* 38 C. L J 353

—S 13—Procedure. See (1922) DIG COL 728 *MATHURA PRASAD, In the matter of* 1 Pat 684 4 Pat. L T 303 71 I C 122 24 Cr. L J 74

—S 13 (b) and (f)—Applicability of—Disciplinary action against pleader. See (1922) DIG COL 728 *EMPEROR v. RAJANI KANTA BOSE* 71 I C 81 24 Cr L J, 33

—S 13 (b)—Dismissal of bail application—Subsequent application without disclosing prior one—If amounts to misconduct

Where after the dismissal of a bail application, a sessions Judge, the said pleader put in another application before the *locum tenens* of the Sessions Judge without disclosing that a previous bail application had been dismissed the pleader is guilty of professional misconduct even though the first dismissal did not bar the filing of a second application. (*Broadway and Martineau, JJ.*) *EMPEROR v. JODH SINGH*

69 I. C 442 23 Cr L J 714 (1923) Lah 211

—S 13 (b) and (b)—Pleader—Professional misconduct—False representation to client—Apprehension of injury to professional reputation—Vindictive proceedings—Costs

A First Grade Pleader falsely stated to his client that he was not in possession of certain documents which were as a matter of fact in his custody. The statement was made out of fear that sinister suggestions might be made against

## LEGAL PRACTITIONER'S ACT (1879), S 13,

him and he might be injured professionally — Held that though there was no justification for not speaking the truth the case was not one which called for any more severe punishment than an expression of disapproval of the conduct of the practitioner by the High Court

Where a pleader was pursued vindictively by a client who with a sinister view made charges of a very serious kind against the pleader all of which failed, the pleader though guilty of improper conduct need not pay the costs of the petitioner. (*Schwabe, C. J., Coutts Trotter and Ramesam, JJ*) A FIRST GRADE PLEADER in the matter of

17 L W 356  
73 I C 329. 24 Cr L J 585 1923 Mad 485

—Ss 13 (c) and (f) and 14—Legal Practitioner—Additional District Magistrate—Power to report to High Court regarding misconduct of pleader—Imputation against the fairness and impartiality of the magistrate See (1922) DIG COL 728 MOHENDRA LAL ROY in the matter of

71 I C 673 24 Cr L J 209

—S 13 Cl. (D)—Pleader—Unprofessional conduct—Prosecuting pleader drafting written statement for accused—Excuse

A legal practitioner cannot represent conflicting interests or undertake the discharge of inconsistent duties. When he has once been retained and received the confidence of a client, he cannot accept a retainer from or enter the service of those whose interests are adverse to his client in the same controversy or in matters so closely allied thereto as to be in effect a part thereof. The rule is rigid and is designed not only to prevent the dishonest practitioner from fraudulent conduct but as well to preclude the honest practitioner from putting himself in a position where he may be required to choose between conflicting duties or be led to an attempt to reconcile conflicting interests, rather than to enforce to their full extent the rights of the interests which he should alone represent. Fidelity is required from all who hold fiduciary relations they must not lightly enter upon such relationships, but if they do, they will not be permitted to be disloyal, and of all species of disloyalty desertion and adherence to the enemy or to the opposite party in a suit is recognised as the worst. On those grounds it has been held that an attorney may be disbarred where he conducts a criminal prosecution against a person or assist therein, and thereafter appears for the defence, or while acting as attorney for the prosecutor in a criminal case he accepts money from the defendant in consideration of a dismissal (*Mookerjee and Chotzner, JJ*) EMPEROR v RAJANIKANTA GHOSE

37 C. I. J. 48 72 I C. 22 24 Cr L J 294  
1923 Cal 106

—S 13 (f)—Counselling disobedience of laws—Expressing regret

Where a pleader preaches at public meetings disobedience to law and order, but expresses his regret and undertakes to help in the administration of law, his sanad may be renewed. (*Schwabe, C. J., Coutts Trotter and Krishnan JJ*) IN THE MATTER OF A FIRST GRADE PLEADER, GUNTUR

45 M. L. J. 718 33 M. L. T. 100 (H. C.)  
(1924) M. W. N. 18 18 L W 717

## LEGAL PRACTITIONER'S ACT (1879), S 14

—S 13 (f)—Non-co-operation speeches—Effect

Where a pleader delivers speeches advocating non payment of taxes, boycott of courts, etc and does not express regret for his action, a case is made out for taking action under the Legal Practitioners' Act and to withhold the renewal of his Sanad (*Schwabe, C. J. and Coutts Trotter and Krishnan, JJ*) In the matter of J. R. A SECOND GRADE PLEADER

45 M. L. J. 684 33 M. L. T. 98 H. C.  
18 L W 689 (1923) M. W. N. 768

—S 13 (f)—Pleader—Professional misconduct—Organised resistance to unpopular tax—Security See (1922) DIG COL 729 SHANKER GANESH DABIR v SECY OF STATE FOR INDIA

44 M. L. J. 32 37 C. L. J. 136  
25 B. M. L. R. 131 27 C. W. N. 343  
69 I C 367 L. R. 4 P. C. 36 18 L W 59  
(1923) M. W. N. 528 (P. C.)

—S 14—Misconduct of pleader—Power to inquire—Jurisdiction of court

The first clause of S 14 of the Legal Practitioners' Act empowers any Court in which a pleader practises to consider a charge of misconduct made against him in such court, and the section does not limit the consideration of the charge to the court in which the misconduct is alleged to have been committed so that it seems immaterial that the misconduct charged was committed in another Court. If the charge is made in the Court in which the Pleader practises, that Court is competent to enquire into it. The expression 'such Court' in the first clause of S 14 cannot be construed to mean the Court in which the misconduct is alleged to have been committed. The section only means that any Court in which a Pleader practises is competent to enquire into a charge of misconduct, if the charge is brought in that Court (*Maung Kin and Duckworth, JJ*) MAUNG TUN AUNG GYAW IN THE MATTER OF 72 I C 521 24 Cr L J 409

—S 14—Nature of proceedings under—Object of section—Written statement put in, See (1922) DIG COL 722 EMPEROR v RAJANI CANTA BOSE,  
71 I C 81 24 Cr L J. 33

—S. 14—Offence committed in court of Sub-Divisional officer—Power of Session Judge to take action

Where certain offences are alleged to have been committed by a Mukhtear before a Sub-Divisional Magistrate, the Sessions Judge of the District has no jurisdiction to take action under S 14 of the Legal Practitioners Act (*Miller, C. J. Mullick and Kulwant Sahay, JJ*) MANAZIRUL HUQ IN THE MATTER OF (1923) Pat 45

4 Pat L T 97 71 I C 703 24 Cr L J. 239  
1923 P. 185 (I).

—Ss 14 and 13—Reference by appellate Court—Statement on behalf of a party whose brief the pleader does not hold See (1922) DIG COL. 730 BANAMALI DAS in the Matter of

1 Pat 689 4 Pat L T 235  
1 Pat L R (Cr), 57 71 I C 209  
24 Cr. L J. 81

## LEGAL PRACTITIONER'S ACT (1879), S 14

—S 14—Scope of enquiry—Asking Bench clerk for trend of judgment before it is delivered—Professional misconduct

A court acting under S 14 of the Legal Practitioner's Act is not restricted in ordering an enquiry to offences mentioned under cls (a) and (b) of S 13. It can direct an enquiry in respect of an offence under cl (f).

Before judgment is actually delivered in a case it is professional conduct to ask the Bench clerk about the trend of the judgment to be delivered (*Dawson Miller, C, J, Kulwant Sahay and Foster, JJ*) In the matter of NARENDRA NATH ROY (1923) Pat 329

—S 28—Pleader and client—Suit by pleader for remuneration on foot of an adjusled account—Account not filed in court—Right to reasonable remuneration

When there is no agreement between the pleader and his client, the pleader is entitled to maintain an action for reasonable remuneration for services rendered. But where there is a contract between the parties such contract to be enforceable must fulfil the requirements of S 28 of the Legal Practitioner's Act, viz., that the contract must be in writing and the writing must be deposited in court within the prescribed period. Where there was an agreement between the pleader and the client for remuneration but the agreement was not deposited in court and the pleader sued the client for the balance due on an adjustment of accounts, held that the suit was one in essence to enforce an agreement which did not comply with the requirements of S 28 of the Act (*Mookerjee and Chotzner, JJ*) KALIPADA DAS v BURGADAS ROY 27 C W, N 769 73 I C 10 1923 Cal 677

—S 36—Declaration of a person as tout—Inquiry—Mode of—Discretion of District Judge

The only qualifications imposed by the Act on the exercise of the discretion in declaring a person a tout are that the District Judge must be satisfied by evidence of general repute or otherwise and further that no person's name is to be included in a list of touts until he has had an opportunity of showing cause against such inclusion. It is a valid ground for interference by the High Court, in the exercise of its general powers of supervision, if the District Judge had disobeyed this latter direction and had included in his list of touts the name of a person who had never been allowed an opportunity of showing cause against such inclusion. It has never the intention of the Legislature to allow anything of the nature of an appeal against the decision of a competent Court under section 36 of Act No 18 of 1879. The High Court cannot allow its general powers of supervision to be invoked so as, in effect, to create a right of appeal which was never intended by the Legislature (*Piggott, J.*) KASHINATH v EMP 45 A 676 L R 4 A 317 21 A, L J 671 90 & A L R 696 74 I C 11 1924 A 69

—S 36—Jurisdiction—Order declaring tout.

Where a person's name is published in a list of touts and the list applies to courts over which

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the judge has no jurisdiction the order is bad (*Newbould and Suhrawardy, JJ*) JAGAT CHANDRA GHOSE v EMPEROR 1923 Cal 484.

—S 36—Tout—Proceedings against—Procedure—Irregularity—Power to interfere—High Court

In proceedings to declare a person a tout under S 36 of the Legal Practitioners Act, it is not necessary that there should be a petition. The Court can act on evidence of general repute provided an opportunity is given to the alleged tout to rebut the evidence against him and to place his case before the Court 11 C L J, 213 Rel. The High Court has power to interfere with an order of the court below in proceedings under S 36 of the Legal Practitioners Act. 15 C W N 1000, 4 C W N 36, (1912) M W N 959, 28 I C 918, 61 I C 829 Rel. (*Venkatasubba Rao, J.*) VARADACHARIAR v KALYANASUNDARAM AIVAR 44 M L J 437 69 I C 433 23 Cr L J 705 1923 Mad 188 (2),

LESSOR AND LESSEE—Acceptance of new lease—by alteration of rent reserved whether surrender of old lease impliedly. See T P ACT, S 111. 71 I C 976.

—Covenant for possession—Limits of doctrine. See (1922) DIG COL 731, UDAI KUMAR DAS v KARYAVINI DEBI 49 Cal, 948

—Lessor and Lessee—Ejectment—Permanent lease—Right to eject person in possession. See (1922) DIG COL 732 MAHARAJAH PRABHU NARAIN SINGH v BHAGWANT SINGH. 9 & A. L R 276

—Renewal—Provision for—Possession of lessee willing to accept renewal

Though the position of a lessee willing to accept a renewal of the lease on proper terms is the same in equity as if a proper lease had been executed, it is essential that the covenant for renewal should be such as to be specifically enforced (*Mookerjee and Cuming, JJ*) GAJENDRA NATH DEY v MOULVI ASHRAF HOSSAIN 27 C W N 169 69 I C 707 1923 Cal 130

—Rent—Suspension of—lessee in wrongful possession of a portion of the land—Effect of. See (1922) DIG COL, 732 NARENDRA CHANDRA LAHIRI v MANINDRA CHANDRA NANDY 49 Cal 1019.

LETTERS OF ADMINISTRATION—Buddhist heir—Necessity for

It is not necessary for a Buddhist heir to take out Letters of Administration before he can institute a suit on a mortgage. A succession certificate will suffice (*Pratt and Duckworth, JJ*) AH DOE v MI AUNG THA PRU. 1923 Rang 74 (1)

—Special citation—Failure to issue—Effect of knowledge of application. See (1923) DIG, COL 733, KANHAI ROU v JOGENDRA ROU 69 I C 611

LETTERS PATENT—Appeal under—Cross objections—Provisions of Civil Procedure Code—If apply. See (1922) DIG, COL 733 MT PURAN KUAR v, MANGAT RAI 70 I C 488 (1),



## LETTERS PATENT (All), Cl 10

—(All.) Cl 10.—*Application for review of judgment—Rejection of—Appeal*

There is no appeal against an order of a single judge of the High Court rejecting an application for review of a judgment made by another judge previously (*Banerjee and Gokul Prasad, JJ*)

TIRMAL SINGH v KANHAIYA SINGH

21 A L J 341 L R 4 A 218 45 A 535

1923 A 356

—(All.) Cl 10—*Judgment—Meaning of—Order of single judge in appeals under O 43, R 1, C P. Code—Appealability*

An regards the question whether a particular adjudication is or is not a judgment within Cl 10 of the Letters Patent (All) the test seems to be not what is the form of adjudication but what is its effect in the suit or proceeding in which it is made. If its effect, whatever its form may be, and whatever may be the nature of the application on which it is made is to put an end to the suit or proceeding so far as the court before which the suit or proceeding is pending is concerned, or if its effect, if it is not complied with, is to put an end to the suit or proceeding the adjudication is a judgment. The word 'judgment' covers not merely final orders but also preliminary or interlocutory orders 35 M, 1, 17 A 442 Rel.

As a general working rule there has grown up in the Allahabad High Court a practice of regarding those matters which are mentioned in O 43, R 1, C P. Code are being generally appealable from a single judge to a Bench. (*Mears, C J and Piggott, J*) SADIG ALI v ANWAR ALI

45 A 66 70 I C 105 1923 A 44

—Cl 10—*Order of Single Judge—Appeal from order of remand—Letters Patent—Appeal if maintainable*

There is no appeal under cl 10 of the Letters Patent from an order of a Single Judge of the High Court on an appeal from an order of remand 39 A 191 followed. (*Mears, C. J and Banerjee, J*) GAJADHAR PRASAD v NAWAB MAHOMED ABDUL MAJID

L R 4 A 227 (1)

1923 A 396

—S 22—*Village panchayat court—Proceedings—If can be transferred*

Held per Kanhaiya Lal J (*Stuart J dissenting*) A village panchayat court is a court for the purposes of S. 22 Letters Patent, and the High Court has got the power of transferring proceedings pending in one such court to another (*Stuart and Kanhaiya Lal, JJ*) SAT NARAIN v SARJU

21 A L J, 925

—(Bom.) Cl 10—*Pleader—Disciplinary jurisdiction—Contempt—Criticism of pending proceedings in Court See (1922) DIG, COL 734 THE GOVERNMENT PLEADER BOMBAY v VINAYAK BALWANT CHAI KAR.*

47 Bom 117

—Cl 12—*Leave to sue—Cause of action outside jurisdiction—Suit against dead man—Subsequent addition of legal representative—Fresh leave if necessary*

Defendant obtained leave under cl 12 of the Letters Patent and instituted a suit against a person residing outside jurisdiction. It was found

## LETTERS PATENT (Cal), Cl 26

that at the time of the institution of the suit the defendant was dead. The plaintiffs amended the cause title of the plaint by substituting the name of the defendant's legal representatives in his place. The legal representative was himself residing out of the jurisdiction. Held, that the suit as originally instituted was invalid and that the plaintiff should obtain leave to sue the defendant's legal representative. 20 B 767 1011. (*Mulla, J*) RAMPRATAP BIRJI MOHANDAS v GAURI SHANKER

25 Bom L R 7

—Cl 12—*Maintenance charged on immovable property—Suit for—If relating to land*

A claim for maintenance to be charged on immovable property is a suit for land within the meaning of cl 12 of the Letters Patent (*Fawcett, J*) YESHVADABAI v JANARDHAN RAGHUNATH WAKH

25 Bom L R 1172

—Cl (12)—*Suit for land—Specific Performance—Land without Jurisdiction, (1922) DIG COL 735 NAGENDRA NATH CHOWDHURY v, ERALIGOO Co LTD*

70 I C, 92

—Cl 15—*Judgment—Sanction for prosecution under S 195, Cr P Code See (1922) DIG COL 735 ABDUL LATIF USMAN v HAJI TAR MAHOMED*

47 B 270

—Cl 39—*Case stated under Income Tax Act—Order on it appealable—Considerations determining. See INCOME TAX ACT, S 51*

(1923) P. C. 148

—Cl 39—*Interlocutory order—Order in Civil Extraordinary application—If appealable See C. P. CODE S, 109 (A)*

1923 Bom 39

—(Cal) Cl 15—*Appeal—Judgment—Conditional order of attachment before judgment on default of defendant furnishing security—Security furnished—Order not appealable as a judgment See C P CODE, O 38, Rr. 5 & 6*

50 C 215

—Cl 15—*Judgment—Suit on behalf of a lunatic—Application to take the plaint off the file—Dismissal of the application—Appeal (1922) DIG COL 736 GOLB MOHUN MULLICK v NOVAN MANJURI DASI*

69 I C 915

—Cl. 15—*Order restoring suit—If judgment See (1922) DIG COL 736 MAHARAJ KISHORE KHANNA v KIRAN SHASHI DASI,*

69 I, C 820.

—(Cal) Cl 26—*Certificate of Advocates-General—Statement of trial judge as to fact—happening at the trial—Conclusiveness of—Procedure for granting certificates.*

The powers of the High Court are limited under Cl. 26 of the Letters Patent. Where there is no misdirection or other error as certified, by the Advocate General the certificate is misconceived and the High Court has no power to interfere with the conviction and sentence. Where the Court is called upon to review a case under Cl 26 of the Letters Patent, it would accept as unquestionable the statement of the trial judge as

## LETTERS PATENT (Cal) Cl 26.

to what took place before him in court 21 C L J 377, 10 B H. C. R 75 Ref

Cl 26 of the Letters Patent though silent as to the procedure to be followed by the Advocate General when he is called upon to grant a certificate, requires that the certificate should reflect the judgment of the Advocate-General and is presumably granted in the interests of justice, after a consideration of all the available materials 21 C L J 377 Ref If that judgment is founded on incomplete materials or inaccurate allegations, its weight is diminished in accordonding decree. In a case where the error ascribed to the judge depends on the evidence adduced at the trial, it is desirable that the notes of the evidence, as recorded by the judge, should be laid before the Advocate General when he is asked to grant the certificate The certificate of the Advocate General should be granted after he has heard the representatives of the prisoner and the crown and has carefully considered all the available materials whose accuracy had been verified by counsel or other responsible persons (*Mookerjee, Richardson, Ghose, Cumming and Page, JJ*) EMPEROR v BARENDRA KUMAR GHOSE 28 C W N 170

38 C L J 411

26—Joint trial—Judicial discretion—Defective summing up—Interference

Where a Judge in his discretion under S 239, Cr. P C desires to try a number of accused jointly it is not a matter for interference on a certificate of the Advocate General under Cl. 26 of the Letters Patent

A defective summing up to the jury, unless it causes a failure of justice is not ground for upsetting a conviction (*Maclean, C J Prinsep, Hill Harrington and Brett JJ*) EMPEROR v CHARU CHANDER MUKERJEE

38 C L J 309 (F B)

Cl 41—Criminal appeal—Decision of High Court—Leave to appeal to His Majesty in Council.

The High Court cannot grant leave to appeal to His Majesty in Council from its decision in a criminal appeal either under cl 41 of the Letters Patent or any other provision of law (*Mookerjee and Chatterjee, JJ*) PHILLIP E BILLINGHURST v EMPEROR 38 C L J 406

(Lah) Cl 8—Proceedings under—Nature of—Propriety of conviction if can be gone into—Duties of legal practitioners.

Where a legal practitioner has been sentenced for being a member of an association which was declared an unlawful one under the Criminal Law Amendment Act and proceedings are taken against him under the disciplinary powers conferred by the Letters Patent, the proceedings are not criminal in their character. They are sometimes described as *quasi* criminal but that is only in so far as they may result in penalties. They are in fact neither civil suits nor criminal proceedings. The High Court will apply such rules of procedure as will ensure a fair trial, giving the practitioner a proper notice and a reasonable opportunity to be heard

When proceedings are stayed on a conviction, it is not in the nature of a second trial. The propriety of the conviction in law or in fact cannot be questioned, but the court is bound to inquire into

## LETTERS PATENT (Lah) Cl 10

the nature of the crime in order to decide if it was of such a character as to render a person guilty of it unfit to remain a member of the profession

Disobeying the order even if it does not imply any moral turpitude, the fact of an officer of court like the legal practitioner joining an association declared to be unlawful renders him liable to be dealt with under the Letters Patent (*Sir Shadi Lal, C J Scott Smith and Abdul Raouf, JJ*) In re ABDUL RASHID 4 Lah 271.

Cl 10—Decision by Single Judge in appeal under S 54 of the Land Acquisition Act—Appeal

The judgment of the High Court in an appeal from an award of the District Judge is a judgment within the meaning of Cl 10 of the Letters Patent and is appealable to a Division Bench of the High Court (*Shadi Lal, C J and Abdul Qadir, J*) HAF DIAL SHAH v. SECY OF STATE FOR INDIA. 3 Lah 420 69 I C 428 1923 Lah 275

Cl 10—Final Order, meaning of

After the passing of the preliminary and final decrees in a mortgage suit against a Hindu father, the son brought an objection against the sale of his share, instituted a suit and got an order of stay His suit was dismissed and he filed an appeal and on the day the appeal came for preliminary hearing stay order was again granted *ex parte* The decree-holder then applied for the discharge of the stay order praying in the alternative security for the amount of the decree and costs be taken The application of the decreeholder was dismissed and he filed an L P A against this order It was contended that the order was not a final order within the meaning of Cl 10 of Letters Patent Held that objection is acceded to it would follow that the appellants would be bound by an *ex parte* order (*Shadi Lal C J, and I forde, J*) BULAGI MAL v SHAMAS DIN. 5 Lah L J 287 1923 Lah 428

Cl. 10—Judgment—Dismissal of appeal for default—Order of Single Judge—Appeal

Where a single Judge of the High Court refuse to set aside a dismissal of an appeal for default his order of refusal is a judgment and is appealable under Cl 10 of the Letters Patent (Punjab) The bench hearing the appeal will not legally interfere with the discretion of the single Judge even though it might have taken a different view of the cause if the matter had originally come up before it (*Shadi Lal C. J and Eforde, J*) NANAK CHAND v SAJJAD HUSAIN 71 I C. 824

Cl 10—New point

*Dubitante* whether in an appeal under the Letters Patent an appellant is entitled to be heard on a point raised for the first time which has not been raised before the Judge from whose judgment he is appealing 20 All 258 and 1 Pat 485 Ref (*Shadi Lal, C J and Abdul Qadir, J.*) HAJI MOHAMMED TAQI v HAJI ABDUL RAHMAN 1923 Lah. 151.

Cl 10—Second Appeal—Appeal from order of a single Judge—Interference with finding of fact

Where a single Judge of the High Court hearing a second appeal interferes with a finding of fact of the first appellate Court, it is open to a

## LETTERS PATENT (Lah) Cl 15

Division Bench in an appeal under Cl 10 of the Letters Patent to set aside his decision and restore that of the lower Appellate Court (*Leslie Jones and Dundas, JJ*) MINA MAL v LALA DASS  
5 Lah L, J 109

— Cl 15—Judgment order in criminal case—Sanction application See (1922) DIG COL 737  
MUNISWAMY MUDALIAR v RAJARATNAM PILLAI  
71 I C, 126 24 Cr L J 78

— (Mad) Cl 10 and 39—Disciplinary jurisdiction—Order suspending vakil from practice—Leave to appeal See (1922) DIG COL 737 E  
RAGHAVA REDDI *In re* 69 I C 290

— Cl 12—Carrying on business—Meaning of—Defendant—If includes foreigners

"Carrying on business" in Cl 12 of the Madras Letters Patent includes carrying on business through an agent by foreigners living outside the jurisdiction of the court as well as the carrying on business through an agent by British subjects. The word "defendant" includes a foreigner (*Schwabe, C J and Coleridge J*) JANOO HASSAN v BATCHU KAMANDU 45 M L J 471  
18 L W 515 (1923) M W N 739  
33 M L T 19 (H C)

— Cl 13—Leave to sue—Mortgage suit See (1922) DIG COL 714, NAMBERUMAL CHETTIAR v RAGHAVA CHARIAR 71 I C 391 (2)

— Cl 12—Leave to sue—Jurisdiction—Discretion of Court—Decree of Malabar Court obtained by fraud—Suit in High Court to set aside—Leave for—Grant of—Several defendants residing in Malabar—Balance of convenience in instituting there—Cause of action for suit—Fraud—Discovery of fraud—"The defendant in cl 12 of Amended Letters Patent (Madras)—If includes case of one of defendants"

Plaintiff was sued for the due performance of his duties and due accounting by an agent. In a suit instituted in Malabar by the principle a decree was passed against the agent and the plaintiff for the balance due by the agent to the principal and that decree was on appeal affirmed by the High Court. Alleging that in allowing that decree to be passed the agent or his representative conspired with the principal in suppressing material documents with a view to make the plaintiff pay the decree amount, the agent being impecunious, that the said fraud was practised in Madras, and that it was discovered in Madras, the plaintiff instituted a suit in the High Court (Original Side) Madras for having the prior decree set aside on the grounds alleged. The defendant were the agent's representatives, who resided in Malabar. In order to bring the suit within the ordinary Original Jurisdiction of the High Court plaintiff applied for and obtained leave under S 12 of the Amended Letters Patent to sue the defendant living in Malabar. The leave so granted was after notice set aside. On an appeal from the order setting aside the leave held that assuming that the High Court had jurisdiction to grant the leave, it should in the exercise of its discretion, refuse the same.

Nearly whole of the alleged cause of action arose in Malabar. There would be no ground at all for bringing the suit here but for the fact that

## LETTERS PATENT (Pat) Cl 8

two of the defendants reside here who it is alleged, have in their power there a very material document. The fact that some difficulty is anticipated in getting the document produced in Malabar is not sufficient ground for holding that the suit which is essentially a Malabar suit not a Madras suit, should be brought in Madras.

*Per the Chief Justice*—The discovery of the fraud is not part of the cause of action but the fraud itself is. *Quere* whether the fraud alleged is sufficient ground for setting aside the decree.

*Semble* S 12 of the Amended Letters Patent does not confer jurisdiction upon the High Court in cases where one or more of the several defendants reside within jurisdiction (*Schwabe, C J and Wallace, J*) PARAMESWARA PATTAR v VIYATHAN MAHADEVU 72 I C, 982 1923 M 272

— Cl 13 and 15—Appeal—Order for transfer of a suit—"Judgment"

An order for transfer of a suit to the High Court, under Cl 13 of the Letters Patent, is a "judgment" and appealable under Cl 15 of the Letters Patent 35 M 1, 21 M L J 1 (H B) foll 47 C 1104 not foll (*Schwabe C. J and Ramesam, J*) KRISHNA REDDI v THANIKACHALA MUDALI 45 M L J 152 73 I C 1054 (1923) M W N 681

— (Mad) Cl 15—Order of Judge under R 206—Original Side Rules—If a judgment

A judge deciding in Chambers to reserve price to be put on property to be sold in auction under R 206 Original Side Rules acts only in a ministerial capacity. Such an order is not a judgment and hence not appealable (*Schwabe, C J, and Krishnan, J*) TAWKER AND SONS v HARSOODOS CHOUGHMULL 45 M L J 611  
18 L W 647 (1923) M W N 834  
33 M L T 72 (H C)

— Cl 15—Order refusing to alter sale proclamation or postpone sale—If appealable

An order of a judge on the original side refusing to alter the terms of a sale proclamation or to postpone a sale is not a judgment so as to make it appealable (*Schwabe, C J and Coleridge, J*) KAVERI BAI AMMAL v MEHTA AND SONS 18 L W 615 (1923) M W N 894  
46 M L J 71

— Cl 15—Partnership suit—Order referring suit to Commissioner for determining shares, taking accounts, etc.—If a judgment—Appeal See PARTNERSHIP 73 I C 903 (2).

— (Pat) CL 8—Pleader or Advocate—Removal of—Conviction under S, 17 (2) of the Criminal Law Amendment Act (XVI of 1918)

Where a High Court Vakil defied the order of constituted authority and took the law in his own hands as a result of which he was convicted under S 17 (2) of the Criminal Law Amendment Act, he renders himself liable to the disciplinary jurisdiction of the High Court. Where the Vakil without expressing regret for his conduct maintained the correctness of his position he was suspended for 6 months. Advocates and pleaders are a privileged class enrolled not only for the purpose of

## LETTERS PATENT (PATNA), CL 10

rendering assistance to the courts in the administration of justice but also for giving professional advice for which they are entitled to be paid by those members of the public who require their services. Their position training and practice give them an immense influence with the public and their example must necessarily have a much greater effect whether for good or for evil than the example of those who do not occupy this privileged position. It is not necessary for the High Court in order to be able to exercise its disciplinary jurisdiction that any offence should have been committed by a pleader nor is it necessary that what the pleader has done should have subjected him to anything like general infamy or imputation of bad character. (*Miller, C J Mullick and Kulwant Sahay, JJ.*) BABU MADHEVA SINGH IN THE MATTER OF (1923) Pat, 42  
1 Pat L R (Cr), 36 : 72 I C 875 1923 P. 185 (2)

## —Cl 10—Retrial ordered—If judgment.

An order of a single judge reversing and remanding a case for fresh disposal is a judgment within the meaning of Cl 10 and is appealable. But if the remand is only for finding to be submitted it is not a judgment. (*Miller, C J and Mullick, J*) AJTI CHAUDHURI v JANAK LAL CHAUDHURI (1923) Pat, 332

## —Cl 12—Applicability of—Submission to jurisdiction—Part of the cause of action within jurisdiction—Waiver of objections,

Where the breach of an agreement took place in Calcutta part of the cause of action arises within the limits of the ordinary Original Jurisdiction of the Calcutta High Court. Though the plaintiffs in the action should have taken the leave of the Court under Clause XII of the Letters Patent before instituting the suit, still if there is a submission to the jurisdiction of a Court and if there is no inherent lack of jurisdiction in that Court the absence of the formality which would confer complete jurisdiction on that Court will not render the judgment of that Court null and void. Part of the cause of action having arisen within the jurisdiction of that Court, there is not an entire absence of jurisdiction in the Original Side of the Calcutta High Court taking cognizance of the suit. In order to give a complete jurisdiction it was necessary for the plaintiff in that action to ask the leave of the Calcutta High Court. Where leave of the High Court was not taken when pliffs instituted the suit in 1914, but the defendants submitted to the jurisdiction of the Court and expressly undertook not to question the jurisdiction of the Court that undertaking having been given when they applied for setting aside the *ex parte* decree, and one of the terms of the consent order by which the *ex parte* decree was set aside was that the defendants would not question the jurisdiction of the Calcutta High Court, *Held* that Calcutta High Court had jurisdiction to render judgment in the case, and the decree could not be set aside on the ground of want of jurisdiction. (*Das and Foster, JJ.*) RAJA GANESH NARAYAN SAHI v. MANIK LAL CHANDRA, 1 Pat. L. R. 318

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## LETTERS PATENT (RANGOON), CL 13

—Cl 27—Matrimonial jurisdiction of the High Court—Extent of—Jurisdiction of High Court confined to limits prescribed by the Divorce Act See DIVORCE ACT, Ss. 4 & 7 (1923) Pat 127,

—Cl 31—Disciplinary jurisdiction—Appeal See (1922) DIG COL, 338 SUDHANSU BALA HAZRA IN THE MATTER OF 1 Pat 590  
4 Pat L. T 229 • 70 I. C 172.

## —(Rangoon) Cl 7—Advocates of Upper Burma—Right to be enrolled—Status

First Grade Advocates of Upper Burma if they want to be enrolled as advocates of the Rangoon High Court must first show they possess all the qualifications prescribed by the rules. The mere fact they were called Advocates in Upper Burma does not entitle them to be Advocates in Rangoon also. (*Robinson, C J Heald and May Oung, JJ*) IN THE MATTER OF CERTAIN FIRST GRADE ADVOCATES 1 Rang 142 74 I. C. 913  
1924 Rang 1

## —cl. 8—Allegations against practitioner in his role as printer—Acts punishable under Criminal Law—Disciplinary action

Where a legal practitioner made certain statements not in his professional capacity but as receiver in a case and where they involve a criminal offence, it would not ordinarily be convenient for the High Court to exercise its disciplinary powers until the charges have been investigated in a Criminal Court. (*Ruledge, Heald and May Oung, JJ.*) In the Matter of MAUNG BA KYIN, 2 Bur L J 210,

## —S 11—Application to remove a suit to High Court

It is desirable that the application for removal to the High Court of a suit under S 11 should also be dealt with in the original jurisdiction of the Court. (*Lentaigne and Carr, JJ*) THE JUPITER GENERAL INSURANCE CO LTD v. ABDUL AZIZ 1 Rang 226 (1923) Rang. 185.

## —Cl. 13 — Appeal—Delay in applying—Limitation

On an application for a declaration under Clause 13 of the Letters Patent (Rangoon) for a declaration that a judgment of a single judge is a fit one for appeal, it was found that the judgment was delivered on the 5th of March last and this application was filed on the 10th of April. *Held* that in view of the fact that there was as yet no limitation the delay in this case had not been such as to preclude the court from dealing with the application on the merits. (*Heald, J*) MAUNG TUNYA v MAUNG AUNG TUN 2 Bur. L J. 165.

## —Cl 13—Appeal—Limitation for—Delay

No period of limitation has been prescribed for appeals under the provisions of Clause 13 of the Letters Patent (Rangoon) but yet the petitioner's delay in making the application can fairly be considered against him. (*May Oung, J.*) MAUNG HMAN v. MA SHIN. 2 Bur L. J. 164.

## —Cl. 13—Order refusing—To file an award a judgment—Case concluded in Chief Court—Effect,

## LETTERS PATENT (RANGOON), CL. 34

An order refusing to file an award is a judgment within the meaning of the Letters Patent. Where the case itself is concluded by the Chief Court of Lower Burma, there is no appeal under the Letters Patent (*Duckworth and Po Han, JJ*)  
 SAVA PYE v. U KUNDINNYA. 1 Rang 661  
 2 Bur L J 193

— — — Cl 34—*Applicability of Difference of opinion among Judges of the Division Bench of the High Court—Procedure—C P. Code, S 98*

Clause 34 of the Letters Patent does not in all cases override the provisions of S. 98 of the Code of Civil Procedure and where that section can be properly applied it may be resorted to in spite of the provisions of Clause 34. Clause 34 of the Letters Patent applies only to those cases in which the appeals come before the Court by virtue of a right of appeal given by the Letters Patent. Where an appeal lies under the ordinary law of the land the Letters Patent will override the provisions of the Code applicable to the appeal (*Robinson, C J*)  
 TIN TIN NYO v. MAUNG BA SAING. 1 R 584

LICENSOR AND LICENSEE—*Obligation of licensor—License coupled with interest*

The grantor of a license is under an obligation to place the licensee in a position to enjoy the license. An appropriation of the land licensed to any use inconsistent with the enjoyment of the license works a revocation and the licensee may maintain an action for damages against the licensor for breach of contract in unlawfully revoking it. A license to catch elephants for consideration is not revocable for it is a license coupled with an interest. Where there is a grant of an exclusive right to catch elephants within a specified area for a specified period it does not follow as a matter of course that the grantee would be entitled to exclusive occupation of the entire territory during that time. (*Mookerjee and Chotzner, JJ*)  
 KINGSLEY v. THE SECRETARY OF STATE FOR INDIA. 1923 Cal 49. 72 I. C. 270

LIMITATION—Decree incapable of execution See (1925) DIG. COL. 739 RAJAKOTI KUMAR MUKERJI v. TINCOURI CHAKRABURTI 70 I. C. 293 (2)

— — — Decree—Execution—Period of stay, if a deduction

The period during which the execution of a decree is stayed by order of court can be deducted in computing the period of limitation for executing a decree (*Richardson and Ghose, JJ*)  
 CHARU CHANDRA MAZUMDAR v. PANINDRA NARAYAN CHOUDHURY. 1923 Cal 310 (2)

— — — Plea of—When to be entertained in appeal See (1922) DIG. COL. 739, KHUB LAL v. JUGDISH PRASAD SINGH 69 I. C. 185

— — — Trust—Constructive Trust—Exemption from limitation—Company—Ultra vires acts—Ratification—Damages.

\* A claim to recover money based on a constructive trust is not exemption from the operation of the statute of limitation. In this connection there is a distinction between a trust which arises before the occurrence of the transaction impeached and cases which arise only by reason of that transaction. A representative action by one of

## LIMITATION ACT (IX of 1908), S. 4.

several defrauded persons for damages for concealed fraud will not lie. A company cannot adopt or effectively approve of what is *ultra vires* but it can adopt and approve of what is merely unauthorized. Where there has been a wilful concealment of material facts officers of a company who lose their position as a result of their improper conduct cannot claim compensation (*Lord Phillimore Lord Justice Clark and Mr Justice Duff*)  
 GEOFFREY TEIGNMOUTH CLARKSON v. E. C. DAIRIES. 32 M. L. T. 196 (P. C.).

LIMITATION ACT (IX of 1908)—*Applicability of—Cause of action—Accrual of—Law governing suit.* See (1922) DIG. COL. 739 GANAPATHY MUDALIAR v. KRISHNAMACHARI 70 I. C. 743

— — — Ss. 2 and 14—Defendant—Joint Hindu family—Status of other members—Suit against manager—Subsequent suit impleading subsequently born son See (1922) DIG. COL. 740 HARI PRASAD SINGH v. SOURENDRA MOHAN SINGH 1 Pat 506

— — — S. 2 (8)—Plaintiff a purchaser from Government—Adverse possession against latter if tenures against former See LIM. ACT ARTS 144, 149 28 C. W. N. 66

— — — S. 3—*Limitation—Waiver of the plea*  
 A waiver of the question of limitation is not permissible, (*Kanhiya Lal, J. C.*)  
 SAMUEL BURGE v. THE IMPROVEMENT TRUST, LUCKNOW 26 O. C. 324. 90 & A. L. R. 925  
 73 I. C. 127.

— — — S. 3—*Plea of limitation—Raised for the first time on appeal—When given effect to*  
 In order that an appellate court may give effect to a plea of limitation raised before it for the first time it is necessary that all the facts should have been elicited and must be apparent from the record (*Newbold, J.*)  
 HEM CHANDRA ROY CHOWDHURY v. SRIMATI BIRAJA CHOWDHURANI 1923 Cal 283 (2).

— — — S. 4—*Applicability of—Compromise decree—Payment of money due under—Court closed on last day—Deposit on re-opening day*

The appellant plaintiff sued the respondents-defendants for joint possession of a plot of land acquired by the defendants. On the 29th November 1920 a decree for joint possession was passed in the plaintiff's favour subject to his paying the defendants one hundred rupees as contribution within six months from the date of the decree. The period of six months expired in the vacation when the Courts were closed, and the appellant deposited his money in Court on the day that the Court re-opened. Held that there was a valid compliance with the decree.

Even where the decree directs payment to the decree-holder, payment into Court is a valid compliance with the decree unless perhaps the Court directed that payment should be to the decree-holder and not otherwise (*Batten, J. C.*)  
 DHANU SINGH v. KESHTO PRASAD 19 N. L. R. 116. 72 I. C. 388. 1923 Nag. 246

— — — Ss. 4 and 5—*Application to set aside dismissal for default—Court working with special permission of the High Court—*

## LIMITATION ACT (IX OF 1908), S 4

*Application presented on the next day—Good ground for excusing delay*

The last day for citing an application to set aside an order of dismissal for default expired on a holiday, but the Court worked on that day with the special permission of the High Court. The applicant presented his petition on the next day. *Held* that the delay could be excused under S. 5 of the Limitation Act. (*Oldfield, J*) *KALIYANA-SUNDARAPPA AIYAR v CHINNASWAMI SERVAI* (1923) M W N 211 17 L W 413 72 I C 13 1923 Mad 489

—Ss 4 to 25—Scope of—Application under C P Code (1922) Dig Col 740 *SUBBARAYAN v NATARAJAN* 70 I C 396,

—Ss 4 and 14—Scope of—Suit filed in wrong court—Deduction of holiday—Permissibility of

A suit was filed on 10.9.1918 the day next to the last day allowed, as the last day happened to be a holiday. The plaint however was presented in a wrong court and was returned on 23-1-1920 for presentation to the proper court. The plaint was represented on 26-1-1920 as the two previous days were holidays. On an objection raised by the defendant that the suit was barred, *held* that the holiday prior to 10-9-1918 could not be excluded under S. 4 of the Lim Act as the suit was filed in a wrong court. S. 4 applies only if the holiday follows the period that can be excluded under S. 14 but not if it precedes such period. 45 B 443 dissented from. 8 L W 256, 36 M 131, 44 M 817 foll. (*Oldfield and Venkatasubba Rao, JJ.*) *GOVINDASAMI PADAYACHI v SAMI PADAYACHI* 69 I C 724 (1923) M W, N. 42 (1923) M 114 (2)

—S. 4—Summary suits—Bombay High Court original side if closed during Summer vacation

The Original side of the Bombay High Court is not closed within the meaning of S. 14, Lim Act for the disposal of summary suits on Negotiable Instruments. For other purposes it is a question of fact whether for any particulars the Courts is closed or not. (*Marleh, J*) *THE TATA INDWILURAA BANK v ABDUL HUSEIN HAKIMJI*,

25 Bom, L, R 1296

—S. 5—Applicability of,

Where the point of law was a doubtful one and the appellants filed their appeal in a wrong Court but within 5 days of the return of memorandum of appeal by the wrong Court, filed it in the proper Court, *held* that extension of time under section 5 of the Limitation Act ought to be granted. (*Gokul Prasad, J*) *MT AKBARI BEGAM v, SHAIKH ZAMIN ALI* 1923 A, 364

—S. 5—Applicability—Application for leave to appeal in an insolvency matter. See PRO. INS ACT, S 78 (1923) M W N 746 18 L W 808

—S. 5—Applicability—Application for leave to appeal—Sufficient cause

An application for leave to appeal to His Majesty in Council clearly comes within the purview of S. 5. Where an affidavit was filed to the effect that the agent of the applicant was coming to Allahabad for the purpose of filing the application, that when he reached the Aligarh station, he had an attack of Renal Colic, which confined him to bed till the 2nd of November

## LIMITATION ACT (IX OF 1908), S 5.

following and the affidavit was uncontradicted and supported by a medical certificate. *Held* that sufficient reason had been shown for the delay. (*Banerji and Gokul Prasad, JJ*) *DEOINDER SINGH v KHUSHI RAM*, 1923 A 536

—S. 5—Applicability to O 41, Rr 17 and 19.

It is desirable that S. 5 of the Lim Act should be extended to applications under O 41, Rr 17 and 19 by means of an enactment or rule. (*Schwabe C, J and Waller J*) *KRISHNASWAMI NAIDU v CHENGALROYA NAIDU*, 45 M L J 813 18 L W 870

—S. 5—Court fee paid outside time by order of Court,

An appeal was filed on Rs. 18 stamp within limitation and the balance of Court fees was made up within a week under the orders of the Court without any objection on the part of the appellant. *Held* the mistake was a *bonafide* one, and it is a fit case for the extension of time under section 5 of the Limitation Act. (*Moti Sagar, J*) *AGHA MAHOMED ASLAM v JODH SINGH* (1923) Lah 513 (2)

—S. 5—Delay in applying for copies—Indulgence

A court is not bound to show indulgence to a litigant who has not been prompt in seeking the remedy available to him, e.g. in applying for copies preparatory to filing an appeal. (*Abdul Raoof, J*) *MADAN GOPAL v MALAWA RAM* 1923 Lah, 96.

—S. 5—Delay in filing appeal—Copies of original judgment not filed in time—Recent notification—Ignorance of

Where the rule requiring the appellant in a second appeal to file a copy of the judgment of the first court had only been published in the Gazette a few days before the filing of the appeal. *Held* that the delay in filing the copy should be excused. The filing a copy of a detailed judgment-dealing with the suit in question and others is a sufficient compliance with the rule. (*Scott-Smith and Moti Sagar, JJ*) *MAHOMED HASSAN-UD-DIN v, SAIF ALI SHAH* 4 Lah 122 5 Lah L J 246 74 I C 451 1924 Lah, 41

—S. 5—Delay in filing appeal—Extension of time—Discretion—Interference on appeal

Where the lower Appellate Court has in the exercise of Judicial discretion refused to excuse the delay in the presentation of an appeal, the High Court would not interfere in Second Appeal with the exercise of that discretion even though it might have taken another view had it been the lower Appellate Court. (*Ryves and Daniels JJ.*) *AHMAD HUSSAN v MD. FASIHULLAH* 45 A 432 [21 A. L J, 319. L R 4 A 178 74 I C 1039. 1923 A 455.

—S. 5—Delay in filing appeal—Ground for excusing—Mistake of Pleader

In considering whether the delay caused by the prosecution of the appeal in a wrong Court is sufficient cause for admitting an appeal after expiration of the prescribed period within the meaning of S. 5 of the Limitation Act, the real question is whether the error was one that is in any way excusable or whether it was one which

## LIMITATION ACT (IX OF 1908), S. 5

might have easily occurred even if reasonably due care and attention had been exercised by the Pleader (*Robinson, C J*) *TIN TIN NYO v MAUNG BA SAUNG* 1 R 584.

—S. 5—*Delay in filing appeal—Negligence of pleader*

It is not always a sufficient ground for excusing the delay in filing an appeal to say that the negligence of the pleader has been responsible for the delay. Each case must be judged on its own facts and circumstances (*Prideaux, A. J. C*) *ISHWARDAS v BISMILLA KHAN* 72 I. C. 158 1923 Nag 133

—S. 5—*Delay in filing appeal—Mistake of pleader's clerk—Unstamped decree*

Where an appeal is filed without a stamped copy of the decree appealed against, and the deficiency in Court fee is not made up within the period of limitation allowed for filing the appeal and it is urged as a ground for excusing the delay that the pleader's clerk concerned had by mistake omitted to file a stamped copy of the decree held that there was no ground for excusing the delay and that the appeal should be dismissed. Valuable right had accrued to the respondent by reason of the period of limitation for filing the appeal having elapsed and it would not be fair to admit the appeal on such slender grounds as had been put forward in the case. (*Scott Smith J*) *SHAHADAT v HUKAM SINGH* 71 I. C. 736

—S. 5—*Delay in filing appeal—Time spent in review Deduction of*

Where an appeal has been filed after the expiry of the prescribed period of limitation and the appellant seeks to deduct in his favour the time spent in a review of the lower Court's judgment the appellate Court would not excuse the delay unless the grounds of review were reasonable (*Maung Aun, J*) *MAUNG LUN v MAUNG DUN*. 1 Bur L J 154 74 I C 39 1923 Rang 75 (2)

—S. 5—*Delay in filing necessary papers—Power to exercise*

Where the necessary papers have not been filed along with the memorandum of appeal, it is open to the court to excuse the delay under S. 5 of the Lim Act. (*Mookerjee and Chotzner, JJ*) *TARA KUMAR GHOSE v KUMAR ARUN CHANDRA SINGH*, 74 I C 383 1923 Cal 261

—S. 5—*Delay in getting copies—Money paid to clerk—Appellant taking no steps—Negligence*

Where the appeal was filed late on account of delay in getting copies and the same was due to the fact that money for getting the same was given to the pleader's clerk and thereafter the appellant took no steps to inquire of his pleader for the same, there is no sufficient cause to excuse delay within the meaning of S. 5 Lim Act, (*Daniels, J*) *MT MAHTAB KUNWAR v BIRHMO* 21 A L J, 817 L R 4 All 580 90 & A. L. R 1017 75 I C 254

—S. 5—*Delay in institution of suit—Mistake of law*

A mistake of law might be a sufficient reason for asking the Court to exercise its discretion under

## LIMITATION ACT (IX OF 1908), S. 5

section 5, of the Lim Act more so when the mistake is one in which the Court was seized of the suits. The real question for consideration in such cases is whether the plaintiffs had acted in good faith in prosecuting their suits in the Revenue Courts before they came back to the Civil Court. If they did, the time spent in prosecuting those suits in the Revenue Court ought to be taken into account, and if there has been on undue delay meanwhile, the delay in filing the appeals from the original decrees, by which the plaintiffs were directed to be returned for prosecution to the Revenue Court should be excused (*Kanhaiya Lal, J C*) *BENI MADHO v SHAM SHAD ALI* 26 O C 56 74 I C, 253 1923 Oudh 238

—S. 5—*Delay in presentation of appeal—Objection when to be taken—Practice—Procedure*

Where an appeal presented out of time has been admitted by the appellate court *ex parte*, the respondent as soon as he is served with notice of the appeal, may apply by motion for dismissal of the appeal on the ground, of delay. If the respondent sleeps over his right and allows the appellant to incur expenses in bringing the case for hearing, he cannot be allowed at the hearing of the appeal to raise a preliminary objection that the appeal is time barred (*Schwabe, C J and Wallace, J*) *MURUGAPPA NAICKER v THAYAMMAL* 70 I C 827, 1923 Mad. 82.

—S. 5—*Failure to file judgment with memo of second appeal*

The memorandum of appeal in second appeals to the High Court must be accompanied by a copy of the first Courts' judgment and if the latter is not presented till after the period of limitation has expired the appeal should ordinarily be rejected as barred by time. A valuable right accrues to the opposite party by reason of the appeal having become barred by time. 2 Lah 227 foll. (*Scott Smith, J*) *LAKHMI DAS v MEHAR CHAND* 73 I C 910 1923 Lah. 144 (1)

—S. 5—*Interference with discretion, (1922) DIG Col. 742 MUNICIPAL COMMITTEE OF CHINIOT v. BASHI RAM* 69 I C 895—S. 5—*Memo, of appeal not signed through oversight—Extension allowed*

Omission to sign a memorandum of appeal by oversight, which was otherwise in order and had been duly presented, was sufficient cause for extension of time under S. 5 (*Scott-Smith and Zafar Ali, JJ.*) *THE FIRM MATHRA DAS v THE FIRM RAM LAL* 1923 Lah 402

—S. 5—*Minority—Ground for use*

Where a decree holder dies during the pendency of execution proceedings and more than 3 years after his minor legal representatives apply for coming on record, the delay can be excused (*Kanhaiya Lal, J, C*) *AKHTAR HUSSAIN v QUDRAT ALI* 26 O C. 244

—S. 5—*Misapprehension of law—Law settled—Time if can be extended—C. P. Code, S. 149*

Where on the question of court fees in a particular class of cases, there was a considered

**LIMITATION ACT (IX OF 1908), S. 5**

ruling binding on all the courts in the districts, it is no ground for extending time that the appellant was under a misapprehension as to the amount to be paid (*Pipon, J. C.*) **MURLI MAL v VAISHNO DITTA**, 73 I C 788

**—S 5—Mistake of law—Pleader's mistake**

Where the only excuse put forward in the affidavit for not filing the appeal within time was that the appellants had no knowledge, before the order of the District Judge returning the memorandum of appeal, that it had to be presented to the High Court but there was sufficient room to hold that they had such knowledge, and the same pleader had been working for the appellants and had filed various appeals rightly in connection with this case, *held* the mistake pleaded in this case was not *bona fide* and extension was refused (*Abdul Raoof, J.*) **UMRAO BAKHSH v MAI IK MAHOMED KHAN** 1923 Lah 612

**—S 5—Second appeal—Delay in filing judgment of trial Court—Excusing delay,**

The presentation of a second appeal without a copy of the first court's judgment is not a valid presentation and in the absence of sufficient cause the delay cannot be excused (*Le Rossignol, J.*) **MUSSAMMAT RAJAN v KURRIA** 1923 Lah 95,

**—S 5—Sufficient cause—Mistake of legal adviser—Extension of time**

Assuming that in some circumstances a litigant is entitled to an extension of time under S 5 of the Limitation Act when he has been misled by a mistake of his legal adviser the principle on which the court acts is that the mistake must be of such a description that it might arise even amongst practitioners of experience 12 I C 677 Rel. (*Dawson Miller, C J and Mullick, J.*) **S. C. DEY v MT. RAJWANTI KUER**, 1923 P 140

**—S 5—Sufficient cause—Mistake of pleader—Appeal filed in Court without jurisdiction**

"A legal adviser's mistake, in order to justify an extension of the period prescribed for presenting an appeal, must be a *bona fide* one, and nothing can be deemed to be done in good faith which is not done with due care and attention" 45 I C 542, 43 I C 317, *fol*

Mere carelessness or oversight of the appellant, or his counsel in presenting an appeal in a wrong Court, which by the exercise of due diligence, could have been avoided, cannot be recognised as a sufficient reason for excusing delay under S 5 of the Lim Act (*Abdul Raoof, J.*) **UMRAO BAKHSH v NUR MAHOMED KHAN** 72 I C 732

**—S 5—Sufficient cause—Time taken in filing review—Appeal**

An appellant is entitled to deduct the period during which an application for review was pending, 45 C 94 Rel. (*Woodroffe and Ghose, JJ.*) **PUFNA CHANDRA CHHATOPADHYA v SHEIKH MABUD BAKSH** 1923 Cal. 291 (1)

**—S. 5—Sufficient cause—Ignorance law or practice—Illiteracy of clients**

The decision appealed against was dated the 20th June, 1921. An application for copies of the

**LIMITATION ACT (IX OF 1908), S. 7**

decrees and the lower appellate Court's order was filed on the 27th June of 1921 and those copies appeared to have been received by the appellant on the 9th of July, 1921. The appeal itself was filed on the 4th of October of 1921 and was returned on the same date on the ground that it was not accompanied by a copy of the judgment of the trial Court. The appellant appeared to have done nothing further in the matter until the 26th October, 1921, when he applied for a copy of the necessary judgment which was ready on the 31st of that month and actually delivered to the appellant on the 7th of November 1921. The appeal was then refiled on the 22nd of November 1921

*Held* even allowing for the fact the Kangra is at some distance from Lahore and the parties are *jaats*, there was no sufficient cause to excuse delay (*Broadway, J.*) **MT. NAZKO v MT. GOPAL** 1923 Lah 208 (2)

**—S 5—Time required in taking copy of trial Court's judgment** See (1922) DIG. COL. 744 **GURDIT SINGH v CHARAN DAS**

72 I C, 797

**—S 6—Applicability—Application to file award** See C P CODE, SCH. II PARA 26 (2) 1923 Rang 226**—S 6—Execution application—Death of decree holder—Failure of minor legal representatives to come on record—Subsequent application after more than 3 years but during minority if barred.** See LIM. ACT, ART. 181.

26 O C 206.

**—Ss 6, 8, 9 and Art 144 Lunatic—Adverse possession against—Legal representative a widow—Right of reversioners when barred** See (1922) DIG. COL. 744 **KALIDINDI SEETARAMARAJU v VEGESANA SUBBA RAJU** 70 I C 679**—S 6—Onus**

A plaintiff must prove affirmatively and clearly that his suit is within time. A mere entry that a son was born to a man of the name of the plaintiff's father does not necessarily prove that the entry relates to the plaintiff, unless the entry can be supported by evidence. Right of collaterals is not a single indivisible right but each is entitled to his own share (*Campbell, J.*) **PREM DAS v. SARBALAND** 1923 Lah 41

**—S. 7 and Art 44—Alienation by guardian—Suit by younger brother within 3 years of majority—Elder brother attaining majority more than 3 years before—Effect**

Where in a joint family consisting of 2 minor brothers, their mother makes an alienation as a guardian and a suit to avoid the same is filed by the younger brother within 3 years of attaining majority but more than 3 years after his elder brother attained age, the suit though governed by Art 44 would still be based under S 7. Time began to run against both from the date when the senior brother who was competent to give a valid discharge attained majority (*Chandrasekhara Aiyar, C J and Ramaswamy Iyengar, J.*) **JAVARE GOWDA v. MARI GOWDA**

1 Mys L J. 72.



## LIMITATION ACT (IX OF 1908), S 9

—S 9—*Execution of decree—Time spent, in obtaining probate—Deduction of.*

The time spent in proving a will and obtaining probate cannot be deducted in computing limitation for execution of a decree (*Duckworth, J*)  
BURN v PAUL 1923 Rang 98 (2)

—S 9, Art 155—*Suit for possession by mortgagee—Limitation—Suspension of*

No suspension or extension of limitation is allowable unless it is provided for in the Limitation Act. 43 M, 185 relied on. Where a mortgagee is entitled to possession immediately time begins to run from the date of the mortgage and the mere fact that possession of the mortgaged property was subsequently taken by the prior mortgagee does not stop limitation from running (*Abdul Raoof and Moli Sagar, JJ*) HUKAM CHAND v SHAHAB DIN 4 Lah 90 71 I C 495 1924 Lah 40

—S 10 and Arts 49 and 145—*Applicability of—Express trust—Suit for recovery of property or its value by beneficiary—Limitation*

The phrase 'trust for a specific purpose' in S 10 of the Limitation Act is merely a more expanded mode of expressing the same idea as that conveyed by the expression 'express trust' in English Law and is used in the section in contradistinction to trusts arising by implication of law, trusts resulting and trusts constructive 32 Bom 394 Relied on

Where certain jewels were in the possession of the defendant and he agreed under a written instrument that the plaintiff should enjoy the jewels for her life and that after her death they should be divided among the defendant and other parties to the instrument, held that defendant was an express trustee of the jewels for the plaintiff and that a suit by her for the jewels or their value fell within S 10 of the Limitation Act

Observation of the Chief Justice on the scope of Art. 135 of the Limitation Act (*Schwabe, C, J and Wallace, J*) KISHTAPPA CHETTY v LAKSHMI AMMAL, 44 M L J 431 17 L W 467 (1923) M. W N 284 32 M L T (H C) 217 (2) 72 I, C 842 1923 Mad 578

—S 10—*Applicability Suit by one trustee against another for possession and management*

The words of S. 10 Lim Act are wide enough to cover a case by one of two trustees who claims against the other that the property ought to be held and managed by both (*Schwabe, C J and Coutts Trotter, J.*) SHUNMUGAPPA v, SANGAYA CHETTY, 18 L W 907 74 I C 120 33 M L T. (H C) 225

—S. 10—*Directors—Whether trustees*

S. 10 of the Limitation Act does not apply to directors of companies as they are not persons in whom the property of the company is vested, as is contemplated by S 10. This section applies to cases of express trusts only (*Shadi Lal, C J, and Abdul Quader, J.*) THE BANK OF MULTAN LTD v HUKAM CHAND, 71 I C 899. 1923 Lah 58 (2).

## LIMITATION ACT (IX OF 1908), S 10

—S. 10—*Scope of—Express trust—Following trust property—Suit to avoid trust and recover on intestacy—Strait Settlements Limitation Ordinance Ss 4 and 10, See (1922) DIG COL 745 KHAU SIM TEK v CHUAH HOOI GNOH*

25 Bom L R 121.

—S 10—*Specific purpose—Meaning of—Agreement for payment of sum out of particular fund—Obligor if a trustee—Suit for recovery of money out of fund—Agreement to pay on demand—Limitation—Promissory note—Assignment—Rights of assignee.*

On the deposition of a Native Prince, the East India Company took over such of his debts as were proved to its satisfaction under commission appointed for the purpose. The manner in which those debts were to be paid—as provided for by an agreement between the company and the creditors of the deposed Rajah by which the Company undertook to set aside a sufficient part of the Revenue to be received by it to provide for the payment to the creditors of the Rajah, who had signed the agreement, of their debts. Those creditors were to receive transferable bonds or certificates and sufficient revenue was to be set apart and applied to paying the interest on those bonds and also to creating and accumulating a sinking fund for the redemption in due course of the principal. In pursuance of that agreement transferable bonds, called Promissory notes, were issued whereby the Company agreed to pay the holders thereof on the expiration of 15 months notice of payment on demand at the general treasury at Fort St George the principal sum and to pay interest half yearly as long as the company was in possession of the revenues of Tanjore. The interest was to be paid at the Treasury in cash to the proprietors if resident in India and in cash or by bills at 12 months at the option of the proprietors, if resident in Europe. In a suit by the assignee of one of such notes against the Secretary of State for India in Council for recovery of the amount due thereon Held, (1) that a trust was created by agreement between the company and the creditors of the deposed Raja, that the company and the Government and its successors were trustees of the funds in their hands for the purpose specifically defined in the agreement namely the payment of interest and of principal of the transferable bond to be issued under the agreement and that S 10 of the Lim Act applied to the case, and (2) that assuming Art 120 of the Lim Act applied, time began to run only from the date of demand for payment and the suit which was filed within 6 years from that date was not barred.

*Per the Chief Justice* The Company was not under a duty to seek out the creditors and pay them, especially as the payment under the promissory notes was to be to the payees or their order. It came under no liability to pay either the principal or interest until the demand was made for payment at a particular place and in some cases in a particular manner. A "Specific purpose" within the meaning of S 10 of the Lim Act is a purpose that is either actually and specifically defined in the terms in which the trust is created or a purpose which from the specified terms can be certainly affirmed.

## LIMITATION ACT (IX OF 1908), S 10

*Per Wallace, J* The trust created by the agreement did not cease by the issue of the bonds, but continued and was to continue according to the agreement, so long as any obligation to pay remained on any bond, and only when every bond was discharged

The assignment to the plaintiff which was made in 1909 recited that the assignor was entitled to the promissory note and to a specified amount of interest. The assignor was on the date of the assignment entitled to a larger sum by way of interest, but the parties to the agreement erroneously thought that interest on the note had stopped from 1854, and hence mentioned a smaller sum as representing interest. The operative part of the assignment however assigned all the interest on the promissory note which the assignor had, *Held*, that the deed of assignment was wide enough to cover both principal and all interest due and to become due, and the plaintiff had by virtue of it all the rights of the assignor, (*Schwabe, C J and Wallace, J*) SECRETARY OF STATE FOR INDIA *v* PANDIT RADHIKA PRASAD BAPULI, 44 M L J 685 46 Mad 259 18 L W 210 74 I C 785 1923 Mad 667

## S. 10—Specific trust—Executors—Vesting of property—Adverse possession

Where the testator by his will dedicated two of his properties to his family deity and at the same time appointed his two wives and adopted son as shebais, executors and executor, it is incumbent on the persons so nominated to take out probate of the will and to carry out the religious trust created by the testator. They are persons in whom the estate becomes vested in trust for a specific purpose within the meaning of S 10 of the Lim Act. They could not by breach of trust continued for a period of 12 years confer a statutory title themselves in derogation of trust. 34 M 257 Ref. Time would be no bar to an action against the shebais themselves in such circumstances for recovery of the debutter properties from their hands. 33 C 511 Ref. (*Mookerjee and Cuming, JJ*) CHARU CHANDRA PRAMANICK *v* NAHUSH CHANDRA KUNDOO, 50 Cal 49 74 I. C 630 1923 Cal 1

S 10—Suit against trustee. Failure of trustee to reduce trust property to possession—Liability for acts on default of predecessors—Failure to account—Limitation. See (1922) DIG COL 746 DORAIVELU MUDALIAR *v* ADIKESAVALU NAIDU, 70 I. C 87

S 12—Absence of Decree—Copying time (1922) DIG COL 746 MUNICIPAL COMMITTEE, CHENNOT *v* BASHI RAM, 69 I. C 895.

## Ss 12 and 19—Acknowledgment—Saving of limitation—Computation of time.

Where a debt is acknowledged in writing the day on which the acknowledgment was signed must be excluded in computing the period of limitation under S. 12 of the Act (*Halifax, A. J. C.*) JAINARAYAN BAPU *v* VITHOBA, 71 I C 556 6 N L J 281 1923 Nag 143.

## LIMITATION ACT (IX OF 1908), S 12

## S 12—Applies to pauper appeals

The provisions of S 12 are applicable to pauper appeals (*Abdul Raoof, J*) PIRJI ASHRAF ALI *v* RAMESHAR NATH, 1923 Lah 684

S 12—Copies sent by post—Time for obtaining copies—Mode of computing. See (1922) DIG COL 746 GHULLA SINGH *v* SOHAN SINGH, 69 I C 818.

## S 12—Decree not prepared in time—Time between judgment and signing of decree

The period between the delivery of judgment and the preparation and signing of the decree would be excluded from the period of limitation prescribed for filing the appeal if the application for copy is made before the preparation of the decree. 1 P L J 573 F B Dist. (*Jwala Prasad and Ross, JJ*) MAUVI SYED MAHOMED MOINUD DIN ASHRAF *v* MOULVI MAHOMED ISHAQ ASHRAF, 1 Pat L R. 459 1923 P 529

## S 12—Scope of—Exclusion of time for obtaining copies

There is no warrant for assuming that a party is bound to apply for Copies of judgment and decree at the same time. So long as the applications are put in within the appealable time the time occupied in obtaining copies can be deducted separately, the overlapping period not being twice excluded (*Shah, A C J and Crump, J*) MACMILLAN AND CO *v* COOPER, 25 Bom L R. 1309

## S 12—Time for obtaining copies—If can be attacked

Under S 12, only the time from the date of making the application for copies up to the date on which the copies are ready for delivery can be excluded. A finding as to the time requisite is one of fact and cannot be attacked in second appeal or revision (*Moti Sagar J*) RAM SARUP *v* ZORAWAR MAL, 73 I. C 447 (1) 1923 Lah 696

## S 12—Time for obtaining decree or order

An appeal was filed in time with a copy of the judgment. Before the appealable period was over, an application for formal order was put in and the same was filed as soon as it was obtained—*Held*, the appeal was within time (*Kanharya Lal, J*) KEDAR NATH *v* NANAK, 74 I. C 486.

## S 12—Time taken for copies of judgment of trial court not excluded

Only the time requisite for obtaining a copy of the judgment appealed against and of the decree can be excluded (*Abdul Raoof J*) CHUHARBAL, *v* BIRA RAM, 73 I C 919 (1923) Lah 461.

S 12—Time taken in obtaining copies—Deduction of—Extent of time permissible. See (1922) DIG, COL 747 PRAMATHA NATH ROY *v* WILLIAM ARTHUR LEE, 49 Cal 999 21 A L J 118 37 C L J. 86 27 C. W. N 156 18 L W 56 (1923) M. W. N 526 (P C)

## LIMITATION ACT (IX OF 1908), S. 12

—S. 12 (2) and (3)—Copies of judgment and decree—Application for, on different dates Time occupied in obtaining copy of decree—Deduction of

An application for copies of judgment and the decree must be made before the expiry of the time for filing an appeal. There is, however, no obligation imposed on appellant to file applications for copies of judgment and decree at one and the same time and therefore he can make his applications for copies at different times. It is settled by authorities that the applications made at different times entitle the Appellant to take advantage of the time occupied in obtaining copies of both judgment and decree. Now, if the time requisite for obtaining copy of one of those documents extends the time of limitation, then the application made for obtaining copy of the other document after the time originally fixed for filing an appeal under the law of limitation but before the extension of time allowed by reason of time required for obtaining copy of one of those documents expires, will entitle the Appellant to extension of time required for obtaining copy of the other document (*Jwala Prasad and Adami, JJ*) *JADU NANDAN SAHAY v HANUMAN SAHAY* (1923) Pat 235 73 I C 619

—S. 12 (3)—Second appeal—Time for obtaining copies of first Court's judgment—If excluded.

S 12 (3) of the Lim Act allows to be excluded only the time requisite for obtaining a copy of the judgment against which the appeal is preferred. Even where the rules of the court require the filing of the judgment of the Court of first instance in a second appeal, the time requisite for obtaining it does not fall under S 12 (*Abdul Kadoof J.*) *MADAN GOPAL v MALAWA RAM* 1923 Lah 96

—S. 13—Foreign territory—Territory under temporary military occupation—Basra

Basra was not a territory under the administration of the Government of India within the meaning of S 13 of the Lim Act. The fact that the troops which took part in the campaign in Mesopotamia were known by the name of the Indian Expeditionary force, and the despatches relating to its operation were published in the Gazette of India is not sufficient to show that Basra was under the administration of the Government of India. The occupation was military occupation for the purpose of proceeding with the expedition and protecting the army on its way onward and securing its safety and support. The territory was, except for those purposes, not under the administration of the Government of India. Consequently a plaintiff is entitled to deduct the time during which the debt had been absent in Basra (*Kanhaya Lal and Sulaiman, JJ*) *FAKHRULLAH KHAN v RAM SARUP* 1923 A 64 45 A 18

—S. 14—Applicability

S 14 of the Limitation Act will apply only in cases of defect of jurisdiction (*Mullick and Macpherson, JJ.*) *SHEIKH AKHAI KHALIFA v RAJLAL MARWARI* (1923) Pat. 271 1924 P 40.

## LIMITATION ACT (IX OF 1908), S. 14.

—S 14—Applicability of—operations when excluded See LIM ACT, SS. 29 AND 14

6 N. L. J. 205

—S 14—Applicability of—Strict interpretation—Misconception of remedy See (1922) DIG COL 748 *GANAPATHY MUDALIAR v. KRISHNAMA-CHARI* 70 I C 743

—S 14—*Berar Court not a Court within the section*

A Berar Court is not a Court contemplated by S 14 of the Limitation Act (*Baiten, J C, and Pradeaux, A J C.*) *RAJANNA v NARAYAN*

1923 Nag 321

—Ss 14 and 15—Bona fide proceedings in Court without jurisdiction—Suspension of proceedings—Effect of

The plaintiff obtained a mortgage from one Tipava in 1904, and in a suit on that mortgage a decree was passed in favour of the plaintiff. In execution of that decree he purchased the property in suit with the leave of the Court. When he tried to get possession, he was obstructed by the present defendants, to whom apparently Tipava had transferred the property while the litigation was pending. As a result the plaintiff filed Suit No 344 of 1911 against the defendants to obtain possession. He obtained a decree on February 15, 1913. There was an appeal first to the District Court and then to the High Court, which ultimately confirmed the decree on December 10, 1915. He filed his application for execution of this decree on June 28, 1920. During the interval, however the defendants filed Suit No 42 of 1916 for a declaration that the plaintiff's decree had been obtained by fraud. The litigation lasted till July 31, 1920 when the suit was ultimately dismissed. In that litigation the matter came up to the High Court in Second Appeal No 328 of 1917. By that judgment the suit was remanded and ultimately decided against the then plaintiffs. The litigation of 1916 lasted up to July 31 1920. The application for execution, even taking the time to run from the date of the final decree in appeal was time-barred, unless the plaintiff can claim a deduction of the period taken up in the litigation of 1916. The lower Courts came to the conclusion that the plaintiff was not entitled to deduct the time under any of the provisions of the Limitation Act, and accordingly rejected the application for execution. Held, that the application for execution was time-barred. S 15 of the Lim Act did not apply to the case as there was no stay of execution of the decree. Nor did S. 14 apply for plaintiff was not prosecuting any Civil proceeding but was merely defending the suit brought against him in a competent Court (*Shih, A C, J and Crump, J*) *SOM SHIKHAR SWAMI v SHIVAPPA* 25 Bom. L. R. 863

1924 Bom 39

—Ss 14, 15—Debt due—Insolvency—Period of pendency of proceedings—Exclusion of time

Where after a debt has become due and payable and time has begun to run against the creditor, the debtor is adjudged insolvent by the order cancelled later if the creditor institutes a suit

## LIMITATION ACT (IX OF 1908), S 14

thereafter against the debtor to recover the debt time during which the insolvency proceedings are pending cannot be deducted in computing the period of limitation (*Macleod, C J and Shah, J*) *SIDHRAJ BHOJRAJ v ALLI HAJI*

47 Bom 244 1923 Bom 33 (2)

—S. 14—*Execution application disposed of on merits—If time can be excluded*

The time during which an execution application was pending in the first court and in appeal, and which was disposed of on the merits cannot be deducted for purpose of bringing in a subsequent application within the period of limitation (*Mookerjee and Panton, JJ*) *RAJANI BANDHU CHATTERJI v KALI PRASANNA CHATTERJI*

74 I C 279

—S 14—*Good faith*

Where the suit was prosecuted in a wrong Court owing to plaintiff's allegation in plaint that accounts had been made but which was found to be untrue and was left unamended in the plaint when it was presented for the first time in the right Court, and though the matter was brought prominently to the plaintiff's notice when the plaint was again returned to him and it was practically the only matter discussed in his appeal, and the plaintiff was very reluctant to make up his mind to amend the plaint and abandon the allegation that there had been a settlement of accounts, *Held* that the allegation was made deliberately in the hope of establishing later on, an allegation of fact that had been found to be untrue and was now admitted to be untrue, and that whatever may be the full extent of the meaning of "good faith" in section 14, it cannot cover conduct of that sort (*Halliday, A J C.*) *SHEONARAYAN v RAM PRASAD*

74 I C 317 1923 Nag 241

—S. 14—*Parties and cause of action different—Applicability*

S 14—Lim Act will not apply it in the prior litigation, the period of the pendency of which is sought to be deducted, the parties and the cause of action were different (*Robinson C and Heald, J.*) *HOSSEIN v ASH BIBI*

1 Rang 402.

—S 14—Scope of *See* (1922) DIG COL 749. *Mr MARYAM BIBI v RAM DAS.*

70 I C. 613

—S 14—*Time required for taking copy of judgment.*

The judgment of the lower appellate court was pronounced on the 24th June 1918 and the appeal to High Court was preferred on the 14th May 1919. An application for certificate was presented on the 31st July 1918 and, though it was rejected on the following day the appellant succeeded in obtaining from the Chief Court an order remitting the question of the grant of certificate to the lower Appellate Court who upon reconsideration granted the certificate on the 7th May, 1919. *Held*, in the circumstances the application for certificate must be deemed to have been pending during the period from 31st July 1918 to 7th May 1919 and this period should be excluded computing the period prescribed for filing the appeal

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## LIMITATION ACT (IX OF 1908), S 14

(*Shadr Lal, C J and Brasher, J*) *MT CHHOTU v Mr SONA DEVI*

70 I C 289

1923 Lah 11 (2)

—S 14—*Time spent in prior litigation—Exclusion of—Bona fide claim by defendants.*

S. 14 of the Limitation Act should be liberally construed, the principle being that limitation would remain in suspense while the plaintiff was *bona fide* litigating on his rights in a Court of Justice 30 M L J 529, 541 (P C) relied on

In a suit by some of the trustees of a mosque for removal of its manager and for the appointment of a receiver the manager, (defendant) claimed that the suit was un-sustainable and that instead of his being indebted to the mosque, the mosque owed him considerable sums of money which he had spent out of his pocket. An issue was raised as to the amount payable to or by, the manager and the trial court found on evidence that the manager was entitled to be paid a sum of Rs 3,302 from the mosque and directed the receiver appointed in the suit to pay up the said sum. On appeal the appellate court concurred with the trial judge as regards the liability of the mosque to pay the manager but dismissed the suit on the ground that all the trustees had not been impleaded as parties. The manager thereupon brought a suit for recovery of the amount found to be due to him deducting the amounts actually paid by the receiver, appointed in the previous suit. The trustees pleaded that the suit was barred by limitation, *Held*, that the manager was entitled to exclusion of the time spent in the prior suit and in appeal therefrom under S 14 of the Limitation Act and that his suit was in time (*Schwabe, C J and Wallace, J*) *THURUPHEELAKATH KUNHI KUTTI ALI v KUNHAMMAD.*

44 M L J 179

73 I C 139 1923 Mad 278

—S 14 (1/)—*Another Civil Proceeding—Proceeding—Partially wrong*

*Maiten J*—The two separate courts of Poona and Vadgaon have a common Judge, from the 1st to the 20th of each month the Judge sits at Haveli, Poona, from 21st to 25th he sits at Vadgaon and from the 25th to 30th of the month he sits at Lonavli a part of the Vadgaon Court. The plaintiff filed his Darkhast No 254 of 1913 on the 10th April 1912. He filed it at Vadgaon quite correctly but as the Judge was then sitting at Haveli, the Court officials apparently sent the papers to the Judge at Haveli and he on the 11th April 1912, gave a notice to the defendants returnable on the 14th or 15th April 1911 in the Haveli Court. The defendants did not appear and on the 15th April the Judge sitting in the Haveli Court made the warrant for possession absolute. Defendants appealed on the 26th February 1913. This order was set aside on the ground that Judge had no jurisdiction to direct the defendant to appear in the Haveli Court nor to make the order against them in that Court. It was accordingly directed that the Court of first instance should take up the Darkhast at the point where it was when the order for issuing the warrant of possession was passed. The plaintiff appealed to the High Court but on 3rd Feb 1915 his appeal was dismissed. On 29th June 1915 Dharkhast was brought on again that the plaintiff was present

## LIMITATION ACT (IX OF 1908), S 15.

but as the Judge was away the proceedings were adjourned to the next day. The Plaintiff this time was not present in Court and accordingly the Darkhast was struck off. The next Darkhast he filed was on the 7th June 1916. *Held* that it was not time barred. (*Warten and Pratt, JJ*)  
*PANDY WALAD DAGADU MAHAR v JAMNADAS CHOTUMAL MARWADI*

1923 Bom 218

—S 15—Applicability of—Limitation prescribed by S 48 C P Code. See (1922) DIG, COL 750, *SUBBARAYAN v NATARAJAN*

70 I C 396

—S 15 (2)—Exclusion of Time—Single-Suit against several debtors—Notice under S 77 of the Railways Act to one debt. See (1922) DIG COL 751 B AND N W R. CO v RAM SARUP LAL CHAUDHURY

70 I C 109

—S 16 and Arts 137, 138, 144—Applicability of—Auction purchaser obtaining symbolical possession, but kept out of actual possession—Suit for possession—Limitation

Where Art 144 of the Limitation Act, applies no deduction of time under S 16 can be allowed either in law or under the general principles of equity

An auction sale was confirmed on 13—9—1902 and symbolical possession obtained on 12—1—1904. An application was made to set aside the sale on 21—6—1905, but was dismissed on 8—4—1906. A suit for possession was instituted on 11—7—1914 but the contesting defendants were added as parties only on 27—3—1916

*Held*, (1) the sale became absolute on 13—9—1902 when the sale was confirmed and not on 8—4—1906 on the dismissal of the application for setting aside the sale, as the confirmation of a sale cannot be kept in abeyance when proceedings are not taken to set it aside before confirmation

(2) Art 137 cannot apply to the case, as the judgment-debtor was in possession at the date of sale, (3) Nor would Art. 138 govern, as it evidently refers to a case where the purchaser has not obtained delivery of possession even if it applies, the suit is barred even after deducting the period during which the application to set aside the sale was pending.

(1) the proper provision applicable is Art 144 and from the date symbolical possession was delivered the possession of the judgment debtor was adverse to the purchaser (*Chatterjee and Pantun, JJ*)  
*BHOJENDRA KUMAR ROY CHOWDHURY v ASUTHOSH ROY*

70 I C 420  
1923 Cal 282 (2)

—S 18—Auction sale—Application to set aside—Judgment debtor fraudulently kept in ignorance of sale—Effect

Where the decree holder failed to serve the judgment debtor with notice of the intended sale and the latter came to know of the sale only when application was made for delivery of possession, the facts justify the application of S 18 of the Lim Act (*Spencer and Venkata-*

*SHEIKH MUHAMMAD ROWTHER*

*17 L W 152*

*32 M. L. T. (H. C.) 262-72 I C. 46*

*1923 Mad. 353*

## LIMITATION ACT (IX OF 1908), S 19

—S 18—Discovery of void sale. See (1922) DIG COL 752, *THAKURAIN HARNATH KUAR v. THAKUR INDIR BAHADUR SINGH*

44 M L J 489 90 L J 652 50 I A 69

27 C W 949 90 &amp; A L R 270

18 L W 383 26 O C 223

33 M L T 216 (P C)

37 C L J 346. 71 I C 629 (P C)

—S 18—Execution sale—Setting aside Limitation—Fraud

Where owing to the fraud of the decree-holder or other parties certain irregularities in the conduct of a sale are concealed from the knowledge of the judgment debtor, the latter is entitled to apply for setting aside the sale in spite of confirmation and the time for the application is to be computed from the date when the fraud comes to the knowledge of the applicant 17 C 769, 14 C 681 Ref (*Mears, C J and Banerji, J*)  
*SHEO RAM KOEHLI v IKRAMUNNISSA BIBI*

45 A 316 21 A L J 176 71 I C 631

L R 4 A 129 (1923, A 282 (2))

—S 18—Fraud—Knowledge—Proof of. See (1922) DIG COL 752 *RADHA KRISHNA v. BISHESHAR SAHAY* 1 Pat. 733 44 M L J 718.

21 A L J 23 37 C L J 430

25 Bom L R 680 90, &amp; A L R 194

27 C. W N 294.

—S 18—Fraud—Execution sale—Application to set aside by Judgment debtor—Limitation Judgment debtor kept out of knowledge of fraud—Effect of See C P CODE, O 21, R 90

4 Pat. L T. 306

—S 18—Knowledge and exercise of right

Section 18 does not deal with the exercise of the right, but with the knowledge of the right. Where it was alleged that the decree-holders had fraudulently kept the judgment debtor from exercising his rights under O 21, R 2 by giving him assurances, no extension was granted (*Robinson, C J and Macgregor, J*)  
*P R P L CHETTY FIRM v G LON POW*

1923 Rang 103

—S 19—Acknowledgment

A previous mortgage deed, though executed more than 12 years before the deed of 1902 was registered on the 12th Feb 1890, less than 12 years before the date of the later deed, and it bore an endorsement by the Sub-Registrar stating that the execution of the deed and the receipt of the consideration, was admitted and signed by the mortgagor. *Held*, the endorsement in which he admitted the receipt of the consideration for the mortgages was an acknowledgment of liability within the meaning of S 19 of the Limitation Act, and that the debt had not become barred (*Martineau and Harrison, JJ*)  
*LABHA MAL v IMAM DIN*

1923 Lah. 369

—S 19—Acknowledgment of debt—Promise to pay—English and Indian law See (1922) DIG. COL 753 *NAND LAL v PARTAB SINGH*

69 I C. 502

—S 19—Acknowledgment—Essentials of—Agency—Inference See (1922) DIG COL 753 *RAM AUTAR v. BENI SINGH*

10 O L J. 7

## LIMITATION ACT (IX OF 1908), S 19

—S 19—*Acknowledgment—Joint Hindu Family—Acknowledgment by junior member when binding on the family*

It is not open to a member of a joint Hindu family, not being its manager to make an acknowledgment so as to bind the other members of the family, except those who claim through the person acknowledging (*Shadi Lal, C J and Abdul Qadir, J*) *RAMKISHAN v HIRDE RAM*  
71 I C 737 1923 Lah 135

—Ss 19 and 20—*Acknowledgment of liability—Joint mortgagors See (1922) DIG COL, 754 NADAR SHAH v ITHARDAS*

5 Lah L J 114

—S 19—*Acknowledgment of liability—Deposition—Statement of execution of mortgage property*

No implied acknowledgment of liability can be spelt out of the mere statement that the witness on some prior date executed a mortgage bond. Moreover it did not amount to an acknowledgment of a subsisting liability at the date of the bond 45 E 443, 26 M 34, 16 M 220 referred to (*Spencer and Krishnan, JJ*) *MUTHUKUMARA MUDALIAR v CHOCKALINGA MUDALIAR*

17 L W 674 73 I, C 952 1923 Mad 634.

—S. 19—*Acknowledgment of liability—Part payment—Liability impliedly acknowledged*

Towards a promissory note executed by him defendant made part payments on three different dates. He endorsed the payments subsequently at the foot of the note, added up the total and signed underneath. *Held*, that the endorsement was an acknowledgment sufficient to save limitation under S. 19 of the Lim. Act, since it recorded that the debt, had paid certain amounts towards the liability which stood against his name on the promissory note. There was therefore an admission of liability to pay the balance.

An endorsement on a promissory note by the promisor is an acknowledgment of liability which starts a fresh period of limitation from the date on which it is made. It makes no difference that such endorsement is below an account showing what has already been paid on the promissory note (*MacLeod, C J and Crump, J.*) *GANESH v DATTATRAYA* 25 Bom L R 144 72 I C 249

—S 19—*Acknowledgment of liability—Proof—Statement in prior case*

The mere fact that in some other case the defendant merely admitted the execution of the document is not an acknowledgment of liability within the meaning, of section 19 of the Lim. Act where no evidence was taken and there was nothing but the endorsement in proof of admission (*Ryves, J.*) *LALLU MAL v, PANDIT KEOTI RAM* 45 A. 679 L R, 4 A 315 21 A. L J. 669

90, & A. L. R. 674 74 I C. 353 (1) 1924 A 70

—S 19—*Acknowledgment of liability—Statement made by witness in Criminal proceedings—Value of—English and Indian Law See (1921) DIG COL 733, SUBRAMANIA AIYAR v. A. P. T. VEERABADRA PILLAI* 70 I. C. 593

## LIMITATION ACT (IX OF 1908), S 19.

—S 19—*Acknowledgment t "Prescribed"—Meaning of See (1922) DIG COL 754 NAND RAM v RANCHHORDAS* 19 N. L R 135

—S 19—*Acknowledgment of right—Sub mortgage—Acknowledgment of—Effect on original mortgage See (1922) DIG COL 754 BHAGWAN GANPATI MANKESHWAR v MADHAV SHANKAR* 70 I C 906

—S 19—*Acknowledgment—What amounts to—Admission of execution of hypothecation deed in plaint—Effect See (1922) DIG, COL 755 KANDASWAMI REDDY v SUPPAMMAL* 32 M L T (H C) 166 70 I C 576

—S 19—*Contract Act, S 25 (3)—Promise to pay and mere acknowledgment*

The document executed by the defendant was in the following terms —"Account of money, in the name of Panaulla Miji and Umer Ali Miji of Nanupui, Mokam Chandore Amount due Brought forward from the account of Panaulla Miji at page 24 of this book Rs 3,535 Interest at the rate of one rupee per cent per mensem, stipulated time for payment the month of Bhadra of the year 1318 B S" Then followed the signatures of the executants on one anna stamp

*Held*, that it sets out a promise made in writing and signed by the persons to be charged therewith to pay wholly the debts specified therein, and not an acknowledgment within the meaning of S 19

*Held*, further, that the document is an agreement or a memorandum of agreement within the meaning of Art 5, Cl (c) of Sec I of the Stamp Act. (*Mookerji and Rankin, JJ*) *PRASANNA KUMAR PAL v PANALLA MIJI* 1923 Cal 659

—S 19 and Art 144—*Co-sharers—Suit for possession of property in the hands of a Co-sharer—Letter of acknowledgment—Adverse possession.*

A suit for a share of property in possession of one of the co sharers is not barred by limitation where it is found that the defendant co-sharer in possession had written a letter to the plaintiff acknowledging his title within the statutory period of 12 years (*Broadway, J*) *BALMORAND v WAZIR CHAND* 5 Lah. L J 47.

—S 19—*Mortgage—Acknowledgment by some of the several mortgagees—Effect of*

An acknowledgment of the title of the mortgagor made by some of the several mortgagees would not avail to save the mortgagor's right to redeem being barred where the mortgage was a joint mortgage and incapable of being redeemed piecemeal (*Broadway and Dundas, JJ.*) *MAHOMED IBRAHIM v MAHOMED ISMAIL*

5 Lah L J 111.

—S 19—*Mortgage—Redemption—Sale of Mortgagee's rights—Acknowledgment*

In a suit in redemption, the defendant who was the purchaser of the mortgagee's rights pleaded limitation. *Held* as he was the purchaser of admittedly mortgage rights at the date of his purchase the mortgage right was subsisting and lim-

## LIMITATION ACT (IX OF 1908), S 19

tation began to run from that date. (*Banciji, A C J and Ryves, J*) *SIDHARI RAM v. DR. GARJI DIN*  
L R 4 A 470

—S 19—*New consideration or actual promise to pay—If required*

A new consideration is not required for an acknowledgment nor an actual promise to pay (*Newbould and Rankin, JJ.*) *IBRAHIM MULLICK v. LALIT MOHAN ROY*  
50 Cal 974

—S 19—*Oral agreement to pay does not extend time*

Where there was a *sandu* and a date fixed for delivery and defendant failed to deliver and there after he said he would pay damages at Rs 8 per *khandi*

*Held*, the mere fact that at a later date he said, he would pay the damages cannot extend the time where the cause of action already accrued (*Pri deuv, A J C*) *KAMAL NARAYANA v. BANIRAM*  
75 I C 440 1923 Nag 332

—S 19—*Promissory note by father—Acknowledgment by son—Effect on joint family*

Where the father and managing member of a joint Hindu family borrow money on a promissory note reciting that the debt is for their necessity and not for a joint family purpose an acknowledgment by the son would not save the limitation against the father (*Wallace, J*) *MAHALAKSHMI v. VAKKALAGADDA VENKAM SETHI*  
32 M L T 317 (H C)

—S 19—*Starting point Sec (1922) Dig*  
COL 753 *WAMAN v. DEORAO* 6 N L J 14

—S 20—*Acknowledgment—Part payment—Distinction between—Settlement of accounts—Accounts stated*

It is open to a borrower to make a promise in writing signed by himself to pay a debt of which his creditors might have enforced payment but for the law of limitation of suits. If the entry be construed as a promise to pay, such promise is applicable quite as much to the sum borrowed on that day as to the sum found due on adjustment of account. 18 C L J 269, 18 C L J 329, 23 M 94, 31 A 495, 3 M 159 Ref. The distinction between an acknowledgment and promise to pay is sometimes difficult to draw, specially as an unconditional acknowledgment, has always been held to imply a promise to pay because that is the natural inference. If nothing is said to the contrary it is what every honest man would mean to do. The case is clear where the entry is made in respect of an aggregate sum, with regard to a portion whereof there could only be a promise to pay and not an acknowledgment. 6 Bom 683 8 B 405 Ref. It is not necessary that the payment should be actually made in money, for an arrangement between the parties intended to have the effect of discharging *pro tanto* the party indebted, will have the same effect as a payment of money. L R 2 Ex. 158 Ref. Thus where there are debts due on both sides and the accounts are gone through and a balance struck this in effect constitutes payment, of the amount of the smaller debt. But it is the striking of the balance that constitutes the payment, not

## LIMITATION ACT (IX OF 1908), S 20

the mere existence or even statement in writing of gross demands. An agreed statement of accounts where all the items are on one side only, if the statement is not signed by the party liable and is inoperative as an acknowledgment will not be allowed to support an action on an account stated in respect of items which are statute barred (*Mookerjee and Chotzner, JJ.*) *GULJAR MANDAL v. SRIMAN MANDALINI* 72 I C 692 1923 Cal 71.

—S 20—*Part payment—Payment within limitation—Written statement after expiry of limitation—Effect of*

A statement of payment made in writing by the payer after the expiry of the original period of limitation is a sufficient compliance with S 20 of the Limitation Act, if the payment itself was made within that period. The written statement is merely evidence of the fact and date of payment, and it is the fact of payment that extends the period and it is the date of payment from which it is extended. The proviso to S 20 lays down that the fact and date of payment can be taken as proved only by evidence of a certain kind, and so imposes a minimum degree of credibility in the evidence. 17 M 92, 9 N L R 78 Ref. (*Batten, J C and Hallifax, A J C*) *RAMPRASAD v. BANSILAL*  
19 N L R 6  
6 N L J 121 71 I C 17.

—S 20—*Part payment of principal of the debt—Joint account—Written by one debtor but signed by both.*

Where two persons are liable on a debt embodied in a Khata and they make payments towards satisfaction of the debt, it is not necessary that both persons should make entries in the creditor's books. It is enough if the writing is made by the debtor paying the debt and it is signed by both the debtors, (*Macleod, C, J and Crump, J*) *DEVCHAND-CHATRAJI v. JAMSHEDJI*  
25 Bom L R 354 74 I C 302 1923 Bom 369.

—S 20—*Payment of interest and principal*

Payment of interest saves limitation even though a part of the principal is paid at the same time. 6 I C 16 and 4 B L R 281 folio (*Phelps, J*) *RAMAKRISHNA ANNAM v. PICHANDI CHETTIAR*  
(1923) M W N 564 (1) 74 I C 777

—S 20—*Payment of interest—Possession of land and receipt of rents—Saving of limitation*

Limitation is saved in this case by receipts of the produce of the land which the plaintiffs continued to occupy in lieu of interest at the request of the defendant. No 1 owing to his inability to pay his debt. There can be no ground or reason why the produce of the land should not be accepted in lieu of interest if the parties had so arranged (*Ross, J*) *FOUJDAR SINGH v. BAIJU MAHON*  
72 I C 492

—S 20—*Receipt of rents and profits by sub mortgagee—Effect on original mortgage See (1922) Dig, COL, 757, BHAGWAN GANPATI MANKESHWAR v. MADHAV SHANKAR*  
70 I. C. 906.

## LIMITATION ACT (IX OF 1908), § 22

—S 22—Application to set aside auction sale—Real purchaser added as party after period of limitation—Petition in time against ostensible purchaser—Effect. See C P CODE O 21, R 90, 1923 All 462

—S 22—Ex parte decree—Application to set aside—Addition of parties—Limitation.

S 22 of the Lim. Act, which speaks only of suits, does not apply to applications. An application to set aside an *ex parte* decree cannot, as regards an added party, be regarded to have been made when the added party is actually brought on the record of the application.

When a thing is to be deemed to be something else, in truth it is not that something else but is treated as that something else by a statutory fiction for the purposes of that particular Statute. Thus the word 'deemed' in S 22 of the Limitation Act indicates that the statutory fiction can be resorted to only when after the institution of a suit a new party is added or substituted (*Das and Bucknill, JJ.*) CHANDRIKA ROY v. RAM KUER THAKUR 1923 P 88

—S. 22—Joinder after limitation of a party not necessary

Where the holder of a bond was not impleaded by the plaintiff assignee until the expiry of the period of the limitation but the assignee admitted that she had authorised her agent to assign the bond for consideration, held, S 22 of the Limitation Act does not lay down that a joinder after the period of limitation shall in all cases necessarily involve a dismissal of the suit. If the presence of a party added after the prescribed period is not necessary to enable the court to award such relief as may be given in the suit framed by the plaintiff and he is joined *Ex Majore Cautela* the suit is not barred merely because the limitation had expired at the time when he was impleaded (*Shadi Lal, C J*) KUNJ LAL v. HARI RAM, 1923 Lah 438 (1)

—S 22—Partnership—Suit for dissolution—Addition of parties

In a suit for dissolution of a partnership two members of the firm were described as Joharmull Manmull, that being the name of a firm constituted by those two members only. Subsequently the plaint was allowed to be amended by putting in the full name and description of each of the partners. Held that the amendment did not amount to addition of new parties and consequently was not affected by the provisions of S 22 of the Limitation Act. 12 C W N 820 C W N 49 37 Cal 229 referred to (*Page, J*) SHEODOYAL KHEMKA v. JOHARMULL MANMULL 50 C 549 75 I C 81

—S 22—Suit for pre-emption—Impleading one of the vendees after limitation—Effect.

Where one of several vendees in a suit for pre-emption is impleaded after the expiry of one year from the date of sale, when the suit would be barred against him the whole suit is barred. (*Broadway, J*) NIAZ ALI KHAN v. MAHAMMAD ABZAL KHAN 78 I C 364

—Ss. 23, 24—Continuing wrong—What is—Suit for damages

## LIMITATION ACT (IX OF 1908), § 26

Where damages are claimed for personal injury inflicted by throwing sulphuric acid on the face, there is no continuing wrong for purpose of limitation nor does time run only from the time any specific injury is caused (*Shah, A C J, and Crump, J*) ABDULLA v. ABDULLA 25 Bom L R 1833,

—S. 23—Lease for a year—Holding over—Effect

Where a sub tenant admitted by oral agreement for one year or from year to year continuing to hold on, a fresh act of sub letting does not take place each year nor does a fresh period of limitation begin to run (*Fremantle, S M*) KUAR JANG BAHADUR SINGH v. NOHAR KOERI L R 4 A, 182 (Rev)

—S 23—Suit for damages for wrongful distraint—Limitation—Agra Tenancy Act, S 146

The plaintiffs had cut and stacked from the land within the purview of their lease, a large quantity of thatching grass which they hoped to sell at a substantial profit. The defendants wrongfully and maliciously levied a distraint, under colour of Chapter IX of the Tenancy Act, upon this grass of the plaintiffs. The immediate result of this was that the plaintiffs missed their market and were unable to sell their grass, while the defendants were disposing of theirs. In the mean time the rainy season began and the land upon which the plaintiffs stacks were standing was flooded. The plaintiffs brought a suit to contest the distraint and finally succeeded in obtaining an order from the Court setting the distraint aside. When however, they became entitled to re-enter into possession of their own grass, the stacks, had been so damaged by rain and flood as to be utterly worthless. Thereupon the plaintiffs claimed the full value of the stacks, as the correct measure of damages for the wrong done to them by the defendants in wrongfully distraining the same. The distraint was levied on the 15 May 1919. The suit under S 142 of the Tenancy Act, to contest the distraint was terminated by the Court's order releasing the grass on 16th of September 1919. The present suit for damages was instituted on the 12th of December 1919.

Held following *Dalip Upadhyay v. Gauridat Upadhyay* (II Legal Remembrancer 61) the cause of action for a suit for damages in respect of a wrongful distraint takes its origin from the day on which the distraint came to an end and the suit may be lawfully instituted within the prescribed limitation period of three months calculated from the said date. The suit was therefore within time. (*Piggott, Walsh, and Lindsay, JJ.*) JHABBU v. MUSAMMAR BATUL 45 A 208 L R 4 A, 1 (Rev) 73 I C 299 1923 All 146

—S 26—Immemorial user

The plea that the defendants had been using a particular *Kul* from time immemorial, does not amount to setting up a plea of easement (*Moil Sagar, J.*) MANSA RAM v. KALU RAM 1923 Lah. 605

—S. 26—'Person' meaning of—If includes predecessors—Acquisition of easement. See (1922)



## LIMITATION ACT (IX OF 1908), S 26

DIG COL 759 MAUNG PO HLA v. MAUNG PO SEIN 70 I C 915

—S. 26—Right to take water prescription—Lost grant.

S 26 of the Lim Act does not govern a claim to take water from a tank where that claim is based on a lost grant. It applies only to cases of easements claimed by prescription (*Greaves and Penton, JJ*) GURU PRASSANNA ROY v FUL CHAND MONDAL, 1923 Cal. 291 (2)

—S. 26—Right to way—Customary right—Length of user and enjoyment—Lost grant

A customary right of way is not an easement in the legal sense of that term, and even if it were an easement it is not necessary for the party claiming it to rely on S 26 of the Act, if the existence of the right could be otherwise established. A right based on custom is established by proof of the custom and it is not necessary that there should be evidence from which a lost grant may be presumed. (*Richardson and Suhrwardy, JJ*) ALI MUHOMED v SHEIKH KATU 70 I C 263 1923 Cal 200

—S. 26—User of intermittent nature—Absence of assertion of right—Acquisition of rights, See (1922) DIG COL. 7-9, BHURU v DATU RAM 74 I C 232

—S. 28—Lapse of time—Effect on possession already got

A right of property which is vested in one person is not transferred by the mere lapse of time to the person actually in possession (*Lord Salvesen*) MAHOMED MUMTAZ ALI v MOHAN SINGH 45 A 419 45 M L J 623 33 M L T 321 (P. C.) 21 A L J 757 26 O. C 231 L R 4 P C 1 90 & A L R 901 100 L J 388 74 I C 476 50 I A 202 (1923) P C 118 (P. C.)

—S. 28—Right to maintenance—Extinction of

The cause of action for maintenance accrues from time to time according to the want and exigencies of the person entitled, and S 28 of the Lim Act does not operate to extinguish it (*Mookerjee and Chotzner, JJ*) GOPALCHANDRA PAL v KADAMBINI DASL. 73 I C 235

—Ss 29, 14—Order passed under S 169, C P Land Revenue Act—Limitation

In the case of a suit filed as contemplated by S. 169 C. P Land Revenue Act, the period of limitation fixed therein, i. e. 6 months cannot be added to in any way, such as by the application of S 14 Limitation Act. S 29 of the Limitation Act excludes the operation of S. 14 in such a case (*Baker, J C, and Halliday, A J C*) LAKSHMAN v KESHEO 6 N L J 205 73 I C 1021 1923 Nag 306

—Art 2—Applicability—Condition for—Termines a quo

All that is necessary in order to bring a suit within the purview of Article 2 of the Lim. Act is that public officer should have done what he did with the honest intention of acting as the Statute authorized. The *terminus a quo* in cal-

## LIMITATION ACT (IX OF 1908), Art 10

culating limitation is the date of the damage (*Harrison and Zafar Ali, JJ*) PUNJAB COTTON PRESS COY v SECRETARY OF STATE FOR INDIA 4 Lah, 428

—Art 2—Damage caused by flood water—Construction of Irrigation work—Limitation

Where as a result of the construction of a canal under Act VIII of 1873, flood water caused damage to plaintiff's land, a suit for damage more than 90 days afterwards will be based under Art 2, Lim Act (*Harrison and Zafar Ali, JJ*) PUNJAB COTTON PRESS COY v SECRETARY OF STATE 4 Lah 432

—Art 7—Applicability

Art 7 Lim Act does not apply to all servants but only household servants—*A bisai dai* in oudh is not such a servant (*Dalal, J C*) GHASI RAM v UMA DATT 26 O C 327 90 & A L R, 554 90 L J 348

—Art 10—Mortgage—Right of pre-emption to mortgagee—Mortgagee refusing to make offer when asked—Suit for redemption—Right of pre-emption if can be pleaded in defence.

A mortgage document contained a covenant that without the consent in writing of the mortgagee, the properties would not be sold mortgaged leased etc and giving the latter a right of pre-emption. In 1918, the mortgagor gave notice to the mortgagee of his intention to sell and asked him what offer he would make. No offer was made by the mortgagee who took up the position that the mortgagor could not sell. The properties were then sold in 9-4-18 and in a suit in 1921 by the mortgagee to pre-empt and a counter suit by the purchasers to redeem. *Held*, the sale being of the equity of redemption of which physical possession could not be given, limitation for the pre-emption suit ran under Art 10 from the date of registration of the sale deed and where such a suit is barred, he cannot in the redemption suit plead by way of defence his claim for pre-emption. 24 Mad 449, 29 Mad 336 and 40 Mad 1134 tollid. 13 Mad 490, 20 Mad 305 not tollid.

Even assuming there was a valid right of pre-emption, the refusal to make an offer when asked amounted to a failure to exercise the right. 39 All 127 and 42 All, 402 tollid. (*Kumarasamy, Sastry, J*) VISWANATHAN CHETTY v ETHIRAJULU CHETTY 45 M L J 389 (1924) M. W. N 57.

—Art 10—Possession with tenants—Pre-emption

Property which is in the possession of a tenant does not admit of physical possession within the meaning of Art. 10, Lim. Act. Whether the subject of sale in a suit for pre-emption does or does not admit of physical possession must be determined with reference to date of sale and it is immaterial whether the property afterwards became susceptible of physical possession (*Shadi Lal, C J and Fforde, J*) GANWA v JOTI PRASAD 73 I C, 903 (1)

—Art. 10—Pre-emption—Share in undivided joint property—Limitation

*Obiter*, A mere share in joint undivided property is not capable of physical possession and

## LIMITATION ACT (IX OF 1908), ART 10

Art 10 of the Lim Act is inapplicable to such cases (*Le Rossignol, J*) SARDAR ALI *v* FAZIL  
1923 Lah 75

— Art 10—Pre-emption suit—Time when begins See (1922) DIG COL 760, ACHUTANANDA PASAIT *v* BIKI BIBI 1 Pat 578 69 I C 666  
4 Pat. L T 277

— Art 11—Applicability of—Suit under O 21, R 63—Order passed without any enquiry.

Even though an order under O 21, R 63, C P C is passed without any investigation and not on the merits and the claim is rejected, a suit to establish the claimant's right is governed by Art 11 of the Limitation Act, 14 N. L R 66 not followed, 41 M 985, 45 C 785 followed (*Hallifax, A J C*) GANGADHAR RAO *v* ABDUL MAJID  
69 I C 522 1923 Nag 69 (1)

— Arts 11, 13 and 120—Attachment before judgment—Order of sale in execution of decree—Claim petition—Order allowing claim—Suit to contest order—Limitation See (1922) DIG COL 741 ARUNACHALAM CHITTY *v* PERIASAMI SERVAI  
70 I C 439

— Art 11—Order under O. 21, R 63, C P. Code—Refusal to investigate a claim—Effect of—Suit to establish title—Limitation

Where the executing Court dismisses a claim preferred without investigation of the merits on the ground of delay, the order is one passed against the claimant under O 21 R 63 C, P Code and a suit to establish title must be brought within the time prescribed by Art. 11 of the Limitation Act (*Prideaux, A J C*) NARSAYYA *v* LAXMINARAYAN  
6 N L J 66 19 N L R 34  
71 I C 404 1923 Nag 187

— Art 11—Order of attachment before judgment—No attachment actually effected—Claim by mortgagee of attached properties—Order disallowing claim—If binding and conclusive See (1922) DIG COL 760 MUTHIAH CHETTI *v* PALANIAPPA CHETTI  
70 I C 432

— Art 11 (A)—Applicability of—C P Code Or 21, R. 100—Application under—Dismissal of, for want of cause of action

The 1st defendant purchased the land in suit in execution of a mortgage decree and took delivery of the same through the Court Thereupon the plaintiff, who, claimed half of each of plots Nos 1 to 3 and entirety of plot No 4 made an application under Order 21, r 100 of the C P Code That application was dismissed on 8—7—1916 and in these terms "On the applicant's (plaintiff's) side he examined himself. The opposite party is ready It appears from the applicant's deposition that he is still in possession of the disputed plots of land. So here is no cause of action for his application under Order 21 Rule 100 Civil Procedure Code Hence it is ordered that this case be dismissed with costs to the opposite party Pleader's fees Rs 2 only" The plaintiff did not bring any suit for recovery of possession within a period of one year from the date of the last mentioned, namely 8th July 1916 His present suit was instituted on the 7th March 1918, that is more than a year after the date of the order pass-

## LIMITATION ACT (IX OF 1908), ART 11 (A)

ed on the application under Order 21 Rule 100 His cause of action, so far as the present suit is concerned has been formulated by him in paragraph (6) of his plaint and it appears therefore that after the date of the order passed on the application under Order 21, Rule 100 defendants Nos 1 to 5 entered into a conspiracy and forcibly cut and took away the paddy reaped by the Bhag tenants of the plaintiff and thereby dispossessed the plaintiff The plaintiff stated that thereupon he instituted a suit being suit numbered 225 of 1917 in the Court of the first Munsiff of Kantai That suit was, however allowed to be withdrawn by the Court, with liberty to institute a fresh suit and the present suit is the fresh suit which the plaintiff had the liberty to institute It was contended for the plaintiff that the subsequent dispossession alleged in para 6 of the plaint gave rise to the cause of action, after the suit had been withdrawn, for the present suit The defendant contended that the plaintiff not having brought the suit within the period prescribed by Art. 11 A of the Limitation Act, the present suit should be held to be barred by limitation. Held that the suit was not barred It is the question of possession with which the plaintiff was concerned and having remained in possession down to the date when, as alleged by him, he was dispossessed in the manner referred to in paragraph (6) of the plaint. He was not under any necessity, so far as we can see, to go to a Civil Court for the useless formality of asking for confirmation of possession of the property in question when as a matter of fact he remained in possession thereof (*Ghose and Panton, JJ.*) PAHAL GHORAI *v* HAJI MUNSHI FAZI UDDIN MAHOMED  
38. C L J 150

— Art. 11 (A) — Period of Limitation—Order under O 21, R 100 of the C P C

Although it is undoubtedly true that a person claiming to get rid of the effect of an order under O 21, R. 100 is bound to bring his suit for such a purpose within the period mentioned in Art 11 (A) of the Limitation Act, where the cause of action alleged by the plaintiff is one that has arisen subsequent to the date of the order made on the application under O 21, R 100 C P C, and where the plaintiff's application under O 21, R 100 was dismissed on the ground that inasmuch as his possession has not been disturbed the application was one which did not come within the purview of O 21, R. 100 C. P. C., the provision of Art 11 (A) of the Limitation Act do not apply (*Ghose and Chotzner, JJ*) ATARMOYI DAS *v* RAMANANDA SEN CHOUDHURY.  
50 C. 311 1923 Cal 601

— Art 11 (A)—Suit to set aside order under O 21, R 100 C, P C — Limitation

A suit to set aside an order passed under O 21, R. 100 of the Civil Procedure Code is governed by one year's limitation under Art 11 A of the Limitation Act (*Das and Adams, JJ*) SHEO NANDAN CHOUDHRY *v* DEBI LAL CHAUDHRY.  
4 Pat. L T. 93 (1923) Pat. 78 ;  
1 Pat. L. R. 134, 71 I C 484 2 Pat. 372  
1923 P 239

## LIMITATION ACT (IX OF 1908), ART 12

— Art. 12—Auction sale—Parties—Strangers—Applicability of article

Art 12 of the Limitation Act which provides for the setting aside of a sale in execution of a decree of a Civil Court, applies only to the parties to the sale and not to strangers. Strangers are governed only by Art 144 of the Limitation Act, 15 P R 1912 foll (Scott-Smith, J) AZIM KHAN v KARIM 71 I C 822

— Arts 12 and 96—Execution Sale—Setting aside—Property included by mistake in decree sold in execution—Limitation.

Where property outside the suit had been included by a mistake in the decree as being liable to be sold in satisfaction of the decree and was sold in execution and two years after the sale the judgment-debtor sued to recover the property, held, (1) that the execution sale was not a nullity and had to be set aside within thirty days from its date, (2) that plff having allowed the sale to become final could not sue to recover the property, and (3) that article 12 of the Lim Act barred the suit (Macleod, C. J and Coyajee, J) NAGABHATTA v NAGAPPA 1923 Bom 62

— Art. 12 (b)—Revenue sale under Madras Estates Land Act—Suit to set aside

A suit to set aside a revenue sale under the Madras Estates Land Act more than one year after the expiry of 30 days after the sale is barred under Art 12 (b) Lim Act. (Phillips and Venkatasubba Rao, JJ) KAMULAMMAL v CHOKKALINGAM ASARI 45 M L J 840

— Art 14—Order ultra vires—Article if applies

Where relief is asked for on the footing that a certain order is *ultra vires*, art 14 of the Lim Act does not apply. (Shah, A. C. J. and Kemp, J) PATDAYA MUPPAY v SECRETARY OF STATE FOR INDIA 25 Bom L R 1160

— Art 16—Levy of water cess—Illegal levy—Suit for recovery Limitation — Madras Revenue Recovery Act, S 59

A suit for the recovery of water cess alleged to have been levied illegally and without any justification is governed by the period of limitation specified in Art 16 of the Limitation Act and not by the limitation prescribed by S 59 of the Revenue Recovery Act. S 59 of the Madras Revenue Recovery Act applies to cases of persons aggrieved by illegal or irregular proceeding taken for the collection of revenue under the provisions of that Act and not to case where the levy of the cess or tax is ab initio illegal 12 M 168; 15 I C 328, 1918 M, W N. 75 12 L W 334 followed (Spencer and Krishnan, J) SECRETARY OF STATE v. NAGARAJA AIYER 44 M L J. 645 (1923) M W N 327 32 M. L T (H. C.) 230 17 L W 618 74 I C 281 1923 Mad 665

— Art 16—Suit for recovery of water cess paid on demand but under protest.

A suit for the recovery of water cess paid under protest on demand but without any proceedings by way of attachment, sale, etc, is governed by Art 16 of the Lim Act and not by S. 47 of Mad Act II of 1864. (Abdur Rahim and Sundara

## LIMITATION ACT (IX OF 1908), ART. 30

Aiyar, JJ) PANCHALAPALLI PICHU REDDY v. SECRETARY OF STATE FOR INDIA 70 I C 884

— Art 16—Water cess—Illegal levy—Suit for recovery of cess—Limitation — Madras—Revenue Recovery Act, S 59

A suit by a person for recovery of water cess alleged to have been illegally levied and paid under protest is governed by Art 16 of the Lim Act, and not by S 59 of the Madras Revenue Recovery Act 15 I. C 328 foll (Sir Walter Schwabe, C J) SECY OF STATE FOR INDIA v CHITTASAMI VENKATARATNAM

46 Mad 488 45 M. L J 12  
32 M L T 236 (H C) 17 L W 683  
73 I C 106 (2) 1923 Mad 652,

— Art 22—Personal injury caused by throwing sulphuric acid—Suit for damages

In a suit for damages for personal injury caused by throwing sulphuric acid on the face, the period of limitation is one year as prescribed by Art 22 of the Lim Act and time begins to run from the date of the injurious act done (Shah A C J and Crump, J) ABDULLA v ABDULLA 25 Bom L R 1333

— Art. 23—Malicious prosecution—Suit for —Limitation from date of discharge—Revision petition if suspends period See (1922) DIG COL 762 PURSHOTTAM VIHARDA'S SHET v RAVJI HARI, 47 Bom 28

— Arts 26, 36, 48 49 and 62 Tort —Irregular sale in execution—Suit for compensation—Claim for refund—Limitation

Plaintiff in this case sued to recover Rs. 6,000 on account of compensation for loss sustained by him on account of the irregular sale of certain property in execution of a decree alleging that in consequence of the irregularities a sum far below the market value of the property had been realized. He also claimed the refund of a sum which he said had not been credited. Held that there could be no question that the act complained of in bringing the property to sale was a tort, whether it be described as a nonfeasance or malfeasance. Neither Article 48 nor Article 49 nor any of the articles governing torts applies in express terms to the suit but it is governed by Article 36 and having been brought admittedly more than two years after the sale it was barred by time. (Harrison and Zafar Ali, JJ.) CHANDA SINGH v JAI KISHEN DAS 5 Lah L J 289

— Arts 30 and 31—Carriage of goods by railway—Loss—Suit for damages—Limitation

Art 30 of the Lim Act applies to suits for compensation for losing or injuring goods and the period is one year from the date when the loss or injury occurs. The article refers to losing or injuring goods by the carrier and not by the consignee that is to say, limitation runs from the time when the carrier lost or injured the goods, and not from the time when the consignee may be said to have suffered loss 19 I C 47 Rel. Art 31 of the Lim Act fixes one year from the date when the goods ought to have been delivered and applies to suits for compensation for non delivery. Where no time is fixed for the delivery of the goods, the suit may be instituted within a year after

## LIMITATION ACT (IX OF 1908), ART 30

the expiry of a reasonable time for the delivery of the goods (*Stuart and Sulaiman, JJ*) JUGAL KISHORE v G I P Railway

45 A 43 1923 A 22 (2)

— Arts 30 and 115—Carriage of goods by Railway—Short delivery—Damages—Suit for—Limitation

A suit for damages for short delivery of goods consigned by a Railway is governed by Art 30 and not by Art, 115 of the Limitation Act Short delivery means loss of the portion of the consignment undelivered (*Ross, J*) RAMESWAR DAS MALI RAM v THE E I RY Co

4 Pat L T 331 71 I C 565 1923 P 298

— Art 30—Loss of goods—Transit by Railway—Misdelivery—Non delivery.

The term 'loss' in Art 30 of the Limitation Act contemplates a loss of goods arising from non delivery as well as mis-delivery 2 Lah 103 41 M 871, 43 Mad 617 Bom 486 referred (*Mullick and Bucknill, JJ*) THE GREAT INDIAN PENINSULAR RY Co v JITAN RAM NIRMAL RAM

2 Pat 442 (1923) Pat 82 4 Pat L T. 173

1 Pat L R. 169 72 I C 440 1923 P 285

— Arts, 31 and 115—Common carrier—Suit by consignor for compensation—Limitation

No distinction should be drawn between a cause of action for compensation for non-delivery by a consignor and one by a consignee.

Article 31 of the Lim Act is wide enough to include a suit brought by the consignor also It provides for a suit for compensation for non-delivery, that is, a suit by a person who by reason of non-delivery has sustained loss. There may be cases in which it is not the consignee who sustains loss but the consignor In such cases it would be a suit by the consignor for compensation for non-delivery (*Page, J*) VALLY MD HAJI v NEDERLAND S NAVIGATION Co

27 C W N 806

— Arts 31 and 115—Non-delivery of goods consigned—Suit for compensation against carrier—Limitation See (1922) DIG COL, 763 LAL MOHAN HAZRA v E I RAILWAY & Co

70 I C 857

— Art. 32—Easement—Perversion See (1922) DIG COL, 763 BISHAMBAR SAHAI v JANKI DAD

69 I C, 819

— Art 32—Placing heavier beams on pliffs wall—Perversion of purpose—Suit for removal

Placing on the plaintiff's wall heavier and more numerous beams than had existed before and putting up a masonry roof instead of thatched roof cannot be said to be a perversion of the purpose for which the wall was to be used Art 32 Lim. Act, does not apply to a suit for removal of the beams (*Banerjee, A C J and Ryves J*) MOHAN v BISHAMBAR SAHAI L R 4 A, 510

— Art 36—Applicability—Personal injury—Damages

Y D—57

## LIMITATION ACT (IX OF 1908), ART 48

A suit for damages for personal injury Caused does not fall under Art 36 Lim. Act (*Shah, A C J and Crump J*) ABDULLA v ABDULLA

5 Bom L R 1333.

— Art. 36—Liquidator—Companies Act S 235.

A suit for recovery of compensation from an officer of a company in respect of certain misfeasance committed by him is barred against the liquidator, if it is brought by the liquidator after 2 years (*Shadi Lal, C J and Abdul Qadir, J*) THE BANK OF MULTAN, LTD v HUKAM CHAND

71 I C, 899 1923 Lah 58 (2)

— Art 36—Misfeasance—Claim for compensation—Company—Winding up—Commencement of limitation See COMPANIES ACT, S 235

69 I C 255

— Art 44—Mother as guardian making alienation—Suit by son after attaining majority to avoid—Limitation See LIM ACT, S 7 and ART 44

1 Mys L J 72

— Art 44—Suit by minor after attaining majority—Transaction a mortgage and not a sale—Declaratory suit—Limitation See DEKHAN AGR RELIEF ACT S 10 A

25 Bom L R 1209

— Art. 44—Suit for setting aside guardian's alienation—Limitation—Burden of proof as to age

A ward, on attaining majority can sue within 3 years of that date to set aside the alienation made by the guardian He will have to prove that his suit is in time, if the date of attaining majority is disputed (*Mookerjee and Rankin, JJ*) PROHLAD CHANDRA CHOWDHURY v RAMSARAN CHOUDHURY

38 C L J 213

— Art 44—Suit to set aside sale—Burden of proof as to suit being in time

In a suit by a minor on attaining majority to set aside sale by his mother on the ground that she was induced by fraud and misrepresentation the burden lies on plaintiff to prove that his suit is in time (*Campbell, J*) JAGAT SINGH v BALAGA SINGH

70 I C 984 1923 Lah. 254 (1)

— Art 47—Applicability—Order under S 145, Cr P Code—Suit for declaration

A suit for a declaration of title to property, as regards which an order had been passed against the plaintiff's predecessors under S 145, Cr P Code is barred unless brought within three years of the order. The plaintiffs cannot escape the bar of Art 47 by framing the suit as one for declaration after taking forcible possession (*Ryves and Gokul Prasad, JJ*) RAM SAHAI v BENODI BEHARI GHOSH

45 A 306 .

21 A, L J 102 L R 4 A. 113 71 I C 402 (1923) A, 151

— Art 48—Railway Company—Loss in transit—Right to claim price and damages when accrues

In a case where a railway parcel arrived on a certain day but plaintiff ascertained shortage and loss only on a later day the cause of action to

## LIMITATION ACT (IX OF 1908), ART 48

claim price and damages arises only on the later date (*Kanhaya Lal, J*) *DEVI DEEN & SONS v ROHILKHAND AND KUMAUN RAILWAY*  
75 I C 669 1923 A 342

—Arts 48 and 49—*Suit for compensation for trees wrongfully cut and removed—Limitation*

Where sale to the plaintiff was a sale of standing trees which were to be cut and converted into timber, there is a sale of moveable property and a suit for recovery of the timber or for compensation, where the act complained of is said to have been wrongful, is governed by Art 48 or Art 49 of the Lim Act (*Le Rossignol J.*) *BIRSEV v RAJA RAM*, 73 I C 33

—Arts 49 and 120—*Steam launch—suit for declaration of title and possession—Limitation*

Where there was a prayer in the plaint for a declaration of title to a steam launch and for possession of the launch, the suit was in substance one to recover possession of specific moveable property governed by Art 49 and not by Art 120 of the Lim Act. The prayer for declaration was unnecessary or at any rate ancillary to the main relief (i.e.) possession. In dealing with an entire estate there are no different periods of limitation for moveable and immoveable property 15 I C 545 foll 36 M 383, 21 C 157 dist (*Pratt and Duckworth, JJ*) *PUN AUNG v. BRIJ LAL*  
70 I C 841 (2). 1923 Bang 11

—Art 52—*Suit of price of goods supplied from time to time—Limitation*

Where a tradesman has a bill against a party for any amount in which the items are so connected together that it appears that the dealing is not intended to terminate with one contract, but to be continuous one, so that one item, if not paid shall be united with another and form one continuous demand, the whole together forms but one cause of action and cannot be divided. If all the items form but one cause of action, it cannot be contended that a part of it can be barred by limitation and that the rest may not be so barred (*Mulla, J*) *NAYAN AHMED HAJI ALI v SALEMAHOMED PEER MAHOMED*, 1923 Bom 113

—Arts 57 and 85—*Punjab Loans Limitation Act (1901)—Mutual account—Test*

The plaintiffs sued the defendants on accounts claiming Rs. 1,450. The suit was instituted on the 30th of August, 1918. The accounts showed a balance struck of Rs. 361 6 0 in favour of the plaintiffs on the 20th May, 1913. Thereafter the account continued for another year and ended with a total in favour of the plaintiffs of Rs. 832-9. No second balance was struck formally. Interest at 1 per cent per mensem was claimed bringing the amount in suit up to Rs. 1,450. Held, that the article applicable was Art 57 for which the period is six years under the Punjab Loans Limitation Act of 1904, the balance being an acknowledgment starting fresh period of limitation under S 19 of Act IX of 1908. An account is mutual when there are transactions on each side, creating independent obligations on the other hand, where the transactions create obligations on one side only, those on the other being

## LIMITATION ACT (IX OF 1908), ART 62

merely complete or partial discharges of such obligations, the account is not mutual 59 I C 609 Appl (*Campbell and Moti Sager, JJ*) *THAKUR DAS v THE FIRM OF BISHAN DAS MEWA RAM*, 1923 Lah 636

—Arts 59 and 60—*Loan—Deposit—Suit for recovery—Limitation*

There is no distinction in the Limitation Act between money lent and money deposited with regard to the agreement to repay. So that it is not the agreement that the money should be payable on demand that distinguishes a deposit from a loan. There must be something further proved, and it is not possible to define exactly what that must be. It has sometime been suggested that facts must be proved which create a sort of fiduciary relationship between the lender and the borrower, but it cannot be said that it is always necessary. Ordinarily when A hands over money to B on the understanding that it is not a gift, but has to be repaid when demanded, that would be considered in law a loan, and when the plaintiff seeks to prove that the money so handed over was a deposit the onus would lie upon him to prove that there were additional circumstances which turned the loan into a deposit 19 B 775 referred to, (*Macleod, C J and Crump, J*) *GOVIND CHINTAMAN v KACHUBHAI* 25 Bom L R 503  
73 I C 978 1924 Bom 28

—Art 61—*Partnership—Contribution—Debt paid by one partner—Limitation*

Art 61 of the Lim Act applies to a suit for contribution by a partner of a firm who has paid the whole or more than his share of the amount due from all the partners (*Abdul Raoof and Abdul Qadir, JJ*) *WALAITI RAM v RAM KISHEN*  
5 Lah L J 310 72 I C 385

—Art 61—*Purchase—Part consideration—Sum to be paid to a third person—Failure to pay* See (1922) DIG COL 766 *BRIKANT PANDE v PANDIT JAMNA DHAR DUBF.* 70 I C 582

—Arts 61 and 115—*Suit for contribution—Share of costs and money due in redemption* See (1922) DIG COL 767 *SHAIKH JAMAL v SHAIKH CHAND* 70 I C 289.

—Arts 62, 120, 123—*Co-heirs—Realisation of assets by some—Suit against them by others—Limitation*

Where one of the heirs has collected the debts due to the deceased on the strength of a succession certificate taken out by him, a suit by the other heirs for their shares of the assets is governed by Art 62 and not by Art 120 or 123 of the Limitation Act, (*Ghose and Panton, JJ.*) *ABE DUNNISSA BIBE v ISUF ALI KHAN*  
50 Cal 610 27 C W N 941 74 I C 1010

—Art 62—*Divided Hindu family—Collection of debts by one member—Suit by another for his share of the collections—Limitation—Limitation Act, S 18* See (1921) DIG COL 748 *RAMA-LAGU SERVAI v SOLAI SERVAI* 69 I. C 274.

—Arts 62, 89, 109, 120 and 127—*Joint family—Partition—Collection of debts and profits of immoveable property by one member—Suit by another for account of the same and for his share*

## LIMITATION ACT (IX OF 1908), ART 62

—Limitation See (1922) DIG COL 767 YERUKOLA  
v YERUKOLA 71 I, C 177

—Arts, 62 and 89—Money lending business  
—Joint business—Suit for recovery of share—  
Limitation—Accountability

The plaintiffs and defendants were members of the same Hindu family and were doing business jointly. The moneys of the business came under the control of the defendants and were invested by them in investments which were intended to be or ought to have been both for the benefit of the plaintiffs and the defendants. In a suit by plaintiffs for recovery of the share of the moneys due to him *Held*, that the defendants were bound to account for the sum to the plaintiffs and that the limitation for the suit would be governed by Art 89 and not by Art 62 of the Limitation Act (*Lord Pullimore*) MERLA VENKANNA v. MERLA AGASTHIAH 27 C W N 725  
32 M L T 86 (P C) 1923 P C, 31

—Arts 62, and 97—Sale set aside—Money paid for discharging incumbrance—Suit for—  
Limitation

A suit for possession of properties under a sale deed was decreed by the first court, but dismissed in appeal—Certain sums of money had been paid by the purchaser to discharge incumbrances on the property and in a suit brought to recover these sums from the vendors more than 3 years after the paying and the decree dismissing the prior suit for possession. *Held*, whether Art 97 or 62, applied the suit was barred (*Spencer and Devadoss, JJ*) GOPALA IYENGAR v MUMMACHI REDDIAR 17 L W 254 74 I C 416  
1923 Mad 392

—Arts 62 and 115—Suit for damages against representative of deceased agent—Limitation

Where a principal brings a suit against the representatives of a deceased agent for damages caused by reason of breach of duty on the part of the deceased agent the suit is governed by Art. 115 of the Limitation and the starting point of Limitation is the date of the alleged breach (*Miller, C J and Foster, J*) RAMESHWAR SINGH v NARENDRANATH DAS 71 I C 916  
1923 P. 259

—Art 64—Account in terms of grain—  
Applicability

Even if it were conceded that in order to bring a suit within the purview of Art 64, it is not necessary to show that there have been cross or reciprocal demands between the parties the article can only apply where the money found to be due is a definite sum entered in the account books (*Harrison and Zafar Ali, JJ*) RAM v GAMAN RAM. 1923 Lah 645

—Art 64—Reciprocity of demands—How far necessary.

In every case to which Art 64 applies, it is not necessary that there must always be a reciprocity of demands (*Ghose and Pantam, JJ.*) SARIFUN MANDALIN v FERADOL KHATUN 1923 Cal 578

## LIMITATION ACT (IX OF 1908), ART 74.

—Arts 64, 106 and 115—Suit on a balance of account—Account stated—Limitation—Novation See (1922) DIG COL 769, NAND LAL v PARTAB SINGH 69 I C 502

—Arts 65 and 116—Sale—Compensation,  
Where the compensation, to be paid, if vendee got less area than agreed upon, would be payable, if by the order of the Revenue Officer, subject to any modification on appeal, the vendors on partition were allotted a less area than that sold by them, limitation begins from the date when the order becomes final i.e. from the date when a co-sharer has a right to recover his share, (*Martineau and Blasher, JJ*) RUKAN DIN v. HASSAN DIN 72 I C 897 1923 Lah 23

—Art 65—Scope of.

Where the defendant agreed to give half of the land to plaintiff who was to help him in recovering it, *held* that limitation ran from the refusal of defendant, after recovery (*Prideaux, A J C*) SHRIRAM v BABAJI 71 I C 40 1923 Nag 47

—Art 66—Applicability of—"Single bond"—Meaning of

A bond merely for the payment of a certain sum of money, without any condition in or annexed to it is called a simple or single bond. The term "single bond" is sometimes used to signify a bond given by one obligor as distinguished from one given by two or more. Where under a bond power is given to the creditor to demand the whole of the money due under the bond whenever default is made in payment of the interest for any two years consecutively it is impossible to predicate of the bond that there is any certain "day specified for payment" within art 66 of the Lim Act (*Wazir Hasan, A J C.*) HARI LAL v THAMMAN LAL 26 O C, 121 70 I C 85 1923 Oudh 19

—Art 68—Administration bond—Breach of condition—Suit on

An administration bond is a bond subject to a condition within the meaning of Art 68 Lim Act and where a suit is brought for breach of one of the conditions contained therein it must be filed within 3 years of that breach. The breach of each condition gives rise to a separate cause of action and time begins to run from the date of the particular breach giving rise to the suit (*Robinson, C J and May Oung, J*) MAUNG SAN U v MAUNG KYAN MYE 1 Rang 463.

—Art 74—Instalment bond—Failure to pay instalment—Limitation

Where an instalment bond provides for 10 monthly payments and provides that the whole shall be payable on demand on default of any one instalment, limitation runs as regards each payment on the date it is payable under art. 74, Lim Act. A suit brought just within 3 years of the last date for payment will be barred except with respect to the last payment (*Devadoss, J*) PERIANAN CHETTY v MARIAPPAN ASARI (1923) M W N. 699

—Art 74—Sue for full amount on default—Failure to Waiver—Effect

## LIMITATION ACT (IX OF 1908), ART 75

An instalment bond provided that on default of payment of any instalment, the whole claim could be enforced or if the creditor liked to waive such right. There was no payment at all made, some of the instalments were recovered by suit and for the rest a suit was filed more than 3 days from the first default, but within 3 years of the time at which the earliest of the instalments claimed fell due. *Held*, the filing of the prior suit amounted to a waiver of his rights to claim the full amount and the cause of action for the second suit arose only when the earliest of the instalments claimed fell due. (*Hallifax, A J C*)  
**KESHO RAO v SUKLIA** 19 N L R 170

—Art 75—Cause of action. See (1922)  
**DIG COL 769 WACHHI v MAROTI**

69 I, C 237

—Arts. 75 and 132—Mortgage—Instalments—Whole amount to become due on default of payment of single instalment—Limitation

Under a mortgage executed in 1902 the principal sum borrowed was Rs 1,200 and the sum was made payable in annual instalments of 100 rupees each. On default of payment of every one instalment the whole of the balance was to be paid at once. In the years 1903 and 1904 the mortgagors paid Rs 44 only. In 1923 the mortgagees filed a suit to recover the amount of the first two instalments and obtained a decree. In 1917 the mortgagees filed a suit for recovery of the remaining instalments with interest. *Held* that the suit was barred by limitation. (*Macleod C. J and Crump, J*)  
**SHRINIVAS v CHANBASA-PAGOWDA** 25 Bom L R 203 72 I C 290  
 1923 B m. 201 (2)

—Arts 80 and 116—Bond payable in twelve years—Provision for periodical payment of interest—Default—Effect of

Under a mortgage the period fixed for redemption was 12 years but the mortgagor was to pay interest annually. In case of default it was open to the mortgagee either to add the interest due to the principal and charge compound interest or to sue for the principal at once. *Held*, that the bond fell under art 80 read with art 116 of the Lim Act and time began to run against the mortgagee from the date of the first default in payment of interest. Consequently a suit for sale on the mortgage or for a simple money decree against the mortgagor brought beyond the first date of first default, would be barred by limitation. (*Mears, C J Piggott, Walsh, Ryves and Sulzman, JJ*)  
**SHIB DAYAL v MEHARBAN**  
 45 A 27 L R 4 A 3  
 69 I C 981 (2) 1923 A, I

—Arts. 80 and 68—Bond—Money to be repaid with interest after fixed period—Default in payment of interest entitling creditor to call for whole amount—Suit to enforce bond—Limitation.

Under the terms of a bond, the principal sum Rs 500, interest was agreed to be paid at the rate of 6 p. c. per annum every year and in default of payment of interest for any year compound interest was to be paid. The whole amount of principal and compound interest was agreed to

## LIMITATION ACT (IX OF 1908), ART 85

be paid within a period of 7 years. The bond further provided that the lender would have the liberty to demand the repayment of the entire sum due under the bond on the happening of default in payment of the interest due for any two consecutive years. There was a default in payment of interest for 2 consecutive years. In a suit on the bond it was contended that it was barred by limitation. *Held* that the suit was governed by art 80 and not by art 68 of the Lim Act. The creditor under the terms of the bond acquired merely an option to recall the whole of the money due thereunder on the happening of default in payment of the interest for 2 consecutive years and the breach of the original promise for the repayment of the money within 7 years gave another remedy to him to enforce at the end of that period. (*Wazir Hasan, A J C*)  
**HARI LAI v THAMMAN LAL** 26 O C 121 70 I C 85  
 1923 Oudh 19

—Art 83—Starting point—Contract Act, S, 222

Where a commission agent buys goods for a principal but through the latter's default in paying for the same they are resold by the agent at a loss a suit by the agent to recover the amount of the said loss with interest and other incidental expenses must be brought within the period of limitation prescribed by Article 83 Limitation Act in such a case operates to run from the date of the payment made on behalf of the principal and not from the date of the sale. (*Scott Smith and Forde JJ*)  
**FIRM OF DEVI SAHAI RAMJI DAS v TIRATH RAM** 73 I C 143 1923 Lah 473

—Art 85—Applicability—Test of. See (1922) DIG COL 771 **ABDUL HAQ v FIRM OF SHIVJI RAM KHEM CHAND** 71 I C 259.

—Art 85—Mutual accounts—Test of. See LIM ACT, ARTS 57 & 85. 1923 Lah. 636

—Art 85—Mutual open and current account—Meaning of

It is well settled that an open account is one which is continuous or current, uninterrupted or unclosed, by settlement or otherwise consisting of a series of transactions. A current account has been held to be an open or running account between two or more parties, or an account which contains items between the parties from which the balance due to one of them is or can be ascertained. Mutual accounts are accounts which show reciprocity of dealings between the parties and do not embrace those having item on one side only though made up of debits and credits. (*Scott-Smith and Mohi Sagar, JJ*)  
**THE FIRM RUP CHAND JIVAN SINGH v. THE FIRM POHO MALNATHU MAL** 73 I C 916  
 1923 Lah 347

—Art 85—Mutual open and current account—Limitation for suit on.

Under art 85 of the Lim Act the Court has to consider whether the account between the parties was mutual, open and current indicating reciprocal demands between the parties. It is not essential that the balance should in fact have been in favour of one party at some stage. It is enough if the dealings are such that the balance might

## LIMITATION ACT (IX OF 1908), ART 85

have been in favour of either party 23 Bom L R, 510 Rel. (*Shah, A C J and Crump, J*)  
*SATAPPA JAKAPPA v ANNAPPA*

47 Bom 128 1923 Bom 82

—Art 85—*Mutual, open and current account—Test of*

The fact that the balance of an account was always in favour of the same party does not prevent the account from being mutual. The test is the intention of the parties (*Hallifax, A C J*) *PANDURANG v KALLUDAS*. 1923 Nag 108

—Art 85—*Mutual, current and open accounts—Test of*

In order that accounts might be mutual within the meaning of Art 85 of the Limitation Act there must be transactions on each side, creating independent obligations on the other, and not merely transactions which create obligations on the one side, those on the other being merely complete or partial discharges of such obligation. If there may be a balance in favour of either party it follows that there must be mutual liabilities of both parties to each other, if however the balance is always in favour of one party in the very nature of the transactions, then there is no case of separate mutual dealings and art 85 will not apply 6 C L J 158 toll (*Schwabe, C J and Wallace, J*) *THURUTHELLAKATH T P KUNHI KUTTI ALI v KUNHAMMAD*

44 M. L J 184 17 L W 243 71 I C, 466  
 (1923) Mad 347

—Art 85—*Mutual, open and current account—Test of*

It cannot be said that an account is a mutual account simply because there may have been occasionally a balance in the defendant's favour. There must have been reciprocal demand between the parties 17 M 293, 6 C L J 158 followed (*Ross, J*) *RAM SUNDAR v AMRIT PAJIYAR*

4 Pat L T. 424 72 I C 135 1 Pat L R 288  
 1923 P 242 (1)

—Art 85—*Mutual open, and current account—Test of.*

Mutual accounts are such as consist in reciprocity of dealings between the parties and do not embrace those having items on one side only though made up of debits or credits. Where the account in this case shows dealings between the parties which amounted to mutual debits and credits on both sides so that sometimes the balance was in favour of one party and sometimes of the other, the case comes within art. 85 of the Lim Act. It is not necessary that there must have been a shifting balance, but it must be shown that was a possible and likely incident of the mutual transactions with regard to which the account was kept (*Kulwant Sahay and Foster, JJ*) *FYZABAD BANK, LTD v RAM DAYAL*. 4 Pat L T 571 74 I C, 831

—Art 85—*Scope*

The agent for both the parties, lent money on behalf of one firm to himself as agent for the other firm. Each of these loans gave rise to a right of set off or claim against the borrower, and as both plaintiff and defendant were on occasions the lenders, these transactions gave

## LIMITATION ACT (IX OF 1908), ART. 91

rise to reciprocal demand from time to time. The accounts were never settled.

*Held*, the fact that the agent for his own convenience totalled up the position and made entries of the result in each firm's books did not close the account. It was continuous and was, therefore, an open and current account, and having regard to the mutual loans, it was also a mutual account 8 L B R, 149, Dist (*Robinson, C J and Macgregor, J*) *R M A R R, M CHETTY FIRM v V L R M N SOMASUNDARAM CHETTY* 1923 Rang 18

—Arts 85 and 90—*Suit by principal against agent for recovery of money not accounted for—Suit for damages—Breach of duty—Suit against representatives of agent*

Where a principal sues his agent for recovery of money received by the agent on his behalf and not accounted for, the suit is governed by Art. 89 of the Limitation Act and where the agency is continuous, the period of limitation starts from the date when the agent refuses to account for the moneys. A suit by the principal against his agent for damages caused by the agent's breach of duty or negligence is governed by Art 90 of the Limitation Act, and the starting point of limitation is the date when the breach of duty or negligence comes to the knowledge of the principal. Arts. 89 and 90 of the Limitation Act which relate to suits by principal against his agent have no application to a suit by the principal against the representatives of his deceased agent (*Muller, C J and Foster, J*) *RAMESWAR SINGH BAHADUR v NARENDRANATH DAS* 71 I C, 916  
 1923 P 259.

—Art. 89—*Suit for accounts—Agency*

In a suit by co principals for accounts against an agent in the absence of a joint demand, limitation under Art. 89 runs from the termination of the agency. A demand by one only does not start limitation as against him (*Das and Kulwant Sahay, JJ*) *JAGDIP PRASAD SAHI v MT RAJO KUER*, 2 Pat 585 (1923) Pat 177  
 4 Pat L T 531 1923 P 464

—Art 89—*Suit for account against agent by co principal—Demand and refusal—Limitation*

Where there was a suit for account against an agent by the two principals by whom he was appointed and there was no evidence that there was a joint demand for an account by the two ladies. *Held*, that time began to run from the termination of the agency. The mere demand of account by one of the principals and refusal by the agent would not start limitation (*Das and Kulwant Sahay, JJ*) *JAGDIP PRASAD SAHI v MT. RAJO KUAR* 2 Pat 585 4 Pat L T 531  
 1923 Pat 177 1923 P 464

—Art 91—*Applicability of—Instruments void and not voidable—Avoidance of—Declaration*

If the instrument is voidable and not void *ab initio* and is executed by the plaintiff or by his predecessor, the plaintiff cannot elude the operation of Art 91 by suing as for a declaration, but in determining whether the plaintiff is attempting to elude the operation of Art 91, it is necessary to consider the plaintiff's case as to the



## LIMITATION ACT (IX OF 1908), ART 91

instruments where according to the plaintiffs an instrument is not voidable, but void *ab initio*, and they make the definite case that the instruments were nominal and were not acted upon during the lifetime of the executant. *Held* it is impossible to hold that Art. 91 applies to the facts of the case (*Dus and Adams, JJ*) MT BIBI KANIZ BAINAB v SYED MOBARAK HOSSAIN 72 I C 748

— Arts. 91 and 120—Registered document admitting adoption—Suit to set aside and for declaration *See* (1922) DIG COL 774 UDIT NARAIN SINGH v. RAMDHAN SINGH 45 A 169 69 I C 971

— Arts. 91 and 120—Suit to set aside sale deed—Limitation—Money decree holder—No attachment made—Suit if lies.

Art 91 of the Lim Act can only be applied to cases where the person who wants to set aside the sale deed is himself or through his predecessors in title a party to the instrument. Where the suit by mortgagee is in effect one for a declaration that a sale by his mortgagor to a third party is null and void Art. 120 applies to the case.

Where on account of the invalidity of the mortgage deed, the mortgagee obtained only a money decree and without attaching the property he sued for a declaration that the sale of the property to another was invalid.

*Held*, the proper relief in the case would be to attach the property and wait till the attachment had been removed and then sue to have his right to attach declared (*Pratt and Duckworth, JJ*) MI SAN MA HAIANG v SHWE BA. 74 I C 164 1923 Rang 82 (2).

— Art 96—Scope of

Art 96 is intended to apply to those cases in which the courts are asked to relieve parties from the consequences of mistakes committed by them in the course of contractual transactions (*Shadi Lal, C J and Abdul Qadir, J*) SHER v PIARA KAM. 69 I C 501

— S. 97—Applicability—Failure of consideration—Suit for amounts paid—Limitation, *See* LIM. ACT, ARTS 62 AND 97 17 L W 254

— Art. 97—Sale of property by Hindu Reversioner—Transfer unenforceable—Suit for recovery of purchase money—Limitation—Starting point

A Hindu Reversioner purported to sell the estate to which he had a reversionary right agreeing to give proprietary possession of the same on the death of the widow or the last male owner. On the death of the widow, the vendee sued for possession or in the alternative for recovery of the purchase money with interest. *Held* that the transfer was inoperative that the vendee was entitled to recover the purchase money paid with interest and that the cause of action for the suit arose from the date when he discovered that the transfer was void, that is to say, on the death of the widow of the last male owner (*Sir Lawrence Jenkins*) HARNATH KUAR v INDAR BAHADUR SINGH. 45 A 179 50 I A 68 44 M. L. J. 489 90 C. L. J. 669 (P. C.)

## LIMITATION ACT (IX OF 1908), ART 103

— Art. 97—Suit on consideration that fails—Vendor and purchaser—Limitation

Where a person is entitled to sue for specific performance of a contract for sale of land he can also sue for refund of the purchase money whether it has been paid in cash or has been set off against debts due by the vendor. In either case the starting point of limitation under art 97 of the Lim Act is three years from the date of the payment or set-off 9 A 47, 57 Rel (*Muung kin, J*) MAUNG AUNG BA v MAUNG AUNG PO 1923 Rang. 87 70 I C 121,

— Arts 97 and 120—Suit for damages—Breach of covenant for title—Limitation—Starting point

Where on execution sale is declared a nullity for want of any saleable interest in the judgment debtor a suit by the purchaser for recovery of the purchase money is governed either by Art 97 or by art 120 of the Lim Act and in either case the starting point is the date of the decree of the first court declaring the sale to be invalid and not of the appellate court confirming that decree (*Phillips and Ramesam, JJ*) NADU KANDELA KATH PAKURAN v KUYATIL KANDAN KUTTY 70 I C 45 1923 Mad 23

— Art 97—Suit for Specific performance Dismissal of—Subsequently suit for recovery of earnest money—Limitation

Plaintiff's suit for specific performance of a contract for the sale of land in his favour was dismissed by the Appellate Court. Subsequently he brought a suit for recovery of earnest money which he had deposited with the defendant. On a question arising as to the period of limitation applicable for the suit, *held* that it was governed by Art 97 of the Limitation Act 25 A 618, 31 A 68 referred to (*Lindsay, J*) MUNNI BABU v KOER KAMTA SINGH 45 A 378 21 A L J 265 L R. 4 A 176 72 I C 86 (2) 90 & A L. R. 429 1923 A 321

— Art 97—Suit by vendee for purchase money—Limitation—Starting point—Date of dispossession

Where a vendee under a deed of sale had been given possession and was subsequently dispossessed under a decree of court obtained by a third person a suit for damages by the vendee against the vendor is governed by art 97 of the Lim Act. The starting point of limitation is not the date of the decree of court but the date of actual dispossession of the vendee 46 C 670 distinguished. 14 M L T 524, 40 M L J 449 18 M 887, 32 I C 176 Relied on (*Ayling and Odgers, JJ*) HARI HARAMANGALATH SANKARA VARIYAR v. KALATHIL UMMAR 70 I C 787 32 M L T (H C) 3 1923 Mad 46

— Art 102—Suit for wages by *bisardar*.

A suit by a *bisardar* for wages falls under Art 102, Lim Act (*Dalal, J C*) GHASI RAM v UMA DATT 26 C C 327 10 C L J 348. 90 & A. L. R. 564.

— Art. 103 104 and 116—Dower debt—Suit by heirs of wife—Limitation.

Where there is a registered deed of dower Art. 116 of the Lim Act applies to a suit of dower

## LIMITATION ACT (IX OF 1908), ART. 103

by the heirs of the wife In the absence of such deed arts 103 and 104 would apply 44 C 759 Rehed on 36 C L J 379 foll (*Mookerjee and Rankin, JJ*) MAHOMED MAZAHARAL AHAD v. MAHOMED AZIMUDDIN 27 C W N 210 37 C L J, 108 73 I. C 17 1923 Cal 507

—Art 103, 104 and 116—*Suit for dower debt—Registered agreement.*

Where dower is payable under a registered instrument executed by the husband in favour of the wife a suit for dower whether it is brought by the wife during her lifetime or whether it is brought by her heirs after her death is a suit for compensation for breach of contract in writing registered within the meaning of Art 116 of the Lim Act. The distinction between prompt and deferred dower seems immaterial in this connection. The wife may sue the husband for her prompt dower at any time even during the continuance of the marriage. The wife may also sue the husband for her deferred dower in the event of the marriage being dissolved by divorce. Where the suit for dower is brought by the heirs of the wife after her death it is still a suit on the contract the contract being one which the heirs are entitled to enforce (*Richardson and Shrivarday, JJ*) ASIATULLA v DANES MAHOMED

50 Cal 253 70 I C 169 1923 Cal 152

—Art 110—*Cause of action—Money—Suit for, Maintainability—Debtor and Creditor the same—Effect—Rent—Arrears becoming due—Meaning—Same person being landlord and tenant at end of jash year—Right of landlord vested in different person subsequently—Suit for arrears of rent in such cases—Limitation—Starting point*

When the hand that receives and the hand that pays is the same no suit will lie for payment. When there is no one competent to sue there can be no cause of action and consequently limitation can not run, because there is no one against whom it can run.

Usually arrears of rent become due, within the meaning of Art 110 of the Limitation Act, at the end of each fash year. But a different time may in certain circumstances be the time from which limitation begins to run. In a case in which there was no one to whom the arrears were payable and who was capable of enforcing the obligation by suit, held that there was no cause of action in existence and the arrears became due, within the meaning of the article, only as soon as there was some one to whom they were payable.

In a case in which a Devasthanam was the melvaramdar, and a Mutt the kudiwaramdar held that there was no cause of action in existence for a suit to recover arrears of rent from the Mutt, so long as the trusteeship of the temple and of the Mutt was vested in the same person and that for a suit for such arrears, time began to run only from the date on which a different person was appointed trustee of the temple (*Phillips and Devadoss, JJ*) SRIMATH DEIVASIKHAMONY NATARAJA DESIKAR v. M R GOVINDA RAO

46 Mad 579, 44 M L J 318 17 L W 344 32 M L T. R. C 174 72 I C 5 1923 Mad. 461

## LIMITATION ACT (IX OF 1908), ART. 115

—Art 110—*Suit for recovery of Jodi—Limitation*

A suit for the recovery of Jodi payable by an inamdar to a Zemindar is governed by art 110 of the Lim Act, for Jodi is only favourable rent 21 M 243 22 M 11 Ref (*Krishnan, J*) RAJA SAMBASADASIVA CHINNA RAYALVARU v BANNAR MADDULAPPA (1923) M W N 524

74 I C. 968 1924 Mad 73

—ART 113—*Contract—Specific performance—Suit alleging himself to be beneficially entitled See (1922) DIG COL 777 SUBBARAYA PILLAI v RAJA KUMARA VENKATA PERUMAL RAJA* 44 M L J 740 21 A L J 297 37 C L J 426 25 Bom L R 640 90 & A L R 372 (P C.)

—Art 113 144—*Deed—Construction—Exchange—Suit for possession of property received in exchange*

Under a compromise an exchange of properties was to take place on a future date, that is to say on the 1st of Maghar Sambat 1966, after the wood work of the houses had been removed. The other party sued for recovery of possession of the property. Held that the suit was for specific performance of a contract to hand over the ownership rights in the property in suit on a certain date and not for possession of property in which the ownership rights had passed completely by the deed of compromise. Art 113 governed the suit (*Campbell, J*) KHUSHI MAHOMED v HAYAT

72 I C 1040 1923 Lah 672

—Art 113—*Specific performance—Suit for starting point of limitation*

In the absence of a date fixed for performance of the contract time does not commence to run till there has been a demand and refusal 5 C 175 Rel (*Duckworth, J.*) MA MA GYE v MA NYO PO 1923 Rang 44 (1)

—Arts 113, 148 178—*Suit to enforce award*

Limitation for a suit to enforce an award depends on the nature of the relief sought, if the award is to the effect that the defendants shall hold the land as usufructuary mortgagee for a definite sum, and the plaintiffs sue for redemption the Article of the Schedule applicable is Art 148, (*Brown, A J C*) MAUNG NE DUN v. MAUNG CHO. 70 I. C. 517 1923 Rang 108.

—Arts 115 and 63—*Agreement to deliver produce of land or a sum of money on default—Suit for money—Limitation*

The defendant agreed in consideration of a sum of money received by him to deliver the plaintiff half the produce of certain land and on default, a sum of money annually. Plaintiff sued for the recovery of the money, the defendant having defaulted to deliver the produce. Held that the suit was governed by art 115 and not by art 53 of the Lim Act (*Scott Smith and Brasher, JJ*) WALI v KHUDA BAKHS

5 Lah L J 366 72 I. C. 480

—Art, 115—*Dispute as to mineral rights—Compromise fixing royalty—Suit on*

A suit between a lessor and lessee regarding mineral rights was compromised, a certain sum

## LIMITATION ACT (IX OF 1908), ART 115

was fixed as royalty and in pursuance of the written agreement a decree was passed. A suit was subsequently filed for royalty. *Held* it fell under 115, Lim art, Act (Miller, C J, and Foster, J) SMITH v KENNEY 2 Pat 749

## —Art 115—Hatchitta—Suit on—Limitation

A suit on a *hatchitta* containing an unqualified promise to pay the amounts found due on an adjustment of accounts is governed by Art 115 of the Lim Act (Ghose and Panton, JJ) SARIFUN MANDALIN v, FERADOUL KHATUN 1923 Cal 578

—Art 116—Agreement discovered to be voided—Suit for refund of consideration—Limitation when commences—Alienation by joint family. See CONTRACT ACT, S 65

90 &amp; A L R 1066

## —Art 116—Breach of Covenant—Limitation

Where a contract is in writing registered a suit for breach of all covenants whether expressed or implied therein will fall under Art 116, Lim, Act (Sanderson, C J and Richardson, J) INJAD ALI v MOHINI CHANDRA ADHIKARI 27 C W N 1025

## —Art 116.—Covenant for quiet enjoyment Breach—Suit for damages

*Per Spencer, J*—In the case where the vendor of property has no title to convey and the vendee never gets possession, a suit for damages for breach of the covenant for quiet enjoyment will lie if brought within 6 years of the sale, if he got possession and lost it, then within 6 years of the loss of possession. But to come under this category the suit must be for damages or return of purchase money and there must be privity of contract between the plaintiff and defendant (Spencer and Devadoss, JJ) GOPALA IYENGAR v MUMMACHI REDDIAR 17 L W 254

74 I C 416 1923 Mad 392

—Art 116 and 132—Mortgage by manager of joint Hindu family—No necessity—Personal decree—Limitation See (1922) DIG COL 778 RAM NARAIN v NAND KUMAR

100 L J, 180 69 I C 786

## —Art 116 - Non-transferable interest—Sale of—Breach of covenant—Damages—Limitation.

The plaintiff entered into possession of the *jaimanka brit* sold to him and remained in possession until he was dispossessed on the 30th August 1918 by his vendor's son. In a suit for damages *Held* that time would begin to run either from that date on which the sale was held or from the date of dispossession. There was a distinct stipulation in the conveyance that if there was any defect in title, the vendee would be competent to realise the consideration-money with damages. This was a registered instrument and as there was a breach, both of the covenant for title and of the implied covenant for quiet enjoyment, the plaintiff was entitled to bring his suit within six years of the breach. (Ross J.) JHINGUR OJHA v MECHNATH PANDAY 72 I. C 653.

## LIMITATION ACT (IX OF 1908), ART 118.

—Art 116—Registered Sale—Breach of covenant for title—Suit for damages—Limitation—Starting point.

A registered deed of sale executed in 1905 by two persons, after reciting the receipt of consideration therefor, stated "If there is any dispute in respect of the property by relations and others, etc we shall settle them at our own expense and we shall be bound to carry out this sale without obstruction." The son of one of the vendors sued to set aside the sale as regards the share of his father and obtained a decree in 1913 for possession of that share. In a suit by the vendee in 1917 within 2 years from the date of dispossession in pursuance of the decree of 1913 for the recovery of the part of the purchase money corresponding to the share of the property recovered from him *Held* that, assuming that the clause in the sale-deed set out above did not amount to a covenant for quiet enjoyment there was clearly a covenant for title and on breach of that covenant that vendee had 6 years to sue under art 116 of the Lim Act from the date when the covenant was broken and that the suit was not barred (Kumaraswami Sastri and Devadoss, JJ) SISTLA SUBBAYYA v PATA PICHANNA. 1923 Mad 28

—Art 116—Suit for dower—Registered deed—Suit by heirs of wife for dower Art 16 applicable See LIM ACT, ARTS 103 104 AND 116

27 C W N 210

—Art 118—Adoption—Invalid adoption—Gift of ancestral property to adopted son—Suit for declaration of validity—Limitation

Where the reversioners of a deceased Hindu allow a suit for a declaration against the adoption of a daughter's son to become barred by time under art 118, they are not entitled to sue for a declaration that a subsequent gift to the adopted son is not binding upon them because that gift does not give them a fresh cause of action, in that it does not involve any further denial of the rights of reversioners then was involved in setting up the adoption in the first place (Leslie Jones and Abdul Raoof, JJ) KHUSHAL SINGH v NANDA 5 Lah L J 63.

—Art 118—Declaration without further relief of possession—Adoption alleged to be void

A suit for a declaration that an adoption under a registered deed was null and invalid and for a further declaration that the plaintiff was a reversioner is governed by Art 118, even when the adoption is alleged to be void *ab initio*. Had the plaintiff been suing for possession on the ground that he was the reversioner and had he further alleged that the adoption was invalid under the Hindu Law, Art 118 would not have been applicable and the plaintiff would have had twelve years within which to sue. Under Art 118, time begins to run from the date of knowledge of the alleged adoption (Rafique and Lindsay, JJ) RAM LAL RAI v MT MURTA KUER 75 I. C 676 (1) 1923 A 361 (1).

—Art 118—Suit for possession of property—Article if applicable

Art 188 does not bar a suit for possession of immovable property on the ground that an adop

## LIMITATION ACT (IX OF 1908), ART. 119

tion is invalid. The article applies to a suit for a declaration that an adoption is invalid. *Stuart and Sulaiman, JJ*) RADHA DULAIYA v RASHIK LAL, 45 A 1 75 I C 14 1923 A 25

## —Art 119—Interference—What is

The interference contemplated by Art 119 must amount to an absolute denial of the status of adoption and an unconditional exclusion from the enjoyment of rights in virtue of that status. *Prait J*) MAUNG GYI v MAUAG ON GAING

1 Rang 186 74 I C 970

—Art 120—Agreement for payment of sum out of particular fund—Suit to recover sum out of fund—Agreement to pay on demand—Limitation. See LIM ACT, S 10 44 M L J 885

—Art 120—Alluvial land—Submerston and re-appearance—Denial of title—Failure to prove possession of disputed land—Effect of

Defendants were mortgagees of certain land from defendants. Some land which had emerged from the river was settled with defendants in 1853. The land submerged and re appeared again and again. The plaintiffs claimed the formation as an accretion to their village but the revenue authorities decided in favour of the defendants. More than six years after the date of the said decision the plaintiffs sued for declaration of title. Held that the accretion not having been slow and imperceptible the plaintiffs could not acquire a title thereto and that even if they had any right, they lost it by failure to have it declared when the revenue authorities decided against them. 24 A 521, 27 A 313 ref. (*Binnery and Gokul Prasad JJ*) BIJAI, SHANKER SEIHER v RAM CHARITHRA SINGH,

45 A. 461 21 A L J 409 L. R. 4 A 206  
75 I C 35 1923 A 500.

## —Art. 120—Applicability

Where a person put up beams against the wall of another more than 6 years before suit, a suit for removal of the beams is barred thereafter. (*Gokul Prasad, J*) MT KOKLA KUNWAR v. KALIAN MAI 1923 All 452

—Art. 120—Claim for mesne profits—Accrual after death of testator

A suit for profits accruing after the death of the deceased ancestor is governed by Art. 120 (*Heald and Lentaigne, JJ*) MAUNG PO KIN v MAUNG SHWE BYA, 1 Rang 405

—Art. 120—Co sharer—Village profits—Suit by co-sharer for his share—Limitation

Where a suit is in substance one by a person claiming to be a joint owner against the managing proprietor of a village for his share of the village profits is governed by art 120 of the Lim Act. (*Koital, A, J C*) BHAGERATH BAI v KESHO GANPAT RAO 72 I C 45 1923 Nag 229

—Art 120—Execution sale void—Suit for purchase money. See (1922) DIG 781 MAKAR ALI v SARFADDIN 27 C W N 183 50 Cal 115 70 I C 606 1923 Cal 85

—Art. 120—Money wrongfully recovered under decree—Suit for recovery of Limitation.

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## LIMITATION ACT (IX OF 1908), ART 120.

Where a suit is brought for the recovery of money alleged to have been wrongfully recovered under a decree the period of limitation for such suits is that prescribed by Art 120 of the Limitation Act. (*Hallifax, A C J*) LAKMAN v BISREN BIRJU 71 I, C 42 (2) 1923 Nag 94

—Arts. 120 and 62—Pliff's use—Claim for profits recovered by deft

The plaintiffs were the owners of a village named Ghola while the defendant No 1 and the deft No 3 were the owners of a contiguous Mouzah called Kangore. The deft No 3 owned 5/6th of Mouzah Kangore and the deft No 1 1/6th of the share. Sometime in 1907 there was a dispute between the deft No 3 and the pliffs, predecessor-in interest with regard to some lands one party alleging that the lands appertained to Ghola. The lands were attached under S 146 of the Code of Criminal Procedure and remained under attachment up to the year 1916. In consequence several suits were brought by the deft No 3 for the establishment of his right to these lands and the dispute between the deft No. 3 and the pliffs terminated in a compromise. In the meantime the defendant No 1 withdrew from the collectorate certain sums of money representing his share of the profits of the lands which had been attached as appertaining to Mouzah Kangore on various dates, e. 11th May 1913, 19th June 1913, 7th January 1916 and 18th January 1916. The plff commenced the Suit on 16th March 1917, for among other things recovery of sums withdrawn by the deft No 1 on the allegation that the lands which have been attached being in their Mouzah Ghola the money in the collectorate was their money, held art. 120 and not art. 62 applied. (*Walmsley and Ghose, JJ*) ANANTRAM BHATTACHARJEE v. HEM CHANDRA KAR 50 Cal 475 75 I, C 1041 1923 Cal 379

—Art 120—Record of rights—Publication—Suit for rectification—Cause of action—B I Act, S 111 A

Where plaintiffs are in possession of the property a suit for a declaration that the record of rights did not correctly describe their status as tenants is governed by Art 120 of the Lim Act and the suit can be brought within 6 years of the final publication of the Record of Rights. (*Newbould and Panton, JJ*) BADRUDDIN MUNSHI v SARAPUDDIN BEPARI 1923 Cal 307

—Art 120—Religious Endowment—Alienation of waqf property—Suit for declaration that alienation is void—Limitation

A suit by a worshipper at a mosque or by the mutwalli that an alienation made by the mutwalli is invalid and not binding on the trust, will be governed by Art. 120 if brought during the lifetime of the alienor. The starting point of limitation is the date of alienation. 8 I C 357 Foll. (*Mallick and Ross, JJ*) MAULVI MAHOMED FATI-MUL HI Q v JAGAT BALLAV GHAOSH

2 Pat 391 4 Pat L T 675 74 I C 403  
1923 P 475

—Arts 120 and 126—Sale by Hindu father—Suit to set aside—Limitation.

A suit by a Hindu son to set aside a sale of ancestral property effected by his father is govern-

## LIMITATION ACT (IX OF 1908), ART. 120.

ed by Art. 126 and not by Art. 120 of the Limitation Act (*Martineau and Brasher, JJ.*) GOKHA RAM v SHAM LAL 3 Lah 426 1923 Lah 268

## —Art 120—Suit for construing will—Limitation, when commences

A suit for construction of a will is governed by Art. 120 of the Lim Act, but the right to sue does not accrue from the death of the testator or the date of the probate of the will. So long at least as the estate is in the hands of the executor and the administration has not been completed, the right to obtain construction of the will is a continuing right (*Mookerjee and Chotner, JJ.*) RAMKAMAL BANIK SAHA v SYAM SUNDAR BANIK SAHA

37 C L J 482 75 I C 41.

## —Art 120—Suit by co-mortgagee for his share of mortgage money realised by defendants—Limitation

Where one of the mortgagees sues for recovery of his share of the mortgage money from another mortgagee who had recovered the entire mortgage money held that the suit was governed by Art. 120 of the Limitation Act and that as regards the payments made by the mortgagor more than six years before suit, the claim was barred. (*Broadway and Dundas, JJ.*) MAHOMED IBRAHIM v. MAHOMED ISMAIL.

5 Lah L J 111

## —Art 120—Suit for declaration of partnership right—Limitation

Where more than six years before the date of a declaratory suit regarding a partnership the defendant had to the knowledge of the plaintiff set up that he was a partner, the suit is barred (*Simpson, A J. C.*) KHALIL v MAHOMED ISMAIL.

74 I C 195 1923 Oudh 101

## —Art 120—Suit for declaration as under proprietors—Rent suit and ejectment proceeding—Plaintiff in possession

Limitation for a suit for a declaration that the plaintiff is an under proprietor runs from the ejectment order and not from decree in rent suit against him, on the ground that he was a tenant especially when he is in possession in spite of the decree and order (*Wazir Hasan, A J. C.*) MANOHAR LAL v ACHUTANAND

90 L J 618 74 I C 340 1923 Oudh 27

## —Art 120—Buddhist law—Partition—Ownership of joint estate—Successive marriages—Limitation

A Burman Buddhist married M who died leaving ancestral estate. He then married T, a widow who had been married before and had children by her former marriage. She had also children by her second husband who died in 1264 B. E. Her first husband died in 1281 B. E, leaving the ancestral estate brought by M. The plaintiffs who were the children of the first marriage sued for exclusive possession of their ancestral property against defendants who were children of her first and second marriages. Held that the suit was essentially a suit for partition and that the estate became the undivided family estate of the second marriage in which T enjoyed a joint interest with the plaintiffs. The failure of the plaintiffs to exercise their right to partition of the

## LIMITATION ACT (IX OF 1908), ART. 126

property of the first marriage did not debar them from claiming an entirely separate estate which accrued only on the death of T (*Brown, A J. C.*) MAUNG LU GALE v. MAUNG LU PO

1 Bur L J 267 1923 Rang 110

## —Art 123—Co-heirs—Suit for share of inheritance

Art. 123, Lim. Act applies to a suit for the distribution of shares of corpus of an estate left intestate (*Hald and Lentaigne, JJ.*) MAUNG PO KIN v MAUNG SHIV BYA

1 Rang 405

## —Art 123—Mahomedan Law—Joint property—Limitation for recovery of individual heir's share

Joint family is not an institution of Muhammadans governed by Muhammadan law and there is no joint holding after the death of the proprietor, further it cannot be presumed that the male relations hold as managers of an admittedly joint family. Each sharer becomes entitled on the proprietor's death to a share, and limitation runs against each for the recovery of his share from that day (*Scott Smith and Fford, JJ.*) MT ZAINAB v GHULAM RASUL.

4 Lah 402 1923 Lah 519 73 I C 425

## —Art 124—Suit by trustee of choultry for recovery of possession of the building—Limitation

A suit by a person alleging himself to be the trustee of a choultry for recovery of possession of the building is governed by Art. 124 of the Lim. Act 14 I C 168 Ref (*Spencer and Venkata Subba Rao, JJ.*) SINGARAVELU MUDALIAR v CHOKKA MUDALIAR

46 Mad. 525  
1923 Mad 88 (2) 70 I C 994

## —Arts 125 and 91—Suit by reversioner to challenge validity of gift—Limitation when commences

A suit by the reversioner for a declaration that the gift made by the widow is not binding on him is not barred, merely because he does not sue to have an alleged will declared to be void and the time runs from the date of the gift and not of the will, according to directions in which, it is alleged, the gift is made (*Broadway and Brusher, JJ.*) CHHAJU MAL v KUNDAN LAL.

70 I C. 838 1923 Lah 53

## —Art 126—Alienation by father—Setting aside—Right of sons born and unborn—Cause of action—Limitation—Starting point

A son born in a joint Hindu family acquires by birth an interest in ancestral property but does not acquire any interest in any right to sue. The cause of action accrues after an alienation when the purchaser takes possession and a new cause of action does not accrue upon the subsequent birth of a son in the family. The after born son does not acquire a fresh cause of action and a fresh period of limitation does not start from the date of his birth. In the case of an after born son the time from which the period of limitation is to be reckoned is the date of the transfer and as he was not born on that date under no disability on that date, he cannot obtain the benefit of the provisions of S. 6 of the Lim Act. When he cannot save limitation for himself he can give no

## LIMITATION ACT (IX OF 1908), ART. 127

benefit under S 7 to his elder brother (*Datal and Wazir Hasan, A J C*) RANODIP SINGH v RAMESHAR PRASAD. 1923 Oudh 52

—Art 127—Applicability, See (1922) DIG. COL 785 JAGAT SINGH v ACHAIBAR SINGH 26 O C 191

—Art 127—Hindu Joint family—Exclusion—What constitutes—Possession of guardian is adverse—Ouster—Suit for partition—Limitation

Co parceners in a joint Hindu family are entitled to claim partition of property even though they are excluded from possession and partition is one of the modes of enforcing a right to share in joint family property 3 C. 228 Ref Under art 127 of the Lim Act the defendant has to show when the plaintiff was excluded from enjoyment of the property and when the exclusion became known to him Exclusion by a co owner of other co-owners will not become adverse to those other co owners until they become aware of it but none the less there may be exclusion in fact Where a guardian takes possession of the property of the ward, the presumption is that his possession is taken on behalf of the ward but the presumption is not irrebuttable, 35 B 79 dist

The word "exclusion" in art 127 of the Lim Act involves a mental as well as a physical element. Not only the physical act but also the intention accompanying the act has to be looked at Where therefore a co-sharer holds the property under an express assertion of his title to hold as sole proprietor and makes gifts to other co-sharers as such sole proprietor there is exclusion of the latter and the gifts do not save limitation (*Asworth and Simpson, A J C*) THAKUR RUDRA PRATAB NARAIN SINGH v THAKUR NIRMAL PRASAD SINGH 74 I C 225 1923 Oudh 61

—Art 130—Jagir—Suit for resumption—Limitation

Under Art 130 of the Limitation Act a suit for resumption of a life jagir must be brought within 12 years of the death of the grantee (*Miller, C. J and Mullick, J*) GURU MAHADEO ASRAM PRASAD SAHI v JAGATRAJ KUAR 71 I C 929

—Arts 130 and 131—Right to levy assessment—Limitation claim that tenancy is rent free

Art 130 of the Limitation Act can have no application unless and until the land is found to be rent free, the mere non-payment of rent for a period does not bar the landlord's right to have the rent assessed and to recover rent from his rent Where the suit is not for the resumption or assessment of rent free land, but for the assessment of mal land presumably liable to be assessed, the circumstances that rent has not in fact been paid for more than 12 years before suit is not *per se* sufficient to support a decree of dismissal The right to have rent assessed must continue so long as the relationship of landlord and tenant continued in respect of land liable to be assessed. The right can only be lost by one or other of the modes recognised by law The

## LIMITATION ACT (IX OF 1908), ART 132

right to levy assessment upon rent free land is governed by Art 130 and is consequently extinguished if no suit to enforce the right is instituted within the time allowed On the other hand under Art 131, the right to levy assessment, would, as a recurring right accrue when there has been a demand and refusal, only in those cases where the relationship of landlord and tenant or landlord and occupant had ever existed Once the right is established, then the non payment of rent or assessment would not be sufficient to enable the tenant to begin to set up a title by adverse possession There must be some overt act such as refusal to pay the rent or assessment, before time begins to run Case law reviewed, (*Mo'kerye and Chotzner, JJ*) AKBAR SAHAR v RAMESH CHANDRA MOITRA 38 C. L J 207 1923 Cal 392 72 I. C 329.

—Art 131—Enhancement of rent—Recurring cause of action—Limitation.

A claim to enhance rent is a recurring cause of action and limitation runs from the date of refusal Where the right to enhance the rent is based not on a contract but on statute, the article would not apply (*Bucknill J.*) SHEOPRATAP DUBEY v. SHEOGULAM LAL. 72 I C 781

—Art 132—Applicability of—Claim by subrogation—Payment of prior mortgage by purchaser under invalid sale—Suit to enforce prior mortgage—Limitation. See (1922) DIG COL 785 SIBANAND MISRA v JAGMOHAN LAL 1 Pat 780.

—Art 132—Cause of action—Postponement—Property subject to prior usufructuary mortgage—Covenant to redeem See (1922) DIG COL 786 JAGNA SANYASIAH v MP ATCHANNA NAIDU. 70 I C 759.

—Art. 132—Charge for interest

Claim for interest being subsidiary or incidental to the claim for the principal, the security annexed to the principal must impliedly be available for the interest also (*Kotwal, A J C*) KADARMIYA v CHANDMIYA 1923 Nag 181

—Art 132—Compensation to vendee—Charge of property

Vendee was to receive compensation from the vendor if on partition less area fell to the share of the vendor Held, Art 132 is restricted to cases in which payment or compensation is sought to be enforced out of the property on which it is charged, and not where the plaintiff is only seeking a personal remedy (*Martineau and Brasher, JJ*) RUKAN DIN v HASAN DIN 72 I C 897 1923 Lah 23

—Art. 132—Mortgage bond—Provision for payment by instalments—Waiver—Acceptance of over due instalments

A mortgage bond provided for payment of the debt in twelve instalments the first falling due in Pous 1308 and others in the month of Pous of each of the next 11 years ending with 1319, It was further provided that on the default in payment of any one instalment the creditor would be entitled to recover the entire amount due un-

## LIMITATION ACT (IX OF 1908), ART. 132

der the bond with interest thereon at 2 per cent per mensem, without waiting for the future instalment falling due. The plaintiff alleged that the first instalment was duly paid and the instalment for 1309 to 1311 together with interest thereon were paid and accepted although the payments were made out of time and the suit was brought for the subsequent instalments. The main defence was that the suit was barred by limitation. *Held* (1) that it is a general rule that where money is payable by instalments with a provision that the whole of the money will become due on default of payment of one of the instalments, the money becomes due when default is made in any of the instalments. (2) An exception has been engrafted upon the general rule in certain cases, viz., that if the right to enforce payment of the whole sum due upon the default being made in payment of an instalment has been waived by subsequent payment of the overdue instalment on the one hand receipt on the other, then the penalty having been waived, the parties are admitted to the same position as they would have been in if no default had occurred. (3) The payment and acceptance of overdue instalments in the present case constituted a waiver and the plaintiff was entitled to recover the subsequent instalments. (*Chatterjee and Cuming, JJ*) SURENDRA NATH v. RAJA RESHMI. CASE LAW, 27 C. W. N. 893

— Art 132—Suit to enforce security of the prior mortgagee against the mortgagor—Limitation when starts. See (1922) DIG. COL. 788. SIBANAND MISRA v. JAGMOHAN LALL. 1 Pat 780

— Art 134—Applicability of—Transfer by trustee—Delivery of possession—Simple mortgage.

The first portion of Art 134 of the Limitation Act refers to a case where the transfer by the trustee is accompanied by delivery of possession to the transferee so as to render possible and necessary to institution of a suit for recovery of possession, for instance, in cases of sale, usufructuary mortgage, lease and exchange. It has no application to a case of simple mortgage. The second half of Art. 134 of the Limitation Act provides only for a case where the debt's vendor purports to transfer full ownership when in fact he has only a mortgage right to transfer, it does not refer to the case of a purchaser from a mortgagee of the interest of the mortgagee as mortgagee. 21 Mad 151. Foll Art 134 of the Lim Act does not apply to sales in execution of decree. 25 M 99 foll (*Mookerjee and Cuming, JJ*) CHARU CHANDRA PRAMANICK v. NAHUSH CHANDRA KUNDU, 74 I C 630. 50 Cal 49. 1923 Cal 1

— Art 134—Applicability—Wakf.

Art 134 of the Limitation Act does not apply to a wakf. (*Lord Sumner*) HAJI ABDUR RAHIM v. NARAYAN DAS AURORA. 50 Cal 329. 44 M. L. J. 624. 17 L. W. 509. 25 Bom. L. R. 670. 38 C. L. J. 242. (1923) M. W. N. 441. 28 C. W. N. 121. 32 M. L. T. 153 (P. C.) 71 I C 646. 50 I. A. 84. (1923) P. C. 44 (2)

## LIMITATION ACT (IX OF 1908), ART 134

— Arts. 134 and 144—Execution sale of trust property for personal debts of trustee—Limitation for recovery of trust property.

The purchaser of trust property in execution of a personal decree against the trustee is clearly within the terms of the exception to S 10 of the Lim. Act and consequently he is not prevented by reason of the fact that the property was to his knowledge trust property after the date of the decree, from relying on the provisions of the statute which limit the time within which suits must be brought for recovery. A suit to recover the trust property is governed by Art. 144 of the Lim. Act as the property has been acquired under an execution sale and possession retained throughout by the purchaser. (*Lord Buckmaster*) SUBBAIYA PANDARAM v. MAHOMED MUSTAPHA MARACAYAR. 46 Mad 751. 44 M. L. J. 588. 25 Bom. L. R. 1275. 18 L. W. 903. L. R. 4 P. C. 180. 74 I C 492. 50 I. A. 295. 21 A. L. J. 730. 1923 P. C. 175 (P. C.)

— Art 134—Transferee from mortgagee—Bona fide transferee.

Where there is nothing to indicate that the predecessors of the defendants had acted in bad faith in taking a transfer of property which was subject to a mortgage Art 134 of the Lim Act protects a purchaser in the above circumstances from a claim by the mortgagor unless the claim is brought within 12 years from the date of the transfer. (*Kanhaya Lal, J C.*) MAHOMED ABBAS v. SHAHAMAT HUSAIN. 26 O. C. 64. 9 O. & A. L. R. 1. 1923 Oudh 246

— Art 134—Transfers from mortgagees and trustees—Difference—Notice.

A transfer by a mortgagee does not stand on the same footing as a transfer by a trustee. Where there is valuable consideration, the question of good faith is practically immaterial in the latter case on account of S 64 of the Trusts Act. But where the transferee from a mortgagee purchases in similar circumstances, without having any notice that the transferor had any higher interest than that of mortgagee, Art 134 protects him from a claim by the mortgagor. (*Kanhaya Lal, J C.*) GOMTI MISRA v. DEOTA DIN SINGH. 26 O. C. 197

— Art 134—Transferee from mortgagee—When entitled to claim—Absolute title.

If it can be shown that the transferee from a mortgagee knew that the title of his transferor was not free from doubt and such transferee took no steps whatever to clear up that doubt he can hardly claim the benefit of Art 134 of the Limitation Act.

*Semble* To claim the benefit of the article the transferee must show that he neither had knowledge nor reason to believe that his transferor's title in the property transferred was not a full proprietary one. (*Broadway, J.*) SRI RAM v. MATWALA RAM. 71 I C 577. 1923 Lah 219

— Art 134—Wakf property—Invalid mortgage—Right of mortgagee.

## LIMITATION ACT (IX OF 1908), ART 137.

A person in possession of trust property under an invalid mortgage-deed cannot acquire a valid mortgagee's right by prescription as against the trust. *I L. R. 24 M 831, S C 15 L W 78 P C (Phillips, and Davedoss, JJ)* JAGGA ROV BAHADUR GARU *v* GONHAR BIBI 17 L. W 521 (1923) M W N 347 72 I C 789 1923 Mad 545

## —Art 137—Scope of

Art 137 does not apply to a purchaser at a sale held in execution of mortgage decrees (*Ayling and Venkatasubba Rao, JJ*) TANJORE PALACE ESTATE BY ITS RECEIVER SUNDARAM IYER *v* THIYAGARAJA PILLAI 1923 Mad 160 (2)

## —Arts 137 and 144—Suit for possession against remainderman—Partition—Life estate given to father with remainder to his son—Rights of son.

In a partition among the members of a joint Hindu family consisting of a father and three sons, the land in dispute was allotted to the father and mother for their life and after their death the land was to be divided among the sons equally. In 1905 the father lost possession of the land under a decree passed against him. In 1908 the father, and after him, the mother died. In a suit brought in 1919 by a purchaser of the share of one of the sons in the land *Held* that the suit was not barred, inasmuch as limitation began to run against the son (who was a remainderman) only after 1908 (*Macleod, C J and Crump, J*) RAGHUNATH VITHAL BHAT *v* MADHAV. 25 Bom L R. 456 1923 Bom 415

—Arts 138 and 142—Applicability of—Suit by purchaser in execution sale for possession *See* (1922) DIG COL. 791, JANONI NATH SAHA *v* BAIKUNTHA NATH GHATTAK 27 C. W. N. 259 70 I. C. 602

—Art 139—Applicability—Lease of math lands—Non-payment of rent for 12 years after expiry of lease—Suit for possession *See* (1922) DIG COL. 791 MOHUNT BHAGWAN RAMANUJ DAS *v* RAMAKRISHNA BOSE 74 I. C. 561

—Art 139—Expiry of lease—Holding over—Non payment of rent—Adverse possession by tenant—T. P. Act, S. 116

A suit by a landlord to recover possession from a tenant is governed by Art 139 of the Limitation Act. A tenancy by sufferance would not of itself make the possession of the holder rightful, so as to prevent limitation from running. But that proposition is subject to one important qualification namely, that if the landlord does anything to indicate his assent to the continuance of the tenancy that would itself be sufficient to convert the tenancy by sufferance into a tenancy from year to year. The receipt of rent by the landlord is such an act and would convert the tenancy by sufferance into one from year to year. 37 Cal 674 followed. The effect of holding over upon payment of rent to the landlord was that the tenants must be regarded as tenants from year to year and the tenancy was terminable only by six month's notice expiring with the end of a year of the

## LIMITATION ACT (IX OF 1908), ART 141

tenancy (*Das and Buckmill, JJ*) RAM LOCHAN BAID *v*, KUMAR KAMAKHYA NARAIN SINGH (1923) Pat 54: 4 Pat L T 123 71 I. C. 570. 1923 P 201,

## —Arts 141 and 144—Alienation by widow—Suit for possession after death of widow—Limitation.

A suit by a reversioner for recovery of possession of property alienated by the widow is governed by Art 141 of the Lim Act and time runs from the date of the death of the widow. If the reversioners rely on Art 144 they must prove that adverse possession started in the life time of the proprietor and continued for 12 years up to date of suit (*Chevis, J*) CHANAN SINGH *v*. SALIG RAM. 1923 Lah. 106

## —Art 141—Hindu widow—Settlement in favour of daughters—Alienation by daughters—Suit by grand sons—Maintainability—Limitation

Under a settlement by a Hindu widow in favour of her two daughters each of them purported to take absolutely a moiety of the estate. They subsequently made various alienations of the property without any justifying necessity. The elder daughter died first in 1905 and the younger daughter died in 1908. In a suit instituted in 1918 by the grandsons of the last male owner for recovery of the property from the alienees on the ground that the alienations were not supported by legal necessity, *Held*, that under Art 141 of the Lim Act, the period of limitation began to run only from the date of the death of the surviving daughter and that the suit was not barred (*Spencer and Devadoss, JJ*) JOGA VLERAYYA *v* NAKINA SALLAYIA 69 I C. 389 1923 Mad. 168

## —Arts 141 and 144—Hindu or Mahomedan female—Possession of absolute estate—Suit for possession on her death—Limitation

Art 141 of the Lim Act has no application where a Hindu or Mahomedan female had possession of an absolute estate. Art 144 of the Lim Act applies to a suit for possession on the death of such female (*Kanhayyalal, J C and Dalal, A J C*) CHAUDHRANZARIF-UN-NISA *v* CHAUDHRI SHAFIQ-UZ ZAMAN 26 O C 133 75 I C. 626

## —Art, 141—Onus of proof

Art 141 Lim Act is inapplicable when time has once commenced to run against the last full owner, as in such a case, it continues to run and is not suspended or in any way affected by the mere circumstance that the owner is succeeded by a female entitled to a woman's qualified estate. After the statutory period has run out all persons claiming through the owner are barred. The Article makes it clear, that the reversioner has 12 years after the death of a Hindu or Mahomedan female to establish his right as heir to the last full owner and it lies upon the party in possession to prove that he has got a better title (*Macleod, C J and Crump, J*) PANDURANG *v*, BASAPPA 1923 Bom 364.

## —Art 141—Suit for possession by reversioner—Limitation—Suspension of



## LIMITATION ACT (IX OF 1908), ART 142

Once limitation begins to run it does not stop except in the cases specially provided for by the Lim Act. In 1894 plaintiff's father sued for a declaration that certain alienations by a Hindu widow were invalid but the suit was dismissed on the ground that there was a nearer reversioner one Balusamy. On the death of the widow in 1897 Balusamy sued for possession but his suit was dismissed in 1916 on the ground that his adoption was invalid and he was not a reversioner. Plff sued for possession in 1919.

*Held*, that the suit was barred by limitation. It could not be said that at any time the plaintiff's right was satisfied and that on account of the annulment of that satisfaction a fresh cause of action arose. 12 M I A 244, 43 M 815, 35 C 209; 43 C 660 Dist (*Phillips and Ramesam, JJ*) *RANGANATH RAO v RAMA PANDITHAR*, 44 M L J 87, 70 I C 446, 1923 M 108.

—Art, 142—Adverse possession—Onus of proof.

In a case where the suit is resisted on the ground of acquisition of title by prescription it is not for the plaintiff to prove his title within 12 years. It is for the defendant to prove his adverse proprietary title. 39 Mad 670, 17 A L J 84, *Foll* (*Gokul Prasad, J*) *RAGHA MAI v ABDUS SATTAR*, 74 I C 879, 1923 A 565.

—Art 142—Burden of proof

In 1915 when a survey party came to measure the fields it was found that the defendants were in actual possession of more than half of the land and in excess of the moiety shown under the paper title. *Held* that there being no evidence at all to shew at what period the discrepancy in area between the title deeds and the actual occupation crept in, plaintiff must prove that the discrepancy arose within the last 12 years (*Marten, J*) *KASHINATH GIANOBA v GANESH SITARAM*, 1923 Bom 361.

—Arts 142 and 144—Discontinuance of possession—Submerision and reappearance of land—Rights of true owner—Trespasser—Interruption of possession

Where land becomes submerged it is constructively in the possession of its lawful owner. Consequently where a trespasser has been in possession of lands which at intervals of 4 or 5 years become submerged, there is an interruption of the possession of the trespasser and a revival of the possession of the true owner during the period of submerision. Consequently the trespasser's possession is not continuous and he cannot acquire a title by adverse possession (*Gokul Prasad and Sulaiman, JJ*) *RAM NAIN MISIR v DEBKI MISIR*, 69 I C 912, 1923 A 75.

—Art, 142—Dispossession—Meaning of—Discontinuance.

Art 142 of the Lim Act refers to dispossession or discontinuance of possession. Dispossession implies the coming in of a person and his driving out another from possession. Discontinuance of possession implies the going out of the person in

## LIMITATION ACT (IX OF 1908), ART 142

possession and his being followed into possession by another (*Mookerjee and Cuning, JJ*) *CHARU CHANDRA PRAMANICK v NAHUSH CHANDRA KUNDU*, 50 Cal 49, 74 I C 630, 1923 Cal 1.

—Art 142—Dispossession—What is—Acts done on portions of property—Effect of See (1922) DIG COL 794 *BEHARI LAL v, NRITYA-NANDA GHOSSE*, 27 C W N 340.

—Art 142—Ejectment—Dispossession—within 12 years—Proof of

Where the plaintiff sues for recovery of possession of property alleging a dispossession within 12 years it is for him to prove his possession and dispossession within that period. Payment of revenue may or may not be evidence of possession but relation of rents from tenants is evidence of such possession (*Kolwal, A J C*) *RAGHURAJ v. BALABHDAS*, 1923 Nag 95, 69 I C 883.

—Art. 142—Formal possession—Limitation—When begins to run See (1922) DIG COL 794. *MT PURNA KUAR v MANGAT RAI*, 70 I C 488 (1).

—Arts 142 and 144—Lands forming emoluments of office—Third party in adverse possession—Suit by successor to the office—Limitation See (1921) DIG COL 773, *SUBRAMANIA GURUKKAL v AMMAKANNU AMMAL*, 70 I C 477.

—Arts 142 and 144—Purchaser from trespasser entitled to tack his possession to that of the trespasser

A trespasser cannot tack his own possession to possession of the previous trespasser for purposes of limitation. But where a trespasser sells his claim to possession to a purchaser, that purchaser is entitled to tack the previous possession to his own possession for purposes of limitation and each subsequent purchaser of the claim or right to possession would have the similar right to tack the previous periods of his predecessors in-title (*Lentaigne, J*) *MA MI v HADJI MAHO MED*, 1 Rang 176, 75 I C 81, 1923 Rang 261.

—Art. 142—Suit for possession—Ejectment—Proof of possession within 12 years

The plaintiffs are bound to prove possession within 12 years in a suit for recovery of possession governed by Art, 142 of the Limitation Act (*Ross, J*) *GAYANI SAHU v BALCHAND SAHU*, 73 I C 41.

—Art 142—Suit for possession—Onus on plff to prove subsisting title on date of suit. See (1922) DIG COL 796 *DUNI v MABRI RAM*, 69 I C 171.

—Art 142—Suit for possession—Dispossession—Proof of.

Where a plaintiff sues for possession of property alleging a trespass on the part of the deft the plff must show that he was in possession within 12 years. Otherwise his suit must fail. (*Daniels, J*) *JHARAP RAI v JAINT RAI*, 71 I C 1033, 1923 A 418.

## LIMITATION ACT (IX OF 1908), ART. 142.

— Art 142—*Suit for possession within 12 years of suit*

Where a plaintiff sues for possession, he must prove not only his title but also possession within 12 years if the case falls under Art 142 of the Lim Act. Where there is evidence adduced as regards possession and the land is capable of possession, the plaintiff must succeed on the strength of the evidence and not on the mere presumption that possession follows title (*Chatterjee and Pantan, JJ*) RAM RATAN MANDAL *v* NILMONI CHOWDHURY 1923 Cal 286

— Art 142—*Suit for possession—Proof of title—Delivery of symbolical possession—Adverse possession—Tacking—Independent trespassers* See (1922) DIG COL 796 JANAKI NATH SAHA *v* BAIKUNTHA NATH GHATTAK 27 C W N. 259 70 I C 602

— Arts 142 and 144—*Vacant land—Presumption—Vendee's rights*

Where land is admittedly vacant possession may be presumed to go with title, and in the case of the sale of such land the presumption is that possession is with the vendee.

Where the non proprietor of land sells the same and afterwards the proprietors sues the vendee in ejectment, he has to prove his possession and not merely call in aid the presumption of law in cases of vacant lands, (*Chevis, J*) SAWPAT RAM *v* GANGA DATT 69 I C 427

— Art. 144—*Adverse possession against office holder—Effect on title of successors*

Where Khajri inam lands are held adversely to the office holder for the time being for over 12 years, the title of the office holder and his successors to the land is barred under Art 144 Lim Act (*Odgers and Hughes, JJ*) KHAJI MIR MAJAVATH ALI *v* KHAJI MIR MUJAFAR ALLI, 45 M. L. J. 791 18 L. W. 887 33 M. L. T. (H.C.) 175

— Arts 144 and 148—*Adverse possession—Mortgage—Redemption*

Under Article 144 of the Limitation Act, the possession of the mortgagor, who redeems the mortgage, does not become adverse when he recovers possession of the property on redemption. It must be established that he has been in possession for 12 years on an assertion of a hostile title to the knowledge of his co-mortgagor (*Iwala Prasad, C J and Das, J.*) RAM NARAYAN RAI *v* RAM DENI RAI 1923 P 98

— Art, 144—*Adverse possession—Suit for possession—Death of plaintiff—Successor's right* See (1922) DIG COL 797 MADURA DEVASTHANAM *v* SAMIA PILLAI 70 I C. 369

— Art 144—*Application of Act to Buddhist monastery—Adverse possession*

The Limitation Act applies to suit for possession of Buddhist monasteries.

Possession by a Pargyi of a monastery adversely to the true owner for more than 12 years conveys to him a good and complete title, and the death of the Pargyi does not give the owner a right to sue again. (*Maung Kim, J.*) WISEIKTA *v* PARAMA 1923 Rang. 40

## LIMITATION ACT (IX OF 1908), ART. 144.

— Art 144—*Co-sharer—Common way—Obstruction by one—Suit by the other—Limitation*

A suit by one co-owner against another for the removal of the actual existing obstructions constructed by the other on land which by long usage and by agreement between the parties is reserved for use as common passage is governed by art 144 6 Cal 394 P C ref (*Richardson and Sultrawady, JJ*) DWARKA NATH SEN *v* TARA PRASANNA SEN 1923 Cal 356

— Art, 144—*Delivery of symbolical possession—Adverse possession—Onus.*

On the failure of an owner to pay the Government assessment, his estate or interest in the land is forfeited or rather determined, and under a sale for arrears of revenue what is sold is not the interest of the defaulting owner but the interest of the Crown, subject to the payment of the government assessment, and therefore the time limited by the Limitation act only commences to run from the date of the sale.

Delivery of symbolical possession does not in any way affect the possession of, or give start to a fresh period of limitation against persons who are not parties to a suit or execution proceedings. This rule is applicable to the case of purchasers at sales for arrears of revenue.

In cases governed by article 144, if the plaintiff has succeeded in proving a clear title, the burden lies on the defendant to prove adverse possession for the statutory period, and possession to be adverse must have all the qualities of adequacy, continuity and exclusiveness (*Mookerjee and Chotener, JJ*) JOBEDA KHATUN *v* TULSI CHARAN DAS 1923 Cal. 82.

— Arts 144 and 148—*Denial of title of mortgagor—Effect*

It is not open, to a mortgagee by denying the existence of a mortgage to curtail the period of limitation provided for a suit for redemption. Once a mortgage comes into existence it continues to subsist as a mortgage until the period for its redemption expires despite any attempt made by the mortgagee to deny the existence of that mortgage or set up an adverse title in himself. Art 144 of the Limitation Act IX of 1908 is only a residuary Article and does not apply so long as article 148 of that Act is applicable. (*Kanhariya Lal, J*) RAGHUNATH SINGH *v* JETTO SINGH 74 I. C. 830 1923 A. 613 (1).

— Art 144—*Planting of trees on another person's land—Active trespass—Adverse possession* See (1922) DIG COL 798 MD SHAFI *v* BIDESHARI SINGH 70 I C. 483

— Arts 144 and 149—*Purchaser from Government—Adverse possession.*

In a suit in ejectment by a purchaser from the Government, the defendant pleaded adverse possession for more than 12 years a portion of which was against the Government. Held, plaintiff is not entitled to claim to be in the position of the Government as against which under Art 149, a title would be acquired by only 60 years' adverse possession, but would be governed by Art 144. In such a case the period

## LIMITATION ACT (IX OF 1908), ART. 144.

began to run from the date when defendants' possession became adverse to the Government, as the latter also is plaintiff under S. 2 (8) Lim Act (*Wainsay and Buckland, JJ*) ANNADA MOHAN ROY CHOWDHURY *v* KINA DAS

28 C W N 66.

## —Art 144—Right of fishery—Nature of—Acquisition—Limitation.

A right of fishery of whatever nature is not strictly an easement. It is either an interest in immoveable property or a *profit a prendre* which may be either in gross or appurtenant to a dominant tenement.

The question of acquisition of such rights must be determined by reference to the nature of the right claimed and proved to have been exercised. If it is a mere right to fish not excluding the lawful owner it would appear to be an easement within the description of the word in the Limitation Act and can be acquired by 20 years' uninterrupted enjoyment. If it is an exclusive right of fishery it is an interest in immoveable property and can be acquired by 12 years' adverse possession involving an ouster of the rightful owner. Such a right contains all the essential elements of property and even if it may properly be described as a *profit a prendre*, it has also the distinctive features of an interest in immoveable property. Even if S 26 of the Limitation Act applies, it would not bar the operation of Art 144 and S 28 if the right came under both descriptions (*Miller, C J. and Mullick, J*) MESSRS HENRY HILL & Co *v* SHEORAJ RUI

1 Pat. L R 34 1 Pat 674 : 1923 P 58

—Arts 144 and 127—Sale of joint family properties—Stranger purchaser taking possession—Suit to recover property—Limitation—Starting point—Knowledge See (1922) DIG COL 799 LINGA MUNISWAMI REDDY *v* KANDASWAMI NAICKEN

70 I C 317

—Arts 144 and 120—Suit for declaration of public right of way—Continuing wrong—Limitation See (1923) DIG COL 799, HARISH CHANDRA SAHA *v* PRANNATH CHAKRAVARTHI

69 I C 910

—Art 144—Suit by patnidar to recover possession of *chaukidari chakran* lands from *zemindar*

The patnidar's right under the patni grant to the *chaukidari chakran* lands are not disturbed on resumption of *chaukidari chakran* lands by the Government and settlement of the same with the *remindar*. A suit by the patnidar for the recovery of possession of these lands against the *zemindar* is not barred by limitation unless for more than 12 years prior to the date of the institution of the suit the possession of the *zemindar* had become adverse to the plaintiff. The possession of the *zemindar* may become adverse to the patnidar in a variety of ways e.g. when the lands are settled by the *zemindar* with tenants or when the patnidar after being invited to give and take the land does nothing and the *zemindar* thereafter makes other arrangements either for holding the lands in *khass* or for settling the same with *ijardars* or the like. In each case, the facts have got to be

## LIMITATION ACT (IX OF 1908), ART 144

investigated having regard to the language of Art 144 of the Limitation Act (*Ghose and Panton JJ*) NAGENDRABALA CHAUDHRANI *v*. BEJOY CHAND MAHATAP

50 Cal 577  
28 C W N 114 74 I C 153 1923 Cal 734

—Art 144—Suit for possession—Plaintiff—Onus—Prior possession—Proof of

In cases under Art 144 of the Lim Act it is not incumbent on the plff. to establish possession within 12 years of suit. He has to prove title and it then rests on the defendants to show that he and those under whom he claims have been in possession for over 12 years before suit (*Prideaux, A J C*) SAKHARAM *v* DEOBA.

1923 Nag 2

—Art 144—Suit under—Proof of title—Onus on deft to prove adverse possession.

In cases coming within Art 144 of the Lim Act, if the plaintiff has succeeded in proving a clear title, the burden lies on the defendant to prove adverse possession for the statutory period and possession to be adverse must have all the qualities of adequacy, continuity and exclusiveness 41 A 669, 6 Pat L J 478 Ref (*Mookerjee and Chotzner, JJ*) JOBEDA KHATUN *v* TULSI CHARAN DAS.

1923 Cal 82

—Art 144—*Terminus a quo*

The *terminus a quo* under art 144 of the Lim. Act is the date when the possession of the defendants became adverse to the plaintiff and not to any other person from or through whom he does not derive his right (*Scott Smith and Eforde, JJ*). SARUP SINGH *v* PAL SINGH.

73 I, C 357  
1923 Lah 642

—Art 144—Title—Adverse possession—Prescription

Where the title to a plot of land rests in the plaintiff the burden is upon the defendant to show that that title has been extinguished by adverse possession on his part for over 12 years (*Gokul Prasad, J*) LAKHU *v* SARDAR LAL SINGH

71 I C 265 1923 A 399.

—Art 144 — Transfer inoperative—Suit for possession

Where a transfer is inoperative and a mere paper transaction a suit to recover possession ignoring the transaction is governed by art, 144 Lim Act (*Shah A. C J and Crump, J*) SANGAWA GURUBASAPPA *v*, HUCHANGOWDA GOWDAR

25 Bom. L R. 1207.

—Art. 144—User—Whether adverse possession

According to the general presumption the land being waste land the owner would be presumed to be in possession as possession follows title. Where defendant and his tenants used to gather their cattle and to store fodder and straw, and they used to graze their cattle on the land, held the user of the sort established in this case is common in this country and excites no particular attention. It is neither intended to denote, nor understood as denoting on the one side or the other a claim to the ownership of the land, and, where this, and no more, is the case,

## LIMITATION ACT (IX OF 1908), ART 145

it would be wrong to hold that a claim by adverse possession has been made out 16 Bom 338 Foll (*Abdul Raoof, J.*) *MANSA v KHUSHALI RAM* 1923 Lah 25.

———Arts 145 and 49—Deposit—Suit for recovery—Limitation—Death of depository *See* (1922) DIG COI 800 *FORMOTHANATH MULLICK v PRODYMN KUMAR MULLICK*, 69 I C 900

———Arts 145 and 49—Scope of—Deposit—Meaning of *See* LIM ACT, S 10 AND ARTS, 46 AND 145 44 M L J 431

———Arts 148 and 144—Mortgage—Redemption by one of two co mortgagors—Effect of—Suit by other of the co mortgagors—Limitation

A suit by a mortgagor against a co mortgagor, who has redeemed the mortgaged property, to recover his share on payment of a proportionate share of the mortgage money, is a suit for possession and not a suit for redemption and is therefore governed by Art 144 and not by Art 148 of the Lim Act, (*Jwala Prasad, A. C J and Das, J*) *RAM NARAYAN RAI v RAM DENI RAI* 1923 P. 98

———Arts 148 and 144—Co owners—Redemption of mortgage by one—Suit by others for recovery of their shares—Limitation *See* (1922) DIG, COL 778, *SINNANAN CHETTY v, SIVAKAMI AMMAL* 69 I C 1004

———Arts 148 and 144—Mortgage—Co mortgagors—Redemption by one—Suit for possession by the others—Limitation

A comortgagor redeeming the whole mortgage does not become a mortgagee of the portion redeemed belonging to other co owners, but becomes merely a charge holder, and art 148 of the Lim Act refers only to a suit against a mortgagee and has no application to a suit against a charge holder. The rule that ordinarily one cosharer cannot hold adversely against another cosharer proceeds upon a rebuttable presumption that the cosharer in exclusive possession is holding on behalf of the other cosharers. This presumption is rebutted when it is shown that the cosharer in possession denies the right of the other cosharers to enter into joint possession until they have paid to him their share of a charge upon the property which he has defrayed, (*Campbell, J*) *WAZIR v GIRDHARI* 71 I C. 847 1923 Lah 311

———Arts 148 and 144—Scope—Record of rights—Evidentiary value

Art. 148 provides for a suit against a mortgagee to redeem or to recover possession of immoveable property mortgaged. But a suit by a mortgagor against a co-mortgagor to recover possession of his share of the mortgaged property is not a suit for redemption nor a suit for possession of immoveable property mortgaged. This suit must be governed by Art. 144 and not by Art 148. The possession of the Defendants co-mortgagors, as alienors does not, in any way, contradict the ulterior proprietary right of the Plaintiffs mortgagors. It must be established that the Defendants have been in possession for twelve years on an assertion of a hostile title to the knowledge of

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## LIMITATION ACT (IX OF 1908), ART 164

the Plaintiffs. The entry in record of rights would not operate to the prejudice of the Plaintiffs even if it has recorded the exclusive title of the Defendants, unless it has been established that the Plaintiffs had knowledge of the entry more than twelve years before suit, (*Jwala Prasad, C J and Das, J*) *RAM NARAYAN RAI v RAM DENI RAI* 1923 P 98.

———Art 149—Benefit of—Adverse possession against Government—Purchaser from Government—Position of *See* LIM, ACT, ARTS 144, 149 28 C W N 66,

———Art 158—Award—Decree—Passed on—No time for objections—Effect of *See* (1922) DIG COL 801 *RANGIAH CHETTY v GOVINDASAMI CHETTY* 71 I C 266

———Art 158—Limitation—When commences  
An application to set aside an award must be made within 10 days of the filing of the award and notice of such filing given to the parties (*Po Han, J*) *SHEIKH ABDULLA v. M V R S FIRM* 2 B L J 229

———Art 158—Period—If can be cut down by Court *See* ARBITRATION 90 & A. L. E. 703

———Art. 164—Application to set aside ex parte decree—Substituted service falsely taken out—When duly served

Where a person falsely took out substituted service upon allegations which were false, and based on that an ex parte decree was passed, an application to set the latter aside made within 30 days of the defendant's knowledge of the decree was within time. Notice in such a case could not be said to be "duly served" (*Chavis, J*) *RAM KISHEN v MULA* 69 I C 467

———Art 164—C P Code O. 9, R 13—Substituted service—Mortgage—Foreclosure

The matter of the time at which defendant first had knowledge of the decree only becomes relevant after he has proved that substituted service ought not to have been ordered or was not duly carried. Unless he can do one of these things his application is barred by time. The notice of the application for final decree being as effectual as if it had been served on him personally, the limitation for his application to set aside the ex parte decree runs from the date of the decree (*Batten, J C and Hallifax, A J C.*) *PANJAB RAO v BALLIRAM* 69 I C. 549 1923 Nag 13

———Art 164—Ex parte decree—Knowledge of decree—What constitutes

The words of art 164 of the Lim Act mean something more than mere knowledge that a decree had been passed in some suit in some court against the applicant. The applicant must have knowledge not merely that a decree has been passed by some court against him but that a particular decree has been passed against him in a particular court in favour of a particular person for a particular sum (*Shah, A. C J and Crump, J*) *BAPU RAO SAKHARAM v. SADHU BHIVA.* 47 Bom 485 25 Bom L R 74

72 I C 130 1923 Bom. 193

## LIMITATION ACT (IX OF 1908), ART 165

—Art 165—Scope of Art 165 of the Limitation Act applies only to proceedings under O 21, R 100, C P Code (*Greaves and Ghose, JJ*) *BAHIR DAS PAL v GIRISH CHANDRA PAL*, 1923 Cal 287

—Arts 166 and 181—Application to set aside an execution sale, on the ground of illegality—Application governed by Art 166—Civil Procedure Code, S 47 and O 21, R 90—Absence of publication of the sale in the village where the properties are situate

An application to set aside an execution sale on the ground of illegality though falling under S 47 of the Code of Civil Procedure and not under O 21, R 90 is governed by Art 166 of the Limitation Act not by Art 181 and should be made within thirty days from the date of the sale

Where an application is made after 30 days of the sale to set aside an execution sale on the ground that the proclamation of sale was not made in the village where the property was situate, the application is barred by limitation under Art 166 of the Limitation Act

The case law on the subject considered and discussed (*Spencer and Devadoss, JJ*) *T K P PARAMASIVA THEVAR v PULUKARUPPA THEVAR AND OTHERS* 45 M L J 829 18 L W, 780 33 M L T (H C) 137

—Art 166—Application to set aside sale—Limitation when commences

The period of limitation for setting aside an auction sale begins to run from the date of sale and has no reference either to the date of deposit of purchase money or the date of confirmation of the sale (*Prideaux, A J C*) *SITARAM v ASARAM*, 19 N L R 162

—Art. 166—Execution sale—Absence of attachment—Application to set aside the sale—Limitation

An application to set aside an execution sale on the ground that there was no attachment prior to the sale or that there had been a defective attachment is governed by Art 166 of the Limitation Act (*Lentaigne, J*) *MA PWA v MAHOMED TAMBI* 1 Rang 533

—Art 166—Execution sale—Application to set aside under S 47 C P Code—Limitation See (1922) DIG COL 802 *GANAPATHY MUDALIAR v KRISHNAMACHARI* 70 I C 743

—Arts 166 and 181—Execution sale—Application to set aside—Fraud—Limitation See (1922) DIG, COL 802 *RAMDHARI CHAUDHURY v DEONANDAN PRASAD SINGH*, 1 Pat L R 18 2 Pat. 65

—Arts 166, 181—Execution sale—Fraud and collusion—Setting aside—Limitation—3 years' period

Where an execution sale is alleged to be fraudulent and collusive, the period of taking proceedings to set aside the sale, in the case of fraud, would be three years from the time when the sale took place or when the plaintiffs knew of the fraud, (*Miller, C J and Adam, J.*) *BALDEO SINGH v MEGHU SINGH* 74 I C 202

## LIMITATION ACT (IX OF 1908), ART. 177

—Arts, 166 and 181—Execution sale—Setting aside—Application under S, 47, C, P C—Limitation See (1922) DIG COL 802 *KONDINE KAMAYYA v RAMAMMA* 74 I C 458

—Art 166—Setting aside sale in execution—Limitation when begins to run

For an application to set aside a sale in execution, time begins to run from the date of the sale and not the date of confirmation or date of deposit of 25 per cent. (*Prideaux, A J C*) *SITA RAM v ASARAM* 19 N L R 162,

—Art 168—Dismissal of appeal for default—Notice of hearing of the appeal not fixed—Dismissal—Ultra vires—Application to set aside—Art 168 not applicable See C P C, O 41, R 17 69 I C 618

—Art 168—Dismissal of appeal for default—Restoration—Powers of court

Where an appeal is dismissed for non appearance of the appellant under O 41, R 17, C P, Code, the only course open to the appellant is to have it restored under O 41 R 19 within the period of 30 days prescribed by Art 168 Lim Act As the matter is specifically provided for in O 41, R 19, the court cannot have recourse to its inherent powers (*Schwab, C J and Waller, J.*) *KRISHNASAMI NAIDU v CHENGALROYA NAIDU* 45 M L J 813 18 L W, 870

—Art 175—Scope of

The date of a decree is not a *terminus a quo* of an execution application if there is an agreement between the parties altering the date (*Shadi Lal, C J and Fforde, J*) *BANARSI DAS v RAMZAN* 73 I C 671 1923 Lah 381.

—Art 176—Amending Act 26 of 1920—Not retrospective—Death of appellant—Limitation for bringing on record legal representative See (1922) DIG COL 803 *AJIT SINGH v BHAGABATI CHARAN MUKERJEE* 70 I C 370

—Art 177—Amending Act (XXVI of 1920) S 2—Death of defendant—Time for bringing on record the legal representatives—Limitation

Under Art 177 of the Limitation Act, as amended by S 2 of Act (XXVI of 1920), the period of Limitation for bringing on record the legal representative of a deceased defendant is ninety days (*Page, J*) *SHEODOYAL KHEMKA v JOHAE MULL MANMULL* 50 C. 549 75 I C 81

—Art. 177—Amending Act, 26 of 1920 S 2—Death of defendant or respondent—Time for bringing on record the legal representatives

Under Art 177 of the Limitation Act, as amended by S 2 of Act 26 of 1920, the period of limitation for bringing on record the legal representative of a deceased defendant or respondent is still six months The text of an Act of the Governor General in Council, as published in the Gazette of the Government of India must be taken to be the authorised text of the Act (*Shadi Lal, C J and Martineau, J*) *GOBIND DAS v RUP KISHORE* 4 Lah 387

—Art. 177—Limitation under—Amending Act, 26 of 1920

## LIMITATION ACT (IX OF 1908), ART 177

The period of limitation under Art 177 is now 90 days and does not continue to be six months (*Macleod, C J and Crump, J*) HUSENUDDIN NURUDDIN v, DULAKSHIDAS KESHAVLAL

1923 Bom 299 (1)

— Art 177—Period under, if reduced by Act XXVI of 1920 See (1922) DIG COL 803 RUP KISHORE v GOVIND DAS

69 I C 748

— Art 177—Person not a party at time of death—Application to bring on record his legal representative—Limitation See LIM ACT, ARTS 181 AND 177

73 I C 387

— Art 179—Mortgage decree—Application for order absolute—Limitation—Starting point—Dismissal of appeal for default of prosecution See (1922) DIG COL 803 SACHINDRA NATH ROY v MAHARAJ BAHADUR SINGH

74 I C. 660 (P C)

— Art. 181—Applicability

The Limitation Act does not apply to all applications. The applications specifically described in the 3rd division of the first schedule of the Indian Limitation Act are all the applications under the Civil Procedure Code and under those Article 181 must be so limited (*Pratt and Martin, JJ*) THANA ZALAJI SHET MARWADI v THE SHOP OF DHANA JAWAHARJI

1923 A 268

— Art 181—Applicability of—Leave to appeal to His Majesty in Council—Criminal appeal decided by High Court

*Quaere* Whether art 181 of the Limitation Act applies to applications for leave to appeal to His Majesty in Council from the decision of the High Court in a criminal appeal (*Mookerjee and Chatterjee, JJ*) PHILLIP E BILLING LOWEST v EMPEROR

38 C L J 406

— Art 181—Applicability — Proceedings under S 37 Prov Ins Act, See PROV INS ACT, S 37

69 I C 403

— Art 181—Application for restitution—Time when begins to run

An application for restitution is governed by Art 181 and time begins to run from the date when the decree was reversed. The fact that this was confirmed in second appeal does not affect the question of limitation (*Martineau, J*) CHANDA SINGH v BISHEN SINGH.

5 Lah L J. 389

— Art 181—Application to revive prior one—Minor legal representatives—Limitation if saved

Where the decree holder died pending execution and as his legal representatives who were minors did not come on record the application was struck off, and more than 3 years from the date of the prior application but while they were still minors an application for its continuance or revival was put in *Held* Art 181 applied, but limitation was saved under, S 6 of the Lim Act (*Kanhaya Lal, J. C*) AKHTAR HUSAIN v QUDRAT ALI

26 O C. 206 1924 Oudh 31

## LIMITATION ACT (IX OF 1908), ART 181

— Art. 181, 182—Attachment before judgment—Decree—Claim petition allowed—Suit to set aside—Application to execute—Limitation.

Following an attachment before judgment, a decree was passed, but in execution a claim petition was put in and allowed. The decree holder filed a suit to set aside the order on the claim petition and got decree in his favour, by which time the original decree was more than 3 years old. *Held*, an application for execution put in at that stage is in effect one to revise the former application and is governed by Art 181 of the Lim. Act and not by Art 182 (*Krishnan and Odgers, JJ*) MANYAM SURAYYA v SURKAVALI VENKATARATNAM

45 M L J. 822 19 L W 20

— Art 181—Decree for redemption—Right of mortgagor to deposit money at any time

The position of a mortgagor who has obtained a decree is very different from that of a mortgagor who still has to bring a suit. In the latter case all sorts of defences may be pleaded and it may be found that his right is barred by limitation or by renunciation or that the claimant is not in fact the legal representative of the original mortgagors or that the integrity of the mortgage has been broken. In fact until a decree has been passed there is no certainty whether or under what conditions he may be entitled to recover the property but once he has got a decree in his favour his right is definite, ascertained and final, subject only to his depositing the money. The manner in which a redemption decree is to be enforced is not a mere matter of procedure but a question of right. The right of a mortgagor to deposit the money under a decree *visi* is a continuing right which may be exercised at any time until an order absolute is passed and an application to deposit the money is not governed by Art 181 of the Limitation Act (*Daniels, A J C.*) RAM RUP v GHANI AHMAD

9 O. L. J. 624 9 O. & A. L R 62 74 I C 162  
1923 Oudh 166

— Art 181—Execution application—Limitation

An execution application in order to save limitation need not be directed to the same property which is applied for in the subsequent application or even indeed the same person. (*Daniels, J*) GOPAL NATH SHUKUL v SAT NARAIN SHUKAL

74 I C 1014 1923 A 384

— Art, 181—Mesne profits—Application for ascertainment of See (1922) DIG COL 805. KUBER SINGH v MUSSAMMAI RAJ KUMARI

10 O L J 56

— Art 181—Mortgage decree—Appeal from preliminary decree—Application for final decree

Where a preliminary mortgage decree for sale was taken up in appeal to the High Court, the period of limitation for an application for final decree runs from the date of the High Court decree (*Ryves and Daniels, JJ*) MAHABIR PRISAD v KANHAIYA LAL

L R 4 A 278  
21 A. L J. 526 74 I C 372

— Art 181—Mortgage—Preliminary decree—Application for final decree—Limitation.

## LIMITATION ACT (IX OF 1908), ART 181

An application to make a preliminary decree final in a mortgage suit is governed by art 181 of the Limitation Act (*Macleod, C J and Crump, J*), *HARJIVAN DEORAJ v GAJANAN*  
25 Bom L R 459 73 I C 187  
1923 Bom 420

—Art 181—Mortgage decree—Right to apply for personal decree—Sale of property—Execution of sale deed

In execution of a mortgage decree, the court appointed a receiver and under the direction of the court he sold the property to the decree holders but the price was not sufficient to meet the decree. On an application put in by the latter for a decree under O 34, R 6 for the unrealised portion of the debt within 3 years of the execution of the sale deed, *held* the application was within time as the conveyance of the mortgaged property was not complete until the sale deeds had been executed (*Piggott and Walsh, JJ*) *RAJ NARAIN MAL v, SANTI LAL*  
21 A L J 37 L R 4 A 73  
1923 A 203

—Arts 181 and 177—Person not party at time of death—Petition to bring on record legal representative

Where a person is not a party to suit or appeal, but on his death his legal representative is sought to be impleaded art 181 applies and not art 177 (*Campbell, J*) *WAHID BAKSH v LALTA PERSHAD*  
73 I C 387

—Art, 181—Right to apply—Consent decree in a mortgage suit.

It is quite clear that an application for making a conditional decree passed by consent, absolute would be governed by the general Art 181 which applies to all applications for which no period of limitation is provided elsewhere in the Limitation Act or by Sec 48, C P. C. Even where there is a condition in the decree that until one judgment debtor's share is found to be insufficient no steps are to be taken against the other judgment-debtor the right to apply against both accrues at the same time. The right to apply for order absolute is one thing and the determination of the question as to which property should be sold first is another (*Stuart and Sulaiman, JJ*) *BALDEO DAS v. PITAMBAR*  
70 I C 840 1923 A 29

—Art 181—Right to apply for a final decree—Limitation—Starting point—Amendment of decree

A preliminary decree for sale by a mortgagee was passed on 25-1-1917. Time was given to the mortgagees up to 22-3-1917 to pay up the decree amount. On 28-4-1917 a clerical mistake in the decree was corrected and the sum of Rs 2,486 was substituted instead of Rs 2,350 as being the decree amount. On 27-4-1920 plff applied for the passing of a final decree. *Held*, that the right to apply accrued on 22-3-1917 and that inasmuch as the application was made more than 3 years after that date it was time barred. There was no alteration in the decree and it cannot be said that the decree as amended on 28-4-1917 was a new decree. The mere fact that by a clerical error

## LIMITATION ACT (IX OF 1908), ART 182

a wrong sum had been entered does not affect the case, (*Ryves and Stuart, JJ*) *RAM CHANDER v JAI MAL*  
69 I, C 199 90 & A L R 130  
1923 A 22 (1)

—Arts 181, 182 (7)—Scope of—Execution against estate—Wrong legal representative on record—Effect

Where execution is to issue, unless the decree is paid within 6 months of the decree, on application in execution is governed by Art 181 and the period is 3 years from the time when the right to apply accrues. Even if Art 182 (7) applied, time begins to run only from after the expiry of the period of 6 months provided for payment in the decree. Provided execution is sought against the estate of the judgment debtor, the fact that a wrong legal representative's name was originally entered in the application, will not vitiate the proceedings (*Kanhariya Lal, J.*) *SURAJMAN CHAUBE v ANJORE SHUKAL*  
21 A L J 861  
L R 4 A 591 90 & A, L R 989

—Art 181—Time for applying for final decree—Preliminary decree affirmed on appeal

Where a preliminary decree in a mortgage suit has been affirmed on appeal, an application made within three years of the date of the affirmation with a view to make a final decree is within the period prescribed under art 181. *39 All, 641, 40 All 203 40 Mad 714 (foli)* (*Mukerjee and Chotner, JJ*) *UMA CHARAN CHAKRAVARTHY v NIBARAN CHANDRA CHAKRAVARTAY*  
1923 Cal 389 37 C L J. 452 75 I C 2

—Art 182—Application by assignee of decree to be recognised—If a step in and—Failure to give notice—Effect

An application by the assignee of a decree to have his name substituted is a step-in aid of execution. Where such an application was accepted by the Court, even though without notice to the judgment debtors, the applicant can suppose his application is good in law and the defect which was not discovered then, will not prevent its being a step-in-aid of execution (*Simpson, A. J C*) *MT. MARIAM BEGAM v MAHOMED MEHDI*  
90 & A. L R 635  
74 I C 40

—Art 182—Application for final decree—Injunction—Dismissal of application for final decree—Effect

An application for final decree in a redemption suit was stayed by means of an injunction in a pre-emption suit, and though the money was deposited in court, the application was dismissed, the money throughout remaining in court. *Held* the dismissal must be deemed as one purely for statistical purposes and amounts only to a suspension of proceedings until some obstacle is removed, in which case it must in law be treated as still pending (*Oldfield and Devadoss, JJ.*) *AYISSA UMMA v ABDULLA*  
1923 M. W. N 670

—Art 182—Application for restitution—Reversal of decree on remand—Limitation

Plaintiff in execution of a decree obtained possession of certain property. The decree was reversed in Second Appeal and the case was

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remanded for re-trial. After remand the suit was dismissed. The defendant applied for mesne profits for the period he was kept out of possession. *Held* that the application which was made within three years of the decision in favour of the defendant, after remand was in time. (*Macnair, A J C*) SONBA V PARASHRAM

1923 Nag 101 (1)

—Art 182—Decree—Date of appellate decree—Party not affected by appeal—Execution of decree—Limitation

Plaintiff sued defendants for damages for tort and his suit was decreed against some of the defendants. Plaintiff appealed to the High Court against the other defendants. After the disposal of the appeal by the High Court plaintiff sought to execute the original decree against all the defendants. *Held* that the application for execution being within 3 years of the decree on appeal was not barred. In such cases the court should see whether the original decree was really one decree or an incorporation of several decrees and whether the appeal against it imperilled the whole decree or not for the execution of which application is made. (*Das and Kulwant Sahai, JJ*) PANCHU BANIA V ANAND THAKUR

2 Pat 712 1 Pat, L R 356

—Art 182—Discharged insolvent—Application against—If a step in—aid

An application for execution taken out against a discharged insolvent judgment debtor is not one in accordance with law and as such is not a step-in aid of execution. (*Shah, A C J and Coyajee, J*) GHANSHAMDAS BALKRISHNADAS V MOTICHAND HORAKCHAND 25 Bom L R 1237

—Art 182—Execution application—Application for ascertainment of mesne profits—Liability of surety

An application for the ascertainment of mesne profits awarded by a decree prior as well as subsequent to its date, is not a proceeding in the suit but a proceeding in execution and comes within Art 182 of the Lim Act. Though sureties may not be necessary parties to an application by a decree holder for ascertaining the mesne profits, still an application for ascertainment of mesne profits against the judgment debtors does not keep alive the decree against the sureties. (*Macleod C.J. and Crump, J*) USUF ALI MUJAWAR ALI V AMIN CHANDESAHEB 25 Bom L R 810

73 I. C. 233 1923 Bom. 366

—Arts 182 and 181—Execution—Application by decree holder auction purchaser. See (1922) DIG Col 806 KAMAL NAIN SINGH V MAHARAJA BAHADUR KESHO PD SINGH

1 Pat 701 4 Pat L, T, 226

—Art 182—Execution of application—Continuation of previous application—Test of

It is well established that an application for execution can be considered as a continuation of the previous application only when it is similar in scope and character to the prior application. Where the former application asked the Court in form and in substance to sell the properties of

## LIMITATION ACT (IX OF 1908), ART 182

the judgment debtor other than those which were comprised in the mortgage and the present application, in form and in substance asked the court to release the money from the judgment debtor by his arrest and his detention in jail, *held* that it was impossible to consider the present application as a continuation of the old application. (*Das and Adam, JJ*) RAM SIVENDRA NARAYAN OJHA V AWADH BEHARI SARAN,

4 Pat L T 295 71 I C 332 1923 F 159

—Art 182—Execution application—Continuation of—Suspension of execution

Where the proceedings in pursuance of an application for execution are suspended by the executing Court through no act or default of the decree holder an application to receive and carry on the execution will not be barred even though made after three years, after the suspension of the execution. 27 A 344 followed. (*Lindsay, J*) AMJAD ALI KHAN V. MOHAMMAD USMAN

1923 A 471 71 I C 963

—Art, 182—Execution of decree—Dismissal of application after issue of notice under O 21, R 22, C P Code—Fresh application—Limitation—Starting point

Where on an application for execution of a decree notice under O. 21, R 22 C P Code was issued and the application was thereafter dismissed the limitation for a fresh application for execution begins to run from the date of the issue of the notice and not from the date of the execution application. (*Hopkins, S M and Burn, J M*) ALEXANDAR V RANJIT SINGH

L R, 4 A 79 (Rev.)

—Art 182—Execution—Partition decree—Decree not drawn up owing to delay in furnishing stamp papers—Time for execution

Under the Stamp Act a decree for partition is chargeable with duty to the amount prescribed by Art 45 of Schedule I of the Act and the expense of providing the proper stamp is to be borne by the parties to the decree in such proportions as the Court directs. The result is, that a decree for partition is not formally drawn up until paper bearing the proper stamp is supplied to the Court. The decree is then engrossed on the stamp paper and signed by the Judge. A decree for partition was signed by the Judge on the 2nd January 1920, no stamped paper having been furnished till on or shortly before that date. The judgment was pronounced on 25-3-1914. The delay in signing the decree was due not to any fault of the Court or to any cause beyond the control of the parties but solely to the delay of the parties in supplying the requisite stamped paper. *Held*, that the circumstances disclose no ground for saying that limitation did not run from the date of the decree as provided in Art 182 of the Limitation Act. (*Sanderson, C J, and Richardson, J*) KISHORI MOHAN PAL V. PROVASH CHANDRA MONDAL 72 I C 646

—Art 182—Instalment decree—Default—Waiver—Limitation

Plff obtained a decree in February 1916 for a large sum of money payable in monthly instalments of Rs 50 each, the whole amount to be



## LIMITATION ACT (IX OF 1908), ART 182

realised by sale of the hypotheca on default in payment of any six instalments. There was default in payment of the first six instalments up to August 1916. In April 1917 the debts paid Rs. 5,500 and in January 1918 Rs. 400 towards the decretal amount to the plaintiffs. In September 1919 plaintiffs applied to recover the balance of the decretal amount by sale of the mortgaged properties. On a question arising as to whether the payments of 1917 and 1918 constituted waiver *Held* that there was no evidence of waiver and that the application was barred by limitation. (*Macleod, C. J. and Crump, J.*)  
HANSRAJ GODHAI v BAPI

25 Bom. L. R. 153 72 I C 275  
1923 Bom 207

— Art 182—Prior application—Execution allowed to proceed—Default of judgment debtor—If can raise question again.

Where an execution application is allowed, without the judgment debtor contending it is barred, and the same is not challenged in appeal he cannot in subsequent proceedings in execution re-agitate the question that the prior application was barred. (*Dawson Miller, J. C. J. and Kulwant Sahay, J.*) JAGO MAHLON v KHIRODHAR RAM

2 Pat 759 74 I C 130

— Art 182—Restitution—Article applicable—Proceedings in execution

An application for restitution is in substance an application for execution though the rules of O 21, C P Code may not apply. Consequently Art. 182 of the Lim. Act applies to such applications. (*Miller, C. J. and Jwala Prasad, J.*) BASANTA KUMARI DASI v MALMAKUND MAHWARI

2 Pat 277 1 Pat L R 338  
72 I C 912 1923 P 371 (1923) Pat 1

— Art 182—Revival of execution application.

An application for execution may be deemed to be one to revive and carry through a pending proceeding, when the latter was arrested by reason of circumstances over which the decree holder had no control. (*Mookerjee, and Panton, JJ.*) RAJANI BANDHU CHATTERJI v. KALI PRASARMA CHATTERJI

74 I C 279

— Art 182—Second appeal to High Court—If a step-in-aid

An execution petition having been dismissed in the first Court as well as an appeal, a second appeal was preferred to the High Court, where too it was dismissed. *Held*, the presentation of a second appeal within 3 years of a subsequent application for execution would not be a step-in-aid. (*Mookerjee and Panton, JJ.*) RAJANI BANDHU CHATTERJI v KALI PRASMA CHATTERJI

74 I C 279

— Art 182—Step-in-aid of execution—Summoning witnesses

In execution of a simple money decree, certain property was attached. An objection was preferred and the decree holder put in his application to summon witnesses in reply to the objection. *Held* this application for summoning witnesses was a step-in-aid, 19 A. L. J. R. 843 Foll

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(*Gokul, Prasad J.*) ABDUL QUDDUS v. SAYED AHMAD HUSAIN 1923 A 415

— Art. 182—Step-in aid—Order for attachment.

Where on an execution petition being put in notice was ordered and on the absence of the judgment debtors on the day fixed, the court passed an order directing attachment, this does not amount to a step-in aid of execution. (*Oldfield and Devadoss, JJ.*) DATTADA LAKSHMI NARASA RAJU v GANGAANA

45 M L J 680  
(1923) M W N, 660

— Art 182—Step-in-aid—Suspension of execution proceedings

Where execution proceedings are suspended at the instance of a stranger having filed a suit in respect of the property which is the subject-matter of the execution proceedings, an application made just after the close of that suit is not time barred though it is filed more than three years after the date of suspension. The application is in effect one to revive the old one and not a new application at all. 27 All 337 P C Foll. (*Walsh and Kanhaiya Lal, JJ.*) MAHOMMED HADI v DEBI PRASAD

1923 A 600

— Art 182—Summoning Patwari—Step-in-aid

An application to summon a patwari for ascertaining the area is a step-in aid of execution. (*Dalal, A. J. C.*) MATHURA SINGH v HANDHAI PATHAK

9 O & A, L R 465 74 I C 816

— Art 182—Surety for payment of mesne profits—Application for ascertainment of amount—If keeps decree alive.

Pending an appeal against a decree for possession and mesne profits, sureties were given and execution stayed. The decree was confirmed and application was put in to arrears of mesne profits. More than 3 years after the passing of the appellate decree the surety was sought to be made liable. *Held* the application against him was time barred as the application for assessing mesne profits did not keep the decree alive against him. (*Macleod, C. J. and Crump, J.*) SAYAD YUSUF ALI v SAYAD AMIN,

47 Bom. 778

— Art 182, Expl 1—Decree passed jointly in favour of more persons than one—Decree for partition—Execution application by defendant—Fresh starting point in favour of plaintiff. See (1922) DIG COL. 814 VASUDEVAMUTHU SASTRY v VITTAL SHASTRY

70 I C 296

— Art 182 (1) and (5)—Execution of decree—Limitation—Decree in favour of one person—Transfer of portions thereof to different persons—Execution application by one of the transferees as regards portion of the decree transferred to him—Limitation if saved as regards other transferees. See (1922) DIG COL 808 PUSARAPU VENKATA REDDAYA v IHORAM YARAKAYYA

69 I C 277

— Art. 182 (2)—Appeal—If should be bona fide—Dismissal for non payment of Court fee

The words "appeal" in Art 182 (2) Lim. Act does not mean bona fide appeal. Even when

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an appeal is dismissed for non-payment of court fees, limitation runs for purposes of execution only from the date of the order of dismissal (*Walmsley, and B B Ghose, JJ*) BASANTA KUMAR ROY *v* MANJURI DASOI 74 I C 679

—Art 182 (3)—Application for review of decree—Dismissal—Appeal against order—If suspends limitation

The decree under execution was sought to be reviewed and on the petition being dismissed, an appeal was preferred *Held*, such an appeal being incompetent in law, the running of limitation for purposes of execution was not suspended by reason of the pendency of the appeal (*Greaves, and Ghose, J*) RAM RATAN CHOWDHURI *v* UPENDRA CHANDRA DAS 1923 Cal 288

—Art 182 (4)—Decree barred—Amendment—Effect of

Where a decree capable of execution becomes barred, its amendment cannot entitle the decree holder to a fresh period of limitation under Art 182 (4), because after it is dead, it cannot be revived by a subsequent application for amendment (*Abdul Raouf and Moli Sagar, JJ*) JHAMYAN LAL *v* DAULAT RAM 5 Lah L J 398, 73 I C 461

—Art 182 (5)—Application in accordance with law—Defect—C. P. Code, O. 21, Rr, 15 and 22 See (1922) DIG COL 809 GOBERDHAN DAS *v* SATISH CHANDRA RAI 1 Pat 609 69 I C 668 4 Pat L T 263

—Art 182 (5)—Application in accordance with law—Meaning of—Application to transfer decree for execution—Court having no pecuniary jurisdiction—If a step-in-aid of execution, See (1922) DIG COL 899 AMRIT LAL *v* MURLIDHAR 1 Pat 651

—Art, 182 (5)—Application in accordance with law—Plaint filed in suit to set aside fraudulent transfer—Decree—Limitation—Saving of

A obtained a decree for money against B. On 22-7-1918, B transferred all his properties to a relation of his C by a sale dated 20-8-1918. There upon A instituted a suit on 26-11-1918 in the court which passed the decree, for a declaration that the transfer was fraudulent and void and that the properties were liable to attachment and sale in execution of his decree impleading B and C as parties to the suit. The suit was decreed on 23-8-1921. A applied to execute his decree by sale of the properties of B and C pleaded that the application was barred under Art 182 (1) of the Lim Act. *Held*, that the plaint in the suit filed by A against B and C in the court which passed the decree and was bound to execute it, constituted a step-in-aid and that the present application was not barred 22 A, 358, 25 B 639, 30 A 179, 35 B 452 32 M. 425 19 A L J 905 Ref 37 B 559 dist (*Wazir Hasan, A J, C*) SHEO RAM *v* RAM BHAROSEY 26 O C 71 1923 Oudh 9 69 I C 660

—Art 182 (5)—Application in accordance with law—Return for amendment—Amendment not complied with.

## LIMITATION ACT (IX OF 1908), ART 182

Where an order requiring amendment of an execution application was not complied with it cannot be said that the application was never properly presented in accordance with law.

It is not true that once the application is returned for amendment of any kind, even though the defects had not vitiated the application it could not be regarded subsequently as made in accordance with law unless the defects had been cured within the time allowed (*Miller, C J and Kulwant Sahay, J*) BHAGWAT PRASAD SINGH *v* DWARKA PRASAD SINGH 2 Pat 809

(1923) Pat 229 4 Pat, L T 513  
1 Pat L R 453 74 I C 174 1924 P 23

—Art 182 (5)—Application for confirmation

An application for confirmation of sale is not an application to take some step-in-aid of execution (*Das and Adams, JJ*) TRILOKE NATH JAH *v* BANSMAN JAH, 2 Pat 249 72 I C 938 (1923) P 22 1 Pat. L R 6

—Art 182 (5)—Application for delivery of possession—If a step

An application by a decree holder to be put in possession of the property is not an application to take some step in aid of execution (*Das and Adams, JJ*) TRILOKE NATH JAH *v* BANSMAN JAH (1923) P 22 1 Pat L R 6 2 Pat 249 72 I C 938

—Art 182 (5)—Application to foreign court—Execution in British Indian Court—Law applicable

An application to the court of a Native State to transmit its decree to a British Indian court for execution is a step-in-aid within Art. 182 (5) of the Lim Act 40 M 1069 dist

Art, 182 (5) of the Lim. Act must be read to mean to take some step which according to the law of the place where the application therein referred to has to be made is a step-in-aid of execution 40 M. 1069 dist (*Sir Walter Schwabe, C J and Wallace, J*) SRINIVASA AYYANGAR *v* NARAYANA RAO 69 I C 932 1923 Mad 72.

—Art 182 (5)—Application by mortgagor for extension of time to pay up a redemption decree See (1921) DIG COL 720 (1922) DIG COL 812 SANKARA NAINAR PILLAI *v* P V THANGAMMA 70 I C 333

—Art, 182 (5)—Application for transfer of a decree already transferred—Proper Court, See (1922) DIG COL 811 RANGASWAMI SHETTI *v* BESHAPPA 47 Bom 56.

—Art 182 (5)—Nature of application—Pendency of application necessary—Objection to enter up satisfaction—Plaint in a suit under S 53, T P Act—If a step-in aid See (1922) DIG Col 812 KUPPUSWAMI CHETTIAR *v* RAJAGOPALA AYYAR 32 M L T (H C) 27. 70 I C 324,

—Art 182 (5)—Oral application—Application to record payment

An oral application by the decree holder to record a payment made to him out of court is a step-in-aid (*Hallifaa, A J, C*) NARAYAN RAO *v* BALKRISHNA 1923 Nag 11 (1).

## LIMITATION ACT (IX OF 1908), ACT, 182

— Art 182 (5)—Oral application payment of batta for arrest of judgment-debtor *See* (1922) DIG, COL 811 SEKARIPURAM GRAMAM KRISHNA AIYAR *v* MAYANKUTTI 70 I C 80

— Art 182 (5)—Prior application against judgment debtor—Subsequent application against surety and judgment debtor—Limitation—Saving of *See* DIG COL 812 BADRUDDIN *v* MAHOMED HAFIZ 44 A. 743.

— Art 182 (5)—*Step-in-aid—Appeal from order made in the course of execution proceedings—When a step in-aid.*

An appeal to the High Court against an order in an execution is not an application for execution in accordance with law to the proper court or a step-in aid of execution within the meaning of Art. 182 of the Lim Act (*Macleod, C J and Crump, J*) GOVINDDAS RAJA RAMDAS *v* GANPATDAS. 47 Bom 788 25 Bom. L R 518 73 I C 1030 (1) (1923) Bom 431

— Art. 182 (5)—*Step-in-aid—Application for adjournment to arrive at a compromise—Nature of*

Where both the parties apply to the Court to postpone the hearing of a pending execution with a view to arrive at a compromise, the application so made cannot be considered a step-in-aid of execution. It was intended as a step which, if successful, would avoid the necessity for execution 38 M 695 Rel (*Macleod, C J*) VISHNU NAGAPPA *v* NARASIMHA PANDURANG

25 Bom L R 490  
73 I. C 1011 1923 Bom 461

— Art. 182 (5)—*Step-in aid—Application for execution—Minor—Guardian dead—Effect of*

An application for execution, in which owing to *bona fide* mistake, the minor judgment debtor was described under the guardianship of a dead person, constitutes a step-in-aid of execution under Cl. (5) of Art 182 of the Limitation Act 17 Mad 76 and 35 Cal 1047 foll 31 All 572 (P. C.) dist. (*Mullick and Kulkarni Sahay, J, C*) PURAN MALL *v* MT DILWA 4 Pat. L T 54 72 I C 1003 (2)

— Art 182—Cl. (5)—*Step in aid of execution—Application for adjournment—Application eventually dismissed—Effect of*

The question whether an application is or is not a step in-aid of execution, must depend upon the circumstances of the case. Objections under S 47 C, P Code were filed on 17—4—1917 and on 28—4—1917 the decree-holder applied for time for obtaining copies of the objections and citing witnesses. The case was adjourned to 26th May and then to 23rd June and again to 25th June. No written statement was necessary to be filed and no witness was as a matter of fact cited. On the 25th June, the decree holder's pleader stated that he would not prosecute the case any further and the execution case was accordingly dismissed for non-prosecution. It became unnecessary therefore to proceed with the objection of cases which were disposed of on the next

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day. A subsequent application for execution was filed on the 26th April 1920 and, objection was taken that it was barred by limitation. *Held* that under the circumstances of the case, the application for time filed by the decree holder on 28th April 1917, did not constitute a step-in-aid of execution. Nor, could the subsequent application be considered as one in continuation of the prior application as it asked for different reliefs from the previous one (*Chatterjee and Cumming, JJ*) RAJENDRA LAL SAHA *v* ABDUL KARIM 27 C W. N 505 37 C L. J. 292 1923 Cal 572

— Art. 182 (5)—*Step-in aid—Execution—Arrest warrant returned unexecuted—Order for fresh steps*

On 3rd May 1917, a warrant of arrest, issued at the instance of the decreeholder had been returned, the judgment-debtor not having been found. The Court passed an order on the following terms —“Fresh steps, if any, by 10th May, 1917” This order or the application which must presumably have been made in connection with it was relied on as a step in aid of execution, *Held* that the order itself was clearly not a step taken by the petitioner (decree holder). It was impossible to say whether it was based on any application made or what the nature of that application was. Even on the assumption that there was an application for further time that would not be a step-in-aid (*Oldfield J*) PARTHASARATHY CHETTY *v* ABDUL RAHIM SAHIB 18 L W 109 (1923) M W N 871 75 I C 489 1923 Mad 686

— Art 182 (5)—*Step-in aid—Payment of process fee*

The payment of talbanna in compliance with an order of court is not an application to take a step in-aid of execution which could extend the period of limitation (*Kanhaya Lal, J C*) SHEIKH MAHOMED ALAM *v* BACHCHU 90 & A L R 68 73 I C. 211 (1)

— Art 182 (5)—*Step-in aid—Stay order*

*Marten, J, Quære*—Whether a stay of proceedings granted at the instance of the plaintiff can be said to be a step-in-aid-of execution. A mere adjournment has been held not to be such a step-in-aid of execution, although an application for adjournment in order to obtain further evidence has been held to be a step in-aid 27 Cal 285 ref.

*Pratt, J*, the application for stay is not a step-in aid of execution, (*Marten and Pratt, JJ*) PANDY WALAD DAGDU MAHAR *v* JAMNADAS 1923 Bom 213

— Art 182 (Cl 5)—*Step in-aid—Transfer of decree—Application to Court from which decree has been transferred—Not a step-in aid*

Where a decree has been transferred for execution to another Court an application made to the Court from which the decree has been transferred is not a step-in-aid 39 M 640 followed (*Adams and Das, JJ*) JNANENDRA NATH GHOSH *v* KUMAR JOGINDRA NARAIN SINHA 2 Pat. 247 74 I C 608 1923 P 384

## LIS PENDEN'S

LIS PENDEN'S See T P ACT, S 52 Suit for pre-emption—Declaratory decree affecting sale—Effect on pre-emption suit. See (1922) DIG. COL 814. HAZARA SINGH v BUBE KHAN

69 I C 698

LOWER BURMA LAND AND REVENUE ACT, S 56 (a)—Civil Court—Jurisdiction—Sale of land for arrears of revenue—Fraud—Rights of co-owners

Where one co-owner of a plot of land with the object of defeating the other co-owners makes default in the payment of land revenue and thus causing the property to be sold buys it at a low price in the name of his son, the other co-owners can maintain a suit in the civil court for declaration that their rights are not affected. S 56 (a) of the Land Revenue Act only ousts the jurisdiction of civil courts as to a determination of the validity of sales under S 47.

The sale, in such a case, though it has the appearance of a sale for arrears of revenue, is in essence, a private alienation. (Pratt, J) MA ZA v MA MI

1923 Rang 17

LUNACY ACT, S 14—Proviso 2—Orders of District Magistrate—Power of High Court to revise

The orders of a District Magistrate under part 2 of the Indian Lunacy Act with respect to the reception, care and treatment of lunatics are executive and not judicial in their nature and are not open to revision by the High Court. Where however a person considers himself aggrieved by such an order he may apply under Part 3 for a regular inquisition conducted by a Judicial Officer. The result of such inquisition is conclusive and over rides any order which may have been passed summarily by the executive authority. (Abdul Raouf and Harrison, JJ) DONALD v EMPEROR.

4 Lah 1

73 I C 696 24 Cr. L J 664 1924 Lah 55

MADRAS ACT (I of 1876), Ss 2 and 6—Permanently Settled estate—Suit for separate registry Refusal—Grounds for

Lands in a permanently settled estate had been granted by the then Zemindar to the predecessor in title of the defendants on a small kattubadi and subsequently even the kattubadi was remitted for ever. The present Zemindar on the refusal of the Collector to order separate registry, instituted a suit against defendants for the said relief. The Court below dismissed the suit holding that the effect of the apportionment would be to impose a new burden on the defendants not imposed by the original grantor. Held, on appeal that the circumstance relied on was no ground for refusing relief to the plaintiff. If there was any understanding that the grantor should himself pay the assessment imposed on lands after separate registration that would be a matter of contract between the grantor and the grantee and by paying the assessment the grantees would be able to recover the amount from the grantor. (Krishnan and Ramesam, JJ.) SRI RAJAH INUGANTI RAJAGOPALA RAO, BAHADUR v. CHELIKANI VENKATASURYA RAO GARU

44 M L J 64 17 L. W. 7 71 I. C 200

1923 Mad 368

## MADRAS CITY MUNICIPAL ACT, S 288

MADRAS ABKARI ACT (I OF 1883), Ss 40 to 47 and 55—Police charge sheet and inquiry—Proceedings before Magistrate—Regularity of

Where for an offence under the Abkari Act, a charge sheet is submitted by the police officers in accordance with the Police procedure instead of the Abkari procedure of investigation the proceedings before a Magistrate are not properly instituted by means of a legal complaint or charge sheet.

Ss. 41 to 47 of the Abkari Act provide a much more elaborate investigation than is provided for in the Criminal Procedure Code, giving much, more definite powers to the Abkari officer, who holds that investigation, and in some instances, making the intervention of an officer of a certain status in the department obligatory, and a police charge sheet in accordance with police procedure, would place the accused under a considerable disability depriving them of the procedure to which they would be ordinarily entitled under S 5 (2) of the Criminal Procedure Code read with the Abkari Act, 1913 M. W. N 1000 Ref (Oldfield and Ramesam, JJ) KUPPUSAMY NAIDU In re

44 M L J 231 17 L. W. 308

72 I C. 175 24 Cr L J 335 1923 Mad 339.

—S 55 (a)—Possession—Meaning of—Conviction under section—Valid—Actual possession of contraband Liquor necessary

The word "possession" in S 55 (a) of Madras Act I of 1886 does not mean constructive possession but actual possession. The mere fact that a person is the owner of a cattleshed in which contraband liquor is found is not sufficient to justify a conviction under S 55 (a) when there is no evidence to show that he was in possession of the liquor. (Krishnan, J) JAYARAMULU NAIDU In re

71 I C 504 24 Cr L J 152

1923 Mad 50 (1)

MADRAS (REVENUE) BOARD'S STANDING ORDERS, O 15, S 17—Powers of Board—Darkhast Cases—Reason not given—Presumption

Under S 17 of O 15 of the standing Orders of the Madras Board of Revenue, the Board on being satisfied that a Darkhast order was passed under a mistake of fact or misrepresentation or fraud can set it aside or cancel it or amend it.

Where a petition was put in to the Board on the ground of misrepresentation or fraud and the Board without stating its reasons interfered it must be presumed its powers were lawfully exercised on its being satisfied as to the truth of the allegations. (Dyling and Odgers, JJ) SRINIVASA RAO v RANGASAMY

18 L W 523

MADRAS CITY CIVIL COURTS ACT, S 3—Ejectment suit—Jurisdiction of Small Cause Court and City Civil Court—Presidency Sm C C Act, S 41 See (1922) DIG COL 816 DORAISWAMI AIYANGAR v NARAYANA IYENGAR.

32 M. L. T. (H C) 288.

MADRAS CITY MUNICIPAL ACT, S. 288—Permission to use machinery—License fee—Onus on municipality to prove nature of machine

Permission granted under S. 288 of Act IV of 1919 for the use of a machinery is distinct from

**MADRAS CITY MUNICIPAL ACT, SCH IV, R 17**

permission required for erecting it, in payment of license fee is necessary for both purposes

The onus is on the municipality to show that the machinery makes such noise or vibration as amounts to a nuisance to the neighbourhood and also that it is dangerous under the last part of S 288 (1)

In a prosecution for non-payment of license fee, the fact that the accused did not appeal to the standing committee does not estop him from contesting the validity of the imposition  
(*Krishnan, J*) *A E SMITH In re*

45 M L J 731 18 L W 879

—Sch IV, R 17 Reference to High Court—Scope of *See* (1922) DIG COL 816 *THE SUN LIFE ASSURANCE COY v CORPORATION OF MADRAS*

4b Mad 10

**MADRAS CITY POLICE ACT—Bye law under S 78 Scope of**

The bye law framed by the Madras Government under S 78 of the Madras City Police Act prohibiting the rider of a bicycle from carrying any other person, covers the case of a person riding a bicycle who allows himself to be carried by another person on the same bicycle but not on the saddle

*Semble*, it may be, the rule as worded covers the case of a single person riding a bicycle without being seated on the saddle (*Krishnan, J*)  
*THE CROWN PROSECUTOR v DURAISWAMI*

46 Mad 476. 44 M L J 201 17 L W 273  
32 M L J (H.C.) 152 72 L C 358  
24 Cr L J 358 1923 Mad 364 (2)

**MADRAS CITY TENANTS' PROTECTION ACT (III OF 1922), Ss 9 and 10—Tenant against whom decree in ejectment was passed before Act—If can apply under S 9—Application as legal representative of tenant—Duty of court to determine representative character.**

Where a decree has been passed before the Madras City Tenants' Protection Act came into force for the ejectment of a tenant, it is not open to the tenant to apply under S 9 of the Act, for an order directing the landlord to sell the land to him.

Where an application is made under the Act by a person claiming to be the legal representative of a tenant it is the duty of the court to adjudicate upon his title: there was any contest regarding it and consequently the representative character of the applicant should be determined by the court in the application itself (*Spencer and Venkatasubba Rao, JJ*) *FATIFA BI v MOTTAI AMMAL*, 46 Mad 838. 44 M L J 271 17 L W. 841 (1923) M. W. N 238. 32 M L T (H.C.) 290 72 L C 141 (1923) Mad 320

**—S. 9 Trust land—Tenant of—Right to enforce compulsory sale of land under S 9**

A tenant in occupation of trust land belonging to a temple or mosque cannot enforce a compulsory sale thereof under S. 9 of the Madras City Tenants' Protection Act and require the temple or mosque to deliver the land to him on a valuation to be made by the Court. (*Spencer and*

**MADRAS COURT OF WARDS ACT S 59**

*Venkatasubba Rao, JJ*) *PARTHASARATHY AIVANGAR v. DORAISWAMI NAYAKER*  
46 Mad 823 44 M L J 91 (1923) M. W. N 148  
72 L C 826 1923 Mad 308

**MADRAS CIVIL RULES OF PRACTICE, Rr 32, 36—Fees prescribed—Applicability**

S 35 of the Madras Civil Rules of Practice, which prescribes the fee to be paid by a person who has obtained leave to inspect documents, applies as well to a party to a suit who obtains leave under S 32 as to a stranger who obtains leave under Rr 33 to 35 (*Colridge, J*) *SRI RAJA SOBANADRIAPPA RAO v GOVERNMENT PLEADER*  
45 M L J 721 74 L C 944

**—Rr 131—133—Delay in payment—Excuse**

Where to deposit money in court, the chalan is taken out, but the actual payment is not made on that day because of circumstances beyond the control of the depositor e.g. by the act of court or of its officers the payment must be deemed to have been made in time (*Kumarasamy Sastry, J*)  
*GOPALAKRISHNA PILLAI v. KUNCHITAPATHAM PILLAI*  
45 M L J 849 18 L W. 844  
33 M L T 106 (H.C.) (1923) M. W. N 811.

**MADRAS COURT OF WARDS ACT (MADRAS ACT, I OF 1902), S. 59—Release by the Court of wards of an estate—Appointment of guardian—Powers of guardian—"Property of the minor" meaning of—Whether trust property included in the expression—Direction for taking accounts trust property by the District Court, validity of—Consent of parties cannot give jurisdiction**

Where on the withdrawal by the Court of Wards from the management of an estate, a guardian is appointed for the property of the Ward under S 59 of the Act, such guardian has authority only over the property of the Ward over which the Ward has beneficial interest and not over the properties of a religious institution of which the Ward happens to be a trustee

The expression "property of the minor" in S 59 of the Court of Wards Act has reference only to the property of which the minor is owner

Where the District Court gives directions to such a guardian appointed under S 59 of the Act for the examination of the accounts of trust property a commissioner and for the checking of the collections in a temple of which the Ward is a trustee, such directions are beyond the powers of the District Court

The District Court which is incompetent to deal with the matter cannot acquire any jurisdiction by the consent of the parties

36 Cal 193 at p. 206, 16 C L J 77 and 36 Mad. 39 Ref

Such a guardian managing the trust properties would be a trustee *de son tort* and he would be liable for the Acts done in his unauthorised management to the real trustee and not to the District Court. (*Spencer and Venkatasubba Rao, JJ*) *VARADACHARIAR v. RAJA RAMAKRISHNAMMA GARU*  
44 M L J 367 (1923) M. W. N. 203  
32 M L T H C. 258

17 L. W 744 1923 Mad. 497

**MADRAS CR. RULES OF PRACTICE, S 161****MADRAS CRIMINAL RULES OF PRACTICE S 161—*Vakalat* Not necessary**

There is no necessity to file a vakalat in a Criminal appeal for a proper presentation of a memorandum of appearance is sufficient (*Wallace, J.*) *In re* MANIKONDA LINGAYYA 45 M L J 683 18 L W 960 33 M L T (H C) 224

**MADRAS DISTRICT MUNICIPALITIES ACT (IV OF 1884), S 45—*Suit by municipality for recovery of money due from toll contractor—Contract not in writing—Effect of***

In a suit by a Municipal Council against a contractor who had bought in an auction the right to collect certain fees or tolls in the Municipality for the balance of money due from him, the defence was that the contract was not in writing as required by S 45 of Madras Act IV of 1884 and that the claim was therefore unsustainable.

Held that the defendant having enjoyed the right of collecting the tolls for a year, was liable on an implied contract and the Municipal Council was entitled to a decree against him.

*Lawford v Bellericay Rural Council*, (1903) 1 K B 772 followed, (*Krishnan, J.*) *SRIRANGAM MUNICIPAL COUNCIL v BODI* 45 M L J 164 18 L W 130 (1923) M. W N 872, 72 I C 703.

**MADRAS DISTRICT MUNICIPALITIES ACT (V OF 1920), ss 18 and 28—*Chairman—Chairman delegate—Outgoing chairman standing as candidate for re-election—Presiding at meeting—Taking part in ballot—Breach of Election rules—Election when liable to be set aside—C. P. Code, S 115—High Court—Interference in election cases—Material irregularity.***

The expression "taking part in a ballot" in Rule IV of the Rules under the Mad. District Municipalities Act includes presiding at the meeting of councillors for the election of a Municipal Chairman conducting the ballot, opening the box and counting votes. The expression is not confined to the mere act of voting. The word "chairman" in S 28 of the Act includes "Chairman Delegate" in cases where there is no vice-chairman. A chairman seeking re-election is incompetent to preside at a meeting of the council for election of a chairman, and where there is no Vice Chairman he should appoint a Chairman Delegate who under S 28 of the Act would preside at the meeting. Where instead of so doing the Chairman himself presided, it is a clear breach of the election rules. But the election will not be invalid on that ground unless the result has been materially affected by the breach of the rules. Where therefore the lower court set aside an election of a chairman, on the ground that he presided at a meeting of the council for election of the chairman, though he was himself seeking re-election without inquiring whether the illegality affected the result of the election, the High Court reversed the case for such enquiry and decision. In dealing with an election enquiry a subordinate judge is a court subordinate to the High Court under S 115 C P C 16 L W. 848 foll. (*Wallace,*

**MADRAS DT MUNICIPALITIES ACT, S 352.**

*J.) AHMAD THAMBI MARAVAYAR v. BASAVA MARAVAYAR*

44 M. L J 69 46 M 123 72 I C 902 1923 Mad. 254

**—S 250—*Rebuilding of factory which was burnt down—If within section***

S. 250 only applies where a person intends for the first time to construct or establish any factory, work-shop or workplace. It cannot apply to a case where without changing the machinery, the shed in which it is kept is rebuilt as the prior one was burnt down (*Krishnan, J.*) *GAMINE SATYANARAYANA In re* 17 L W 249 72 I C 613 (2) 24 Cr L J 453 (2) 1923 Mad 375 (1)

**—S 303 (2) (b) and (c)—*Rules framed by the Governor in Council—Validity of—Byelaw—Construction.***

Before a rule framed by a rule-making authority is declared *ultra vires* the Court must be satisfied not only that it had no power to act under the power under which it is purported to act, but also that it has no power at all under any law to act. 18 M 236 followed.

Rules framed by the Governor in Council relating to the election of Chairman and Vice Chairman of the District Municipalities and published as Notification No 1134 under S 303 (2) of the Madras District Municipalities Act though not authorised under that provision of law, can yet be supported under S 303 (2) (c) of the Act. Consequently such rules are not *ultra vires* (*Krishnan, J.*) *SECRETARY OF STATE FOR INDIA v APPA RAO*, 45 M L J 156 (1923) M W N 450

**—S. 352—*Municipal election—Right to stand as a candidate—Rejection of nomination paper by Municipal Chairman—Appeal to local Government—Right of party aggrieved—Liability of Chairman—Injunction—Right to vote—Infringement of***

Where a person standing as a candidate for a Municipal election has his nomination paper rejected by the Municipal Chairman improperly and on a mistaken view of the rules and the Local Government on appeal by the aggrieved candidate refuses to perform his statutory function of interpreting the rules and deciding on the validity or otherwise of the chairman's conduct he has a right to sue in a Civil Court for a declaration that his nomination is valid and for injunction restraining the conduct of the election without him as a candidate. It however the election has been held the remedy of the aggrieved candidate is by an election petition preferred to the Sub Court or the District Court. Where a person having a right to vote or to stand as a candidate for an election is wrongfully deprived of that right, the person so depriving him is liable in damages unless he is himself acting in a judicial capacity. Under R 1 of the election rules made under the Madras District Municipalities Act the decision of the Municipal Chairman as to the validity or otherwise of a nomination paper is not final and the local Government is vested with the power to finally decide upon the interpretation

**MADRAS DT MUNICIPALITIES ACT, SCH V.**

of the rule, (*Schwabe, C, J and Wallace, J*)  
 SARVOTHAMA RAO v CHAIRMAN, MUNICIPAL  
 COUNCIL, SAIDAPET 45 M. L. J. 23  
 17 L. W. 431 (1923) M. W. N. 266  
 32 M. L. T. (H. C.) 178 73 I. C. 619  
 1923 Mad. 475

———Sch V. cl (q)—Construction—Conversion  
 paddy into rice—If an industrial process—Dan-  
 ger—Presumption

The last clause of cl (q) of Sch V of the  
 Madras Act V of 1920 qualifies each of the clauses  
 preceding it and not merely the last clause. The  
 object seems to be to bring under municipal  
 control by the method of issuing licenses the  
 keeping or using of things which are dangerous  
 to human life, health or property.

Conversion of paddy into rice is an industrial  
 process within the meaning of the clause.

Ordinarily any large machinery is dangerous  
 to human life, but it cannot be presumed that any  
 particular machinery is. *K V S RAMACHANDRA*  
*RAO v THE CROWN* 45 M. L. J. 555  
 18 L. W. 618 (1923) M. W. N. 767  
 33 M. L. T. (H. C.) 234 75 I. C. 691

**MADRAS DISTRICT MUNICIPALITIES AND  
 LOCAL BOARDS AMENDMENT ACT (II OF 1922)**  
 —President—Election—Members not taking oath  
 of allegiance—Effect

Under Madras Act II of 1922 the election of a  
 President of a Local Board by persons who  
 though elected as members thereof have not taken  
 the oath of allegiance is invalid (*Spencer and*  
*Devadoss, JJ.*) *RAJABHADAR MUDALIAR v VISVA-*  
*NATHA REDDY* 45 M. L. J. 543 (1) 75 I. C. 620

**MADRAS ESTATES LAND ACT (I OF 1908), S 3—**  
 Rentals—Deduction from assets—Effect.

In the case of lands granted in *inam* in 1798,  
 where it is not shown that the rentals on them  
 had been deducted from the assets of the zemindar  
 for the purpose of assessing peishwash that  
 fact alone does not disentitle them to be treated  
 as part of the estate (*Ayling and Odgers, JJ.*)  
*TOTA VARAHALIAH v SREE VENKATA SURYA-*  
*NARAYANA* 18 L. W. 324 (1923) M. W. N. 732  
 75 I. C. 465.

———S 3 (2) (d) and (5)—Agrabaram village  
 —Pre-settlement grant—Estate—Claim of occu-  
 pancy right

There is no presumption that the grant of an  
 grabaram in *inam* conveys only the melwaram  
 41 M. 1012 43 M. 166 44 M. 588 Ref. *Held*, on  
 the construction of a shrotriem grant of an  
 grabaram village of the year 1689 that the use  
 of the expression 'Mauza' and 'Shrotriem' in  
 reference to the village did not indicate that it  
 was a grant of the melwaram only. It was found  
 however on the evidence that the grantees were in  
 actual possession of the lands, harvesting the  
 crops and mortgaging and selling and letting the  
 land on terms inconsistent with the existence of  
 an occupancy right in any one till the year 1885  
 when disputes arose regarding the claim to occu-  
 pancy rights. *Held*, that the grant was one of both  
 melwaram and the village was not an estate.

**MADRAS ESTATES LAND ACT (I OF 1908), S 3**

under S 3 (2) (d) of the Mad Est Land Act  
 (*Schwabe, C J, Oldfield and Cowles Trotter, JJ*)  
 SUBRAMANIAM SOMAYAJULU v SEETHAYYA  
 46 Mad 92 70 I. C. 729 1923 Mad. 1

———S 3, Cl. 2 (d)—Estate—Grant of village  
 in *inam*—Mouza—Presumption—Grant of both  
 the *warams*

The grant of a whole village in *inam* will not  
 be presumed to be the grant only of melwaram  
 interest unless it is shown that the kudiwaram  
 interest was already in the hands of some one else  
 than the donee. The mere fact that there were  
 about 300 inhabitants in the village after the date  
 of the grant is not proof that at the date of the  
 grant there were any tenants in the village holding  
 lands with any right of occupancy by custom or  
 otherwise. The use of the expression mouza  
 does not necessarily import the meaning that  
 there were occupancy tenants on the land,  
 (*Spencer and Venkatasubba Rao, JJ.*) *JAVVADI*  
*SOORAYYA v TUVVALA SURAYYA RAO NAIDU*  
 44 M. L. J. 41 17 L. W. 555 72 I. C. 795  
 1923 Mad. 623

———S 3, Cls (2) (5) (11) (15)—*Inam*—Estate  
 —Landholder—Ryot—Rent—Meaning—Pre-settle-  
 ment *inam* excluded from assets of Zamindari—  
 Assignee from *inamdar* of an interest in his hold-  
 ing—Assignment under Thirumanam document—  
 Relationship between a *partus*—Construction of  
 Thirumanam document Lease under S 105 1r of  
 P. Act or mortgage with possession—Rent under  
 S. 3, Cl. (11) of Estates Land Act—Amounts  
 payable in future under contract if—Regulation  
 XXV of 1802 S 4—Construction.

An *inam* within the ambit of the Pittapur Estate  
 was granted by the then Zamindar of Pittapur to  
 the plaintiff's ancestors under a sanad and a  
 chekunama dated 22-6-1800. The grant was  
 made free of kattubadi and purported to be  
 sarwadumbala or absolute. The plaintiff assigned  
 an interest in his holding to 1st defendant under  
 a document dated 20-1-13 and described as a  
 Thirumanam document which provided that, in  
 accordance with a prior agreement, the property  
 which had been placed in 1st defendant's posses-  
 sion in 1910-11 should remain in it until the end  
 of the year 1917-18 in consideration of a cash  
 payment of Rs 160 at the date of the prior  
 agreement aforesaid and other subsequent pay-  
 ments on plaintiff's behalf, in all Rs 1,280, and  
 that 1st defendant should 'pay all dues other than  
 extra taxes, which might be levied hereafter,'  
 and should at the end of the term 'surrender  
 without any relinquishment.' There was no  
 evidence of any advances prior to those enumera-  
 ted in the Thirumanam document of 1913, and those  
 enumerated in the said document of the cash pay-  
 ment of Rs 160 were made, after and when the  
 prior agreement was executed, and the former  
 after possession had been given. There was no  
 power of sale and no provision for accounting.  
 In 1912 the Revenue Officer engaged in the pre-  
 paration of a record of rights for the 2nd defen-  
 dant's (Pittapur) estates under the Madras Estates  
 Land Act entered 1st defendant as occupancy  
 ryot in respect of the holding instead of  
 plaintiff. In a suit by the plaintiff for declaration

## MAD ESTATES LAND ACT (I OF 1908), S 3

that the 1st defendant was not an occupancy tenant of his inam, *held*

(1) That the Thirumanan document was a lease within S 105 of the Transfer of Property Act, and not a mortgage with possession,

(2) that the 1st defendant was not a ryot within S 3, Cl (15) of the Estates Land Act,

(3) that the suit inam was not a part of the Pittapur Estate but a presettlement inam excluded from the assets of that Zamindari and did not fall under S 2 (3), (d) as it was not a whole village and plaintiff was not a landholder under S 3, Cls (2) and (5) of the Estates Land Act

The word "payable" in S 3 Cl (1) of the Estates Land Act means "payable according to the terms of the contract between the parties to it," and Cls (1) and 15 are applicable whatever the stage or stages at which those terms, so far as they relate to payment for the use of the land, have to be or have been to be fulfilled. The payments in consideration of which the Thirumanan document was given were "rent" within the meaning of S 3 Cl, (1) notwithstanding that the only payment contemplated were those to be made in future after the beginning of and in the course of the relation between ryot and landholder.

Lands in respect of which the Zamindars purported to make grants either absolute or subject to a Small Kattubadi are "Iakhiraj lands (or lands exempt from the payment of public revenue and all other lands paying only favourable quit rents" within the meaning of S 4 of Regulation XXV of 1802 (*Oldfield and Ramesam, JJ*) KOPPI REDDI NOKAYYA v MANDALEKKA BHEEMANNA

45 M. L. J. 91 (1923) M. W. N 176  
17 L W 712 73 I. C. 733 1923 Mad. 454.

—S 3 (5)—Land holder—Post settlement inam on favourable rent—Grantee if a landholder *See* (1922) DIG. COL 819 JARUGUMILLI BRAHMAYYA v ACHIRAJU 70 I. C. 615

—Ss. 3 (5) 77 and 189—Landholder—Minor mamdar Land in Zamindari granted at favourable quit-rent—Suit by mamdar for rent—Civil or revenue Court *See* (1921) DIG. COL 790 BHUPATIRAJU v VENKATRAM 70 I. C. 452

—S 13 (3)—Rent—Vanpari rate—Implied contract to pay—Onus and quantum of proof—Garden crops raised with improvements at tenant's expense *See* (1921) DIG. COL 800 RAJAH OF RAMNAD v. GNANAMUTHU BHOTHAGAR 69 I. C. 535

—S 13 (3)—Waram systems—Right of landlord to revert to—Muchilika—Construction—Enhancement of rent—Distraint—Suit to set aside—Decision as to propriety or tender of patta

The landholder is entitled to revert to the waram system unless the ryots establish that it has been superseded permanently by the cash system by contract, express or implied, between them and the landholder.

Where there is evidence to show that the tenure was a waram tenure to start with, evidence is not necessary to prove that this is the prevailing tenure unless the presumption that the tenure was a waram tenure is rebutted by the ryot

## MAD ESTATES LAND ACT (I OF 1908), S 26

Evidence of money payments for several years at varying rates under specific contracts in term-pattas for stated periods does not warrant the inference that waram system was permanently given up

The decision in ryot's suit to set aside a distraint that a tender of patta was not a proper tender operates as *res judicata* in a suit by the landholder under S 77 of the Estates Land Act as regards the question of propriety of that tender.

Aman system means waram system and a provision in a muchilika by which after the expiry of the period under it the ryots undertake to cultivate the lands under "pathukattu muchilikas under the Aman rules" amounts to an agreement by the ryots to revert to the waram system after the expiry of the period fixed in the muchilika.

Under the waram the landholder is entitled to a share in all the produce of the land unless there is a special contract to the contrary exempting any particular crop. His claims to share in all the crops cannot be looked upon as an enhancement of rent within the meaning of S 13 (3) of that Act (*Spencer and Krishnan, JJ*) VARADA REDDI v SRINIVASA MUDALIAR

45 M. L. J. 199 18 L. W. 169  
(1923) M. W. N. 357 33 M. L. T. (H. C.) 34  
72 I. C. 683.

—S 13 (13)—Contract before the Act to pay wet rates—Improvements made at tenant's expense after the Act—Enforceability of the contract

A landholder claimed to recover rent at wet rates from his tenant for land which the latter had cultivated wet in consequence of improvements made at his own expense. The plaintiff claimed wet rates on the strength of a contract of the year 1885 before the passing of the Madras Estates Land Act. The improvements were made after the Act was passed. *Held*, in the circumstances the plaintiff was not entitled to rely on his contract with reference to S. 13 (3) of the Estates Land Act. The intention of the Legislature was to refuse to contracts made before, equally with contracts made after the passing of the Act any effect in the relation between the ryots and the landholder, (*Schwabe, C. J. Oldfield and Coultis Trotter, JJ.*) CHOCKALINGAM CHETTIYAR v PALANI AMBALAM 46 Mad 712

45 M. L. J. 124 18 L. W. 646.  
(1923) M. W. N. 411 73 I. C. 926.  
32 M. L. T. 377 (H. C.). 1923 Mad. 685

—S 26—Payment of uniform lower rate from inception of tenancy—Right of successor to raise.

Per *Schwabe, C. J.* S 26 deals with cases where there has been an actual prior rent greater than the rent claimed by the tenant and does not deal with a case when a ryot is setting up that *ab initio* the rent payable was the lower rent, but to be increased to the higher rent in certain eventualities.

Per *Wallace, J.* "The lawful rent payable" in S 26 (3) is not necessarily or invariably the farsal rate fixed by the Government but may be a contract rate on which the occupancy is based. (*Schwabe, C. J. and Wallace, J.*) PARA DEKKAN v AMBERUDDIN SARIB 17 L. W. 169

72 I. C. 181. 1923 Mad. 306.



## MAD ESTATES LAND ACT (I OF 1908), S 52

—S 52 (3)—Pattahs decree—If include these under the Rent Recovery Act See (1922) DIG COL 819 RADHAKRISHNA AYYAR v. SUNDARA SWAMIYAR 74 I C 584 (P C)

—Ss 53, 146, 189—No rent sale under the Estates Land Act Purchaser obtaining possession—Prior purchaser in execution of a mortgage decree against ryot—Suit by former to recover possession—Whether latter can plead invalidity of the rent sale under S 55—Policy of Act See (1922) DIG COL 819 IRULAPPAN SERVAI v. VEERAP PAN 69 I C 918

—S 112—Sale of ryot's holding under—Validity—Notice of intention to sell—Omission to give—Suit to set aside sale—Jurisdiction of Civil Courts—Estates Land Act, Sch I, Part A, Art 12

A sale of ryot's holding held under provisions of Ch VI of the Madras Estates Land Act without notice being given to the ryot by the landholder of his intention to sell is illegal and a Civil Court has jurisdiction to entertain a suit by the ryot to set aside such a sale. The suit, referred to in Art. 12, Part A of the schedule to the Act, is a suit by the ryot within 30 days of the service on him of the notice to contest the right of sale and not a suit of the kind referred to (*Schwabe, C J Oldfield and Coutts Trotter, JJ*) RAJAH OF RAMNAD v. MINOR VENKATARAMA IYER. 69 I C 923 1923 Mad 6

—Ss. 146 and 147—Transfer before the Act—Rights of transferee

S 146 of the Madras Estates Land Act was intended to lay down that the landlord is entitled to deal with the existing pattadar, until notice of transfer is given to him. S. 146 applies to transfers made before the commencement of the Act and does not determine any substantive right. S 146 of the Act lays down simply that when there has been a transfer whether before the commencement of the Act or after if the transferee will be entitled to be impleaded in proceedings if he gives the notice which S 146 prescribes, but until he does so the existing pattadar will still be the person with whom the landlord has to deal. (*Oldfield and Ramesam, JJ.*) SRI MAHANT PRAYAG DOSSJEE VARU v. SARANGAPANI CHETTY 17 L W. 361

(1923) M W N. 193 32 M L T (H, C) 201  
1923 Mad 486

MADRAS FOREST ACT (V OF 1882), Ss 35, 36 and 55—Transporting timber—Expiry of time limited by license before timber reaches destination—Extension of time by another Government—Penalty—Compensation See (1922) DIG COL. 821 KOTI MALLIKARJUNAYYA v. SECRETARY OF STATE FOR INDIA. 70 I C 400

## MADRAS HIGH COURT RULES (Appellate Side)

—Rules Nos 4 1 (i) (f)—Vacation Judge of High Court—Power of—Jail Appeal—Dismissal on ground of limitation—Validity—Notification that he will dispose of "urgent applications which require to be heard immediately"—Effect—Another appeal presented subsequently against same conviction—And: sentence—Maintainability

## MADRAS HIGH COURT RULES

—Admission of that appeal by same Judge in ignorance of his prior order—Effect—Criminal Procedure Code, S. 49—Revision—Review—High Court—Jurisdiction—Criminal case heard and decided by one or more of its own Judges—Powers in regard to—Dismissal for default of appearance—Jurisdiction in Criminal Appeal or Revision

The appellant presented under S 420, Cr P, C a jail appeal to the High Court which was dismissed under S 481, Cr P C as out of time by a learned Judge, sitting as Vacation Judge. On the re-opening of the Court the appellant presented another appeal through counsel against the same conviction and sentence, which was admitted by the same learned Judge. Held, that the decision on the prior appeal was a bar to the subsequent appeal being heard on the merits. Even if the subsequent appeal could be treated as an application for the revision of the previous decision, neither S 439, Cr P Code nor any other provision empowered the High Court to revise the judgment of one or more of its own judges.

The admission of the subsequent appeal could not be treated as a setting aside by the learned Judge of his prior order and as a re-opening of the case on its merits, because the learned Judge was admittedly not at the time aware of his prior order.

The Bench hearing the subsequent appeal apart from the fact that it was constituted differently, had no power to review the prior order. The Code does not confer any such power. The High Court has no inherent power of review in such cases, and the existence of such a power cannot be inferred from the position of the High Court as a Court of Record.

The dismissal of the prior appeal by the Vacation Judge could not be treated as a nullity on the strength of the notification regarding his sittings, which was to the effect that he would dispose of "urgent applications which require to be heard immediately." The notification must not be regarded as more than a general statement of the powers which the Vacation Judge ordinarily will exercise, and cannot be read as derogating from those, which in virtue of statute and rules he possesses and of which he cannot consistently with them, be deprived. And under S 108 of the Government of India Act and High Court Appellate side Rules No 4 and No 1 (i) (f) the vacation judge was competent to dismiss the prior appeal.

*Per Devadoss, J—Quaere*, Whether a Criminal Appeal or Revision Petition can be dismissed for default of appearance.

When a criminal appeal or revision petition is dismissed without hearing there is no judgment at all and the learned Judge or the Bench which disposed of the matter for default of appearance can rehear the matter. (*Oldfield and Devadoss, JJ*) K. KUNHAMAD HAJI *In re* 46 Mad 382

44 M L J 450 72 I. C. 599  
24 Cr L J 439 1923 Mad. 426.

—(Original Side) R 48—Delay in filing written Statement—Sufficient cause Refusal of Vakil to file statement except on payment of fees. See (1922) DIG COL 805 MUTHU KRISHNAYACHENDRA BHADUR v. W H NURSE

69 I. C. 685.

**MADRAS HIGH COURT RULES.**

——— (Original Side) S 63 A—*Applicability—Negotiable instrument—What is—Shah Jog Hundi—Document on the face of it acknowledging indebtedness and promising to pay interest—If a negotiable instrument*

S 63 A of the Original Side Rules was intended to cover all documents in the nature of negotiable instruments, specifically described in the Rule as 'Bills of exchange, Hundis or promissory notes' irrespective of the question how far a particular bill of exchange might be negotiable or what the restrictions might be on its negotiability.

Shah Jog Hundi's sued upon held to be negotiable instruments within the definition in S 13 (2) of the Neg. Ins. Act 1914, as being payable in the alternative to one of several payees (*Sir Walter Schwabe, C J and Coult's Trotter, J*) *KANHAIYA LAL BHOYA v BALARAM PARAMSUKH-DAS* 1923 Mad 44

——— S 205—Order under—Nature of—Ministerial—Not appealable See LETTERS PATENT (MADRAS) CL 15

45 M L J 611

——— APPX. II, Nos 35 and 36—*Contentious probate suit—Decision on—Appeal—Court fee*

The decision of a Judge sitting on the Original Side in a contentious probate suit is a final judgment and a memorandum of appeal from it falls under Serial No 35 of Appendix II of the Original Side and Rules and not under Serial No 36 (*Schwabe, C J*) *PERUMAL CHETTY v. KANDASAMY CHETTY*

46 Mad 592 44 M L J 146 17 L W 238  
(1923) M W N 160 32 M L T (H C) 122  
72 I C 925 1923 Mad. 362

**MADRAS LAND ENCROACHMENT ACT, S 14—**Suit for recovery of penal assessment—Cause of action—Bar See (1922) DIG COL 822 SECRETARY OF STATE FOR INDIA v. HUSSAIN SHERIFF SAHIB 70 I C 165

**MADRAS LOCAL BOARDS ACT (XV of 1920)—***Rules framed under—Rule 4, Sub-Rr (1), (2) and (3)—Election to Taluk Board—Objection petition—Delay in depositing requisite amount—Power of Court to excuse delay and proceed with enquiry—Civil Procedure Code, S 115—Revision, Maxim Actus Curae neminem gravabit—Applicability of*

The provisions of R 4 of the Rules framed under the Madras Local Boards Act (XIV of 1920) are mandatory and where owing to the neglect of the party the deposit of 200 rupees required under R 4 sub-R (1) is not made within the time prescribed the Court has no jurisdiction to enquire into the petition. There is no question of the Court's excusing the delay in such a case and a deposit in time is a condition precedent to the enquiry 13 C. L J 467, 37 All 592, 52 I C. 161 dis. (*Krishnan, J*) *KRISHNAJI REDDIAR v MUTHUVEERA REDDIAR* 44 M L J 344, (1923) M. W. N 199 72 I C 449 18 L W 299 1923 Mad 490

——— *Constitution of Taluk Board—Acts and notifications under, sole test of validity—Election of president—Revisional jurisdiction of High Court.*

**MADRAS LOCAL BOARDS ACT S 57.**

When the Local Boards Act 1920 came into force it was decided to bifurcate the existing Taluk Board at Negapatam and to provide a Taluk Board for each Revenue Taluk under S 6 of the Act which requires that there should be a Taluk Board constituted for each Taluk, the Government having the power under S 4 to declare by a notification any part of a District to be a Taluk. It was consequently decided to have one Taluk Board for the Revenue Taluk of Negapatam (and another for Nannilam) in order to effect this bifurcation the necessary notifications were published in the Fort St George Gazette. The District Board of Tanjore resolved that the the Negapatam Taluk Board to be twenty. The Government by notification appointed 19 persons to be members of the taluk Board, Negapatam, while a twentieth member had not been appointed, the nineteen members elected a President on the 21st August, 1922. The Subordinate Judge having held that the election of the President was invalid for the reason that there were only 19 members in the re-constituted Taluk Board of Negapatam at the time of election, held, in revision that the High Court has power to revise the order of the Subordinate Judge notwithstanding that R 12 cl 3 of the rules to the conduct of enquiries and the decision of disputes relating to election declared to be final 44 M. L J 1 followed 16 L. W 827 dissented from

Held also that the order of the Subordinate Judge was erroneous. It is the Local Boards Act and the notifications of Government that constitute the Taluk Board and not the appointment of members. It is not necessary that every seat should be filled at the first constitution of the Board in order to make it a legally constituted body. Although there is a vacancy among its members a corporation is not incompetent to do its business (*Spencer and Vankatasubba Rao, JJ.*) *VENKATARAMA AYYAR v. JANAB HAMID SULTAN MARACAYAR* 44 M L J 161

32 M L T (H C) 114 17 L. W. 656  
70 I C 987 1923 Mad 360.

——— Ss, 55, 57 and 199 and 238—*Rules framed under—Taluk Board—Election of President—Transitory Rules, Rr, 10 and 12—Interpretation of*

Under Rr 10 (1) and (2) of the transitory provisions of the Madras Local Boards Act the term of office of all the members of the Taluk Board as members expire on the date fixed by the notification made under the Act by the Local Government. But for the purpose of carrying on the executive functions of the Taluk Board, the President of the old Taluk Board continues in office as President until a president for the newly constituted Taluk Board is elected (*Krishnan and Venkatasubba Rao, JJ.*) *RAMASWAMI GOUNDAN v MUTHUVELAPPA GOUNDAN*

46 Mad. 536 44 M L J 1 (1923) M W N 133  
71 I C 103 1923 Mad 192

——— S 57—*Filing a petition under—Member of Taluk Board*

Filing a petition under S 57 of the Madras Local Boards Act is not one of the ordinary functions or duties of a member of a Taluk Board,

**MADRAS LOCAL BOARDS ACT, S 129.**

A member of a Taluq Board who has not taken his seat is not incompetent to file a petition under S 57 (*Ramesam, J*) *AKULA SUDARSANA RAO v CHRISTIAN PILLAI* 45 M. L. J 798

**S. 129—Allowing sewage water to flow across road—Offence**

It is an offence under S 129 of the Madras Local Boards Act to allow sewage water to flow across a road to the opposite side. In fact that the authorities have not constructed a culvert through which sewage water might flow across does not make it any the less an offence. (*Krishnan, J*) *THE PUBLIC PROSECUTOR v PACHIAPPA MUDALI* 18 L. W. 694

33 M. L. T. (H. C.) 166

**S. 221—Court exercising power—Criminal Court**

The Magistrate in acting under S. 221 of the Madras Local Boards Act is acting as a criminal court, and his orders are subject to the revisional jurisdiction of the High Court. In imposing a fine in addition to the recovery of the fees due, the Magistrate is acting beyond the jurisdiction conferred on him by S. 221 of the Local Boards Act (*Wallace, J*) *PUNIYA SYAMALO v EMPEROR* 17 L. W. 155 72 I. C. 624 24 C. L. J. 484

1923 Mad. 275

**MADRAS MUNICIPAL ELECTION RULES, R 14 (1)—Effect of infringement**

R 14 (1) of the Madras Municipal Election rules is not mandatory and its infringement does not necessarily render the vote invalid. If nothing more appears than the infringement of that rule as regards certain votes, those votes should be rejected, but if it is proved that they were given by duly qualified voters they cannot be rejected. The mere fact it did not bear the following officer's initials, when in other respects it is quite valid does not vitiate it. Scope of rules 13 to 15 considered (*Krishnan, J*) *KANNIAPPA MUDALIAR v. CHINNASWAMY CHETTIAR* 45 M. L. J. 329

18 L. W. 160 (1923) M. W. N. 447 73 I. C. 540

33 M. L. T. (H. C.) 37 1924 Mad. 38

**MADRAS PERMANENT SETTLEMENT REGN. (XXV OF 1802), Ss. 3 and 4—Zemindari sanad—Grant of—Inams in Zemindari—Right of Government, to resume** See (1921) DIG. COL. 23 See (1922) DIG. COL. 823. *SECRETARY OF STATE FOR INDIA v RAJAH OF VENKATAGIRI* 73 I. C. 741

**S 4—Construction—Lakshiraj lands—Lands granted by Zemindar prior to Permanent Settlement either rent free or subject to Small Kattubadi** See MAD. EST. LAND ACT, S. 3 (2) (5) ETC 45 M. L. J. 91.

**MADRAS PRESIDENCY SMALL CAUSE COURT RULES, O 37, R. 1 and from 13—If ultra vires**

Where, in a summary suit on a pro-note the defendant was served with the notice as prescribed in Form No. 13 of Appendix I which compels him to obtain leave of court to defend not less than 3 days before the day of hearing, the rule is ultra vires as regards the limitation of time (*Devadoss v. KANNIA V. DRIVICHAND* 43 Mad. 847 45 M. L. J. 699.

18 L. W. 414 (1923) M. W. N. 750.

**MADRAS SURVEYS AND BOUNDARIES ACT (IV OF 1897), S 13**

**MADRAS PROPRIETARY ESTATES VILLAGE SERVICE ACT (II OF 1884) S 27 (4)—Tenant Meaning of—Abolition of cess—Payment of village officers directly by Government—Rights of Remainder against cowledar** See (1923) DIG. COL. 823 *TIRUNBEI AKANTAM SERVAI v RAJA OF RAMNAD* 46 Mad. 177 70 I. C. 469

**MADRAS PROVINCIAL INSOLVENCY RULES, R. 12—If ultra vires**

Per *Venkatasubba Rao, J*—If R. 12 of the Provincial Insolvency Rules negatives the power of the court to remove an Official Receiver from his office, the rule is *ultra vires* (*Spencer and Venkatasubba Rao, JJ*) *OFFICIAL RECEIVER, TANJORE v NATARAJA SASTRIGAL*

44 M. L. J. 251 (1923) M. W. N. 212  
72 I. C. 225 46 Mad. 405 :  
1923 Mad. 355.

**MADRAS REGULATION II of 1819 S. 2—Judicial proceedings—Effect of—Reasons of policy if open to attack**

The starting of a Judicial proceeding against an individual does not deprive the Governor in Council of the power of taking proceedings against him under the Regulation. The reasons for the State policy for action cannot be challenged in a court of law (*Ramesam and Wallace, JJ*) *ETAKANDAN KUNHOKAR IN RL* 45 M. L. J. 473

18 L. W. 517 (1923) M. W. N. 741  
33 M. L. T. 17 (H. C.)

**MADRAS REVENUE RECOVERY ACT, S 59—Proceedings under—Notice of demand—Payment under protest—Suit for recovery of water cess paid under protest**

Where there was only a demand by the Government for watercess and the plaintiff paid it under protest and there were no proceedings as contemplated by the Revenue Recovery Act such as attachment of any moveable or immoveable property or arrest of the plaintiff, a suit by the plaintiff for recovery of the water cess is not governed by S. 59 of Madras Revenue Recovery Act but art 16 of the Lim Act (*Abdur Rahim and Sundara Aiyar, JJ*) *PANCHALAPALLI PICHU REDDI v. SECY OF STATE FOR INDIA* 70 I. C. 84.

**S 59—Water cess—Suit for recovery of water cess paid under protest—Suit governed by Art 16 of the Lim Act and not by S 59 of the Madras Rev. Recovery Act** See LIM. ACT, ART. 16. 32 M. L. T. 236 (H. C.)

**MADRAS SURVEYS AND BOUNDARIES ACT (IV OF 1897), Ss 12 and 13—Suit to establish right—Limitation for—Starting point—Party to dispute before survey officer—Party to appeal—Who is** See (1922) DIG. COL. 824 *SUBRAMANIA MUDALI v MEENAKSHI AMMAL* 70 I. C. 481.

**S 13—Decision of survey Officer—Question of possession—Decision on Omission to sue—Effect of.**

In proceedings before a Survey Officer the plaintiff was declared to be in possession and entitled to certain property. The defendant who as a matter of fact was in possession did not sue

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to set aside the decision within 1 year. In a suit by plaintiff for possession held that though defendant had been in possession for 12 years beginning from a date prior to the decision of the survey officer, still his omission to sue within one year of the decision barred his right and plaintiff was entitled to a decree for possession. 42 M 425 38 M 1202 Ref (*Coutts Trotter and Ramesam, JJ*) KUPPUSWAMI IYER v VENKATASWAMI

70 I C 672 1923 Mad 29

— (XXVIII OF 1860) S 20 (3)—*Tenant if includes the holder of a rent free in Zemindari*

The 'word tenant' in S 20 Cl 3 of the Survey and Boundaries Act does not include the grantee of a rent free inam in a Zemindari, (*Ayling, O C J., Kumaraswami Sastri and Odges, JJ*) RAJAH OF VENKATAGIRI v SUBBIAH.

70 I C 564 (F B)

**MADRAS TOWNS NUISANCES ACT (III of 1880), S 312**—*Trial of offence under by Bench of Magistrate*

It is competent to a Bench of Magistrates to try an offence under S 3 (12) of the Mad Towns Nuisances Act 13 M 142 foll (*Krishnan, J*) RAMASWAMI CHETTY v MUTHUVALU MUDALI (1923) M. W N 57 (1) 71 I C 238

24 Cr L J, 110 1923 Mad 191

**MADRAS VILLAGE COURTS ACT (I of 1899) S 18**—*Suit on contract—Voluntary subscription, for village festival—Right to recover*

A suit by the plaintiff for recovery of a sum of money alleged to have been agreed to be paid by the defendant towards the expense of a village festival, is not a suit on contract and is not cognizable by the village Munsif (*Wallace J*) KOSALI RAMU PILLAI v PULASTHAN PILLAI

17 L W 321 72 I C 744

1923 Mad 330

— Ss 66 and 67—Decree of Village munsif transferred or withdrawn to District Munsif's Court for execution—Power of District Munsif's Court to transfer decree for execution to another court. See C P, CODE, S 39 44 M L J 643

**MAHOMEDAN LAW—Administration—Dower—Liability of heirs is proportionate—Funeral expenses from estate, no contribution**

The heir who sues the widow for possession of his share is only liable to pay the proportionate part of the dower debt (33 A 182 F B Foll) and not the whole of the dower. Where funeral expenses are paid out of the estate, by the heir in possession, he is not entitled to contribution from other heirs for a proportionate share of the expenses (*Baker, O J C*) RAHMAT BI v BHURI BI

6 N L J 161 73 I C 959 1923 Nag 307

—*Administration—Representation by one heir.*

There is no principle in Mahomedan Law as in Hindu Law, whereby the acts of one heir in possession will be binding on the other heirs (*Walmsley and Sukrawardy, JJ*). SUKUR MAHOMED v ASMOT MANDAL

50 Cal 978

## MAHOMEDAN LAW

—*Applicability—Halai Memons, of Porebunder—Succession and inheritance—Exclusion of females*

Halai Memons domiciled in Porebunder State, though Mahomedans, are not governed by Mahomedan law as to succession and inheritance and females are excluded from succession by custom and practice in the community 43 I A 35 Ref (*Lord Dunedin*) KHATUBAI v MAHOMED HAJI ABU

44 M L J 35 17 L W 208 37 C L J 131

32 M L T (P C) 45 25 Bom L R 127

47 Bom 146 L R 4 P C 42 27 C W N 774

72 I C 202 50 I A 108 (P C)

—*Divorce—Impotence of husband—Considerations*

A Mahomedan wife can claim a divorce on the ground of impotency of her husband. She will have to establish that she did not know of it at the time of marriage, that he still remains impotent and for that purpose a certain period will be allowed and if the impotency is proved even after the expiry of the period, divorce will be granted, (*Kanhaya Lal, J*) ALTAFAN v IBRAHIM

21 A L J 811 L R 4 A 561 75 I C 502 (2).

—*Dower debt—Hibanama of property title to which acquired later*

Where a Muhammadan executed a Hibanama of property of which he acquired title after the execution of the Hibanama in favour of his wife in satisfaction of dower debt, held the widow acquired title to the whole property (*Ghose and Pantou, JJ*) RUSTAM ALI MIA v ABDUL JABBAR

1923 Cal. 535

—*Dower—Lien in favour of widow—Transfer of debt and the property—Transfer of the property without the debts—Rights of transferee—Death of widow—Effect of merger*

Where a Mahomedan widow in possession of her husband's property "in lieu of dower" transfers the security, either with or without the dower debt, the transferee is entitled to retain possession of the property until the dower debt is paid, though, where the transfer is without the privity of the persons bound to discharge the dower debt, the transferee takes the security subject to the state of account between the widow and the persons bound to discharge the dower debt at the date of the transfer and any payment made by these persons to the widow after, but without notice of the transfer must, in the absence of collusion be allowed to these persons, as against the transferee.

But the case is different where there is a sale of the property and not an assignment of the security. The right to hold the property as a security for the dower debt and to continue in possession thereof until the dower debt is satisfied is property, and is both heritable and transferable 43 A, 127, 32 A 551, 43 Mad 214 Ref.

But the widow has no proprietary title in the property, except to the extent of her share therein and where she purports to sell the property and not the security only, the sale is utterly ineffectual so as to confer any title on the vendee. But though the vendee takes no title to the property by virtue of the sale, he is entitled to retain pos-

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session of the property, if he is put in possession thereof, not indeed by virtue of the deed of sale, but because, so long as the debt remains unsatisfied, the heirs at law could not claim to be put in possession of the property and the widow herself would be bound to make good her representation to the vendee to the extent of such interest as she could lawfully transfer. The widow is entitled to retain possession of the property so long as her claim is not satisfied. There is nothing to prevent her from putting some one else in possession of the property and conferring on him the same right which she could exercise over the property. Having done so, she could not maintain ejectment against him if she has received consideration for the transaction, and it follows that, though the sale does not operate to confer any title on the vendee, he is still entitled to retain possession of the property as against the widow and all persons claiming through the widow, so long as there is a debt due to the widow. He is also entitled to maintain his possession of the property as against the heirs at law so long as they do not discharge the dower debt.

Where therefore a Mahomedan widow in possession of her husband's property as a security for her dower debt, purports to sell the property and put the vendee in possession of the property, the vendee is entitled to retain possession of the property so long as her claim to the dower remains unsatisfied. But the moment the dower debt is satisfied either by payment to the widow or to her heirs, the heirs of the husband are entitled to recover possession of the property from the transferee, and the same result follows where the heirs of the widow happen to be heirs of her husband, for in such an event the right to receive the dower debt and the liability to pay the dower debt unite in the same persons, and there is consequently an extinction both of the debt and security and therefore of the right to retain possession of the property as a security for the debt. (*Coults and Das JJ*) BIBI MAKBUL UN NISSA v BIBI UMAT UN NISSA, 2 Pat 84

4 Pat L T 272 70 I C 312 1923 P 33

———Dower—Lien of widow—Possessory lien

When a Mahomedan widow is in possession of the undistributed property of her deceased husband, having obtained such possession lawfully and without force or fraud and her dower or any part of it is due and unpaid she is entitled against the other heirs of her husband to retain such possession until her dower debt is paid, 17 A 77, 38 A 581, 17 A 93, 32 A 563 Ref (*Campbell, J.*) MALAWA RAM v SUMARAN

71 I C 820

———Dower—Lien for—Right to possession—Transfer of right—Dower debt—Succession to

When a Mahomedan has promised a woman, whom he marries, a dower but that dower has not been paid, she can lawfully remain in possession of his property when he dies until her dower is paid by her husband's heirs or until she succeeds in realising it out of the usufruct which she enjoys by reason of her being in possession but she has to render to the heirs an account. The right of the widow is heritable and she can assign the right to a stranger. 14 W R 239; 14 M. I

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A 377, 7 A 353, 6 A 50, 20 A 262, 29 A 64, 32 A 551, 40 B 34, 43 M 215 Ref. The transferee of the right would be entitled to possession until the dower debt is liquidated (*Buckmill, J*) SHEIKH ABDUR RAHMAN v SHEIKHWALI MAHOMED

2 Pat 75 4 Pat L T 267 1923 P 72.

———Dower—Nature of right—Widow's lien

A dower debt due to a Mahomedan lady is not a secured debt but a simple debt ranking equally with other debts due from the estate. The widow's lien for dower is the right which she has where she has taken peaceable possession of her husband's estate to hold that estate as against the heirs of her husband until they satisfy her claim to dower. It has no application to the share which she holds in her own right as heir of her husband still less can it give her right to prevent another creditor against her husband's estate from recovering the amount which is due to him (*Ryves and Daniels, JJ*) KANIZ FATIMA BEGAM v RAM NANDAN DHAR DUBE

45 A 384 21 A L J 269 L. R. 4 A 181

73 I C 977 1923 A 331

———Dower—Prompt and deferred when payable (1922) Dig COL 827 Mt, NAWAB BEGUM v ALLAH RAKHA 69 I C 937

———Dower—Relinquishment—Burden of proof—Death illness—Pregnant woman

It is not the Mahomedan Law that a woman who is pregnant is considered to be suffering from a mortal disease but the Law is that the danger does not begin until the pains of labour appear. Consequently to vitiate a remission of dower by a Mahomedan lady on the ground of its having been made during her mortal illness it must be shown that it was made after the pains of labour has commenced. The burden of proving that there has been a valid relinquishment of her dower by a Mahomedan lady is on those who assert it (*Stuart, J*) SHAMSHUL HASAN v, SYED HASAN 71 I C 296

———Dower—Widow's lien—Possession obtained—Nature of

A Mahomedan widow can retain possession of her husband's estate in lieu of her dower debt, only if she got such possession lawfully with the express or implied consent of her husband or his heirs (*Rankin and B B Ghose, JJ*) SAHU BIBI v ISMAIL SHEIK 27 C W N 1013

———Dower—Widow in possession of property in lieu of it—Alienation—Rights of transferee.

Under Mahomedan Law, a widow who is in possession of her husband's property in lieu of dower is competent to alienate the same, But the alienation gives the transferee only the right to remain in possession till she dies or her dower debt is satisfied (*Coults and Das, JJ*) SHEIKH NABI JAN v MT SAHIAN 2 Pat. 75 1923 Pat 153 (2) 4 Pat L T 278 1923 P 72.

———Family arrangement—Maintenance charged as income—Validity of See (1922) Dig COL 828 KHAJEH SOLEHMAN QUADIR v SALLY MULLA BAHADUR 21 A L J 1

37 C L J 56 (P. C.)

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## — Gift—Completion of—Absence of intention—Effect of

The mere absence of an intention on the part of the donor to make the gift effectual is not sufficient to invalidate the gift. Once it is found that the donee meant to take under the gift and he accordingly took possession of the property that will complete the gift (*Ashworth and Simpson, A J C*) *SHARFUZZAMAN v SIR HENRY STAN- YON* 70 I C 253 1923 Oudh 80

## — Gift—Delivery of possession—Endorsement on registration deed

Where there is a deed of gift and before its registration an endorsement is made therein that possession is delivered to the donee and the deed is subsequently registered, the burden of proving that possession was not given and therefore the gift is invalid is on those asserting its invalidity. Where there are tenants on the property, their attornment to the donee is sufficient delivery of possession. (*Schwabe, C J and Wallace, J*) *FATIMA BIBI v KHAIRUM BIBI* 1923 Mad. 52

## — Gift—Delivery of possession—Necessity for—Donor and donee being relations

A temporary abandonment of possession of a house by the donor would be sufficient to show delivery of possession in order to complete a gift under the Mahomedan Law. For the completion of the gift, abandonment even for a short time by the donor would be necessary. For the purpose of completing a gift of immovable property by delivery and possession no formal entry or actual physical departure is necessary, it is sufficient that the donor and the donee are present on the premises, and an intention on the part of the donor to transfer has been unequivocally manifested. 9 B 146, 29 B, 468, 19 M 343 referred to (*Adami, J*) *DALPHEROO MIAN v BANGALI MALI* 4 Pat. L T 397 71 I C 897 1923 P 481

## — Gift—Formalities necessary for—Delivery of possession

A gift can be made orally and need not be made by a registered instrument but there must be evidence from which a declaration by the donor, acceptance by the donee and transfer of possession can be proved (*Ashworth, J C*) *KHALIL ULLAH SHAH v EWAZ ALI* 26 O C 128 74 I C 390 1923 Oudh 214.

— Gift—Hiba bil ewa—Whether can take effect as a simple hiba in the absence of evidence or passing of any consideration or exchange of gifts—Gift by grandfather to minor granddaughter—Delivery See (1922) DIG COL 830 *SERAJUDDIN HALDAR v ISAB HALDAR* 70 I, C 203

## — Gift—Named Donees—Use of the word 'Waqf'

Under a deed executed by a Mahomedan certain named persons were to take the property becoming owners thereof immediately and they and their descendants after them were to enjoy the property without any power to alienate. The word 'Waqf' was used in more than one

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place by the executant in describing the document. Held that there was nothing in the deed which could possibly be stretched so as to constitute a transfer of ownership in favour of the deity and that it was expressly and in terms a gift to three specified persons. The use of the word "Waqf" did not override all other terms in the document and did not necessarily involve a transfer of ownership in favour of the deity such as is required to constitute a valid dedication under Mahomedan Law (*Mars, C J and Piggott, J*) *MAHOMED AFZAL v. MAHOMED MAHOMED* 21 A L J 595 L R 4 A 314 74 I C 343 1924 A 28

— Gift—No possession given—Effect See (1922) DIG. COL 828 *SHARIF, HUSSAIN v RUKAN DIN* 70 I C 493

— Gift—Possession of portion not taken—Life interest of donor in usufruct of part—Validity See (1922) DIG COL 829 *MAHOMED ABDUL GHANI KHAN v FAKHR JAHAN BEGAM* 37 C L J 1 (P C)

— Gift—Restraint on alienation—Estate taken—T, P Act if applies. See (1922) DIG COL 829 *BABU LAL v GHANSHAM DAS* 70 I C 84

— Guardianship—De facto guardian—Rights of transferee from—Ejectment See (1922) DIG COL, 830 *MONMOHINI DAS GUPTA v BASANTA KUMAR DAS GUPTA* 69 I C 753

## — Guardianship—De facto guardian—Power of disposal

A de facto guardian under the Mahomedan Law can deal with a minor's property only at his risk. He can incur liability but not impose any obligation on the infant. Even in cases arising out of wants of the infant, such a person can only deal with the moveables and not the immovables. 45 Cal 878 (P C) folld (*Ryves, J*) *ABDULLAH KHAN v MAHBUB ULLAH KHAN* 1923 All. 485

— Guardianship—Husband and wife—Agreement for future separation—Legality of See (1922) DIG COL 831 *BANNEY SAHEB v ABIDA BEGAM* 10 O L J 13 69 I C 779

## — Guardianship—Minor girl—Husband—Rights of

As regards the guardianship of the person of a minor Mahomedan girl, in the absence of the mother, the mother's mother is the lawful guardian of a minor girl who has not attained puberty and the husband is not the lawful guardian of her person (*Newbould and Suhrawardy, JJ*) *DARAJUDDIN AKANDA v EMPEROR* 37 C L J 329 27 C W N 531 73 I C 936 24 Cr L J 712 1923 Cal 672

## — Guardianship—Mother—Sale of immoveable property.

A Mahomedan mother not being the legal guardian of her minor children cannot sell their immoveable property and make it binding on them (*Abdul Raoof and Fforde, JJ*) *MUHAMMAD SHAFI v. KALSUM BI* 4 Lah 467.

## — Guardianship—Powers of Guardian—Alienation of minor's property

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Under the Mahomedan Law is not open to a person not being the executor of a deceased Musalman to alienate his property which has been inherited by his minor son. The brother of the deceased is otherwise in the same position as a stranger and cannot alienate the minor's property even for his benefit, or necessities (*Batten, J C and Halifax, A J C*) *MT BHURIBAI v. ISHAK HUSSAIN*

69 I C 619 · 1923 Nag 83

## —Guardianship—Rights of guardian

A natural guardian under the Mahomedan Law has no power to deal with the property of the minors and an alienation made by him or her would be altogether null and void (*Moti Sagar, J*) *MT TAHAN v SHADI* 1923 Lah 601 (1)

## —Inheritance—Qureshis of Multan—Special custom of the family in contravention of the Islamic—Law—Proof

Plaintiffs asserted a special custom according to which daughters in the family of the parties did not, in the presence of the sons succeed to the agricultural land although as regards urban immoveable property they took their share according to Mahomedan Law. The evidence on record did not show that a daughter or widow claimed her share but was refused, held, that the special custom was not proved (*Le Rossignol and Zafar Ali, JJ*) *MT HAJRA BIBI v MT JANAT BIBI* 4 Lah 85 (1923) Lah. 184

## —Inheritance—Shi'ahs—Daughter's children and descendants—Direct heir disqualified—Succession by next heir.

Under the Shi'ah Law daughter's children and descendants are not excluded from inheritance in favour of agnatic collaterals, nor does a disqualifying cause which excludes the direct heir from taking the inheritance from a bar, under the Mahomedan Law, to the succession of the next heir, the heir presumptive. The grand daughter is thus as much a "legal heir" under the Shi'ah Law as the daughter (*Mr Ameer Ali*) *AKHTARI BEGAM v DILJAN ALI* 45 M L J, 359

18 L W 193 (1923) M W N, 793

32 M L T (P C), 181 L R 4 P C 90

71 I C 621 (1923) P C 11.

## —Joint family—If exists—Rights to share property—Limitation See LIMITATION ACT, ART. 123.

1923 Lah. 519

## —Joint family—Members living together—Purchase by one in his own name—Presumption

Where the uncle and nephew lived together and land is purchased by the uncle in his name the presumption is that the purchase was made by him exclusively and the burden lies on the nephew to show that he supplied a part of the purchase money. The presumption of Hindu Law that the money came from the joint funds is not applicable to Mahomedans (*Walmsley and Ghose, JJ*) *MOHABBAT ALI v TOFAR ALI*

1923 Cal, 369

## —Legitimacy—Acknowledgment of paternity.

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An acknowledgment of paternity can only confer legitimacy where the paternity is doubtful and not where there is definite proof that the person in question is not the legitimate son of the person whose son he is alleged to be. (*Daniels, J*) *SHEIKH GAUCHAR ALI v MT RAISUNNISSA*

90 &amp; A L R 140

## —Legitimacy—Acknowledgment—When possible

Unless there is an absolute bar or impediment to a valid marriage acknowledgment has the effect of legitimation according to Mahomedan Law where either the fact of the marriage or its exact time with reference to the legitimacy of the child's birth is a matter of uncertainty. Where there could not have been a valid marriage between the parents the question of acknowledgment does not at all arise, 9 C W N 352 48 C 856 10 A 289 15 A, 380, referred to (*Ross, J*) *MAN MOHAN SAW v MUHAMMAD HUSAN KHAN*

1 Pat L R 328 72 I C 152

## —Legitimacy—Presumption as to

The Mahomedan Law raises a strong presumption in favour of legitimacy where a child was born under a man's roof and continued to be maintained in his house without any steps being taken on the father's part to repudiate his title to legitimacy as his offspring, (*Simpson, J C and Dalal, A J C*) *GALSTAUN v MIRZA ABID HUSSAIN* 10 O L J 263 90 & A L R 282

73 I C 428 1924 Oudh 19

## —Legitimacy—Presumption as to—Rules if superseded by the Evidence Act, S 111

The presumption raised by Mahomedan Law that a child born within 2 years (in some schools of the termination of a lawful marriage, Marriage is legitimate is a matter relating to the law of evidence and must not be deemed to be governed by S 112, Evidence Act (*Daniels, J*) *MT HAJIRA KHATUN v MT AMINA KHATUN* 73 I C 983

1923 A 570.

## —Legitimacy—Presumption rebuttable

Where it was found that the plaintiff was born 331 days or eleven full months after his alleged father's death and that his mother had been living for the last few years in illicit connection with another person. Held that the plaintiff appellant was not the legitimate son of the alleged father (*Daniels, J*) *FATTEH DIN v UMRAO*.

1923 A 440

## —Legitimacy—Rules governing—Burden of proof

The question whether the rule of Mahomedan law as to the maximum period of gestation is a rule of evidence or a rule of substantive law is a highly debatable question.

The modern view of Mahomedan jurists limits the period of gestation to 10 months. Hence it is for the person who alleges there were abnormal circumstances attending his birth to show that they existed, (*Shadi Lal, C J and Abdul Qadir, J*) *UMAR HAYAT v. MISRI KHAN*

69 I C 491.

## MAHOMEDAN LAW

## ———Life interest—Reversioners

The plaintiffs' case was at the Settlement in 1878 a life interest only was conferred on their mother Kallu Bi and her step mother Raj Bi so that they have no power of alienation and now that they were dead the property reverts to them. *Held* even if the grant were limited to a life interest as they alleged it was nowhere stated that the heirs of Kallu Bi or those of her father Sheikh Baktawar to be the reversioners. *Held* further that the grant to Kallu Bi were for her life only then unless it is otherwise stated, on her death the estate reverts to the grantor, that is the Government, and not to her heirs nor to those of her father. (*Hallifax, J C*) RAHIM BAKSH v SHEOCHARAN 1923 Nag 132.

## ———Marriage—Breach of contract—Damage

Under the Mahomedan Law in a suit by a plaintiff for damages for breach by the defendant to give his daughter in marriage to the plaintiff, the latter would be entitled only to receive compensation under section 73 of the Contract Act for any loss or damage caused to him by the breach which the parties knew would be likely to result from the breach of it. (*Campbell, J*) GHULAM MAHOMED v. MBIRAJ DIN 1923 Lah 679

## ———Marriage—Dissolution—Death or divorce—Re marriage

Under the Mahomedan Law death or divorce dissolves the tie between the husband and wife. On the happening of either event the relationship between the parties ceases. Much more would it be so in the case of a woman who after the death of her first husband marries into another family. (*Rafique and Piggot, JJ*) JAHANGIR KHAN v SYED ABDUR RAHMAN 1923 A 128

## ———Marriage—Dissolution—Divorce—Conditions—Vindictive—Apostasy

An agreement that the wife should be entitled to get a divorce pronounced on the breach of a certain conditions of the marriage contract by her husband, is not void as being opposed to the principles or policy of the Mohammadan Law, as it treats marriage as a purely civil contract. (*Hallifax, A J C*) KIDA ALI v SANAI 6 N L J 166 73 I C 1042 1923 Nag. 262

## ———Marriage—Guardian for marriage—Marriage by person not guardian—Effect

Where the mother and brothers of a minor girl are alive a marriage contracted for her by her uncle, whether he was the husband of the father's sister or mother's sister who is not a guardian for marriage under Mahomedan Law, is void. (*Broadway J*) MT. GHULAM FATIMA v. KHAIRA 1923 Lah 674

## ———Manager—Iddat period of—Pregnancy, effect of.

The duration of the period of the *iddat* and the period prescribed for the *iddat* of a widow on the death of a regularly married husband, if not pregnant is 4 months and 10 days or until delivery, whichever is longest. The period fixed is not curtailed if the delivery takes place before the expiry of the period of four months and ten

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days (*Broadway and Moti Sagar, JJ*) JHANDU v MT. HUSAIN BIBI 4 Lah 192 5 Lah L J 401 73 I C 590 1923 Lah 499

## ———Marriage—Legality of—Apostasy

By the apostasy of either the husband or the wife a Mahomedan marriage is dissolved 132 P R 1884 61 P R 1899 33 A 90 39 C 409 Ref the test is whether the parties have renounced the Mahomedan religion. (*Scott Smith, J*) MT. BAKHO v LAL. 71 I, C 830.

## ———Marriage—Option of puberty—When to be exercised

Where a Mahomedan girl who has been married when she was a minor wants to exercise her option of puberty the repudiation should be made immediately she perceives signs of the menstrual flow. The principle underlying is that there must be no acquiescence in the marriage after that event. (*Le Rossignol, J*) HUSSAINA v MT. JIWANI 69 I C. 281

## ———Marriage—Option of puberty—When to be exercised

The right to repudiate a marriage has to be exercised as soon as the minor attains puberty. Where the right had not been exercised for fully a year after the plaintiff had reached the age of puberty. *Held*, that she had lost the option given to her. 44 All 61 Diss (*Broadway, J*) MT. GHULAM FATIMA v. KHAIRA 1923 Lah 674.

## ———Marriage—Option of repudiation by girl unaware of marriage on obtaining knowledge.

A girl who is unaware of her marriage at the time when she attains puberty retains her option of repudiation until she becomes aware of it. (*Martineau and Zafar Ali, JJ*) SULTAN v. WARYAM 1923 Lah 502 (1) 73 I C 895

## ———Marriage—Puberty—Age of

The age of puberty is generally fixed at 14 in the case of males and 12 in the case of females but according to Mahomedan Law a girl must be presumed to have reached puberty on completing her 15th year. (*Shadi Lal C J and Zafar Ali, J*) MT. NAWAB BIBI v. ALLAH DITTA 73 I C 896

## ———Marriage—Repudiation—Option of puberty

A girl can exercise the option of repudiation of marriage under the Mahomedan Law only after she attains puberty and not before. A denial of the factum of marriage by the girl when examined as a witness in a criminal case where her mother was charged with bigamy does not amount to the exercise of the option of repudiation of marriage on puberty. (*Daniels, J*) HUB ALI v EMPEROR, L R 4 A. 73 (Gr) 1923 A 329.

———Minor—Guardianship—Minor girl—Husband not the lawful guardian before puberty—Maternal grandmother—Rights of. See PENAL CODE S. 363 27 C. W N. 531



## MAHOMEDAN LAW.

## —Mosque, private or public—Evidence

The question whether a particular building is a public mosque or not is a question of fact, and while the existence of a *mihrab* and *mimbar* may be evidence to be considered along with the other facts in the case in deciding that question of fact it is not possible to lay down that as a matter of law the judge is bound to accept the existence of such structures as practically conclusive proof of the fact that the building in question was a mosque. *ie.*, a public mosque (*Shah and Crump, JJ.*) *SHEIKH HASAN SAB v MOHIDIN SAB WALAD* 70 I C 850 1923 Bom 42 (2)

## —Mutwalli—Agreement to appoint—Committee of mutwallis—Previous accounts

Clause 14 of the agreement which dealt with the dismissal of a mutwalli was in the following terms—

"Should a mutwalli in the opinion of six mutwallis at least be found dishonest or negligent or should the existence of a mutwalli be not useful for the management of the mosque or should he make unnecessary interference in the management of the mosque he shall lose his rights, and another man of his caste shall be appointed in his place in accordance with the above rules." Two thirds majority of the mutwallis on whom very wide powers were conferred by the resolution having concurred in passing the resolution removing the plaintiff from the committee of the management of the institution plaintiff was legally removed. The new trustees were bound to take steps to acquaint themselves with the state of the trust property and to get in the trust estate including any lands belonging to the institution. In order to discharge this duty, which the law casts upon the trustees, they were entitled to call upon the dismissed trustee to produce the previous accounts and he is not justified in ignoring the demand (*Shadi Lal C. J. and Fford, J.*) *KHUDA BAKSH v NUR MOHAMMAD*

1923 Lah 379

## —Mutwalli de facto—Right to collect money due.

A *de facto* mutwalli is entitled to collect money due to the trust, provided he agrees to credit the same and duly account therefor to the legal owners. (*Walsh and Kanhaiya Lal, JJ.*) *SHEIKH MUZUDDIN v MOHAMMAD IKHLAQ*

21 A L J, 616 I R. 4 A 503  
74 I C 756 1924 A 59

—Partition—Partial partition—Alienation from co-heir See (1921) DIG COL. 819 MOIDEEN KUTTI v. MARIAM UMMA 70 I C 118

—Pre-emption—Applicability of—Hindu vendor—Property in Behar—Sale in Delhi—Law applicable See (1922) DIG COL. 833 SAHYID BAZAL KARIM v MT. BIBI FAIMATUL KUBRA

1 Pat 774

## —Pre-emption—Contract of sale—Demand before registration—Validity

A right of pre-emption arises not only when an out and out sale has been completed but also when a complete contract of sale (without any option in the vendor) has been made. Hence a

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demand made after the execution of the sale deed but before registration is not premature or defective (*Lindsay and Sulaiman, JJ.*) *ZAWANI BEGAM v KHAN MUHAMMAD KHAN*

21 A L J 908

## —Pre-emption—Demands—Proof of—Joint demand—Legality

To prove the *tabli-lishhad* in a claim for pre-emption, it is enough if the court believes the statement of the plaintiff that he made the demand in the presence of witness as required by law. The witnesses themselves need not be called. The fact that two demands were made at one and the same time regarding two separate transfers does not make them illegal (*Rafique and Lindsay, J.*) *SAYAD AMJAD ALI v SAYAD WAJID ALI* 1923 All 487

## —Pre-emption—Formalities not fulfilled

For two or three months before the demands were made the plaintiff had an intention of bringing a suit for pre-emption in respect of the sale deed. He made up his mind to bring a suit when he claimed pre-emption. Held as the demands required by the Muhammadan Law were not made immediately after learning of the sale in question by the plaintiff, he cannot succeed in his present claim (*Rafique and Piggot, JJ.*) *ABDUL RAHMAN v MI RIFFAQTUNISSA*

1923 All 229

## —Pre-emption—Pre-emptor and vendee on same relation—Effect

Where in a claim for pre-emption, the vendee and pre-emptor stand in the same relation as regards the property, the latter can get a decree only as regards one half (*Rafiq and Lindsay, JJ.*) *ZIA-UD-DIN v. ABDUL HASSAN*

45 All 487.

## —Pre-emption—Second demand—Absence of reference to first—Effect

Under Mahomedan Law, the second demand or *talab-i muasabat* in a case of pre-emption must call the attention of the witnesses present to the first demand or *talab-i ishtishad* which he had previously made. The fact that the same witnesses were present when the first demand was made is immaterial (*Rafiq and Piggott, JJ.*) *SADIQ ALI v ABDUL BAQI KHAN*

45 A 290 21 A L J 109 I R 4 A 99

71 I C 460 1923 A 251

## —Pre-emption—Second demand—Validity

Mahomedan Law requires that the second demand for pre-emption should be made either in the presence of the vendor or vendee or on the property that is the subject of pre-emption. The singular words 'vendor' and 'vendee' include the plural also. According to the interpretation of the Mahomedan Lawyers, if the demand is made neither in the presence of vendor nor on the property sought to be pre-empted but in the presence of the vendee then in case there are more than one vendee the demand should be made in the presence of all, (*Rafique and Lindsay, JJ.*) *ALIMAN BEGAM v ALI HUSAIN*

45 A. 449 73 I C. 1029 1923 A 355 (1)

## —Pre-emption—Vendee and pre-emptor equally related to vendor

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Where both the pre-emptor and the vendee stand in the same degree of relationship with respect to the vendor whether as owners of dominant tenements or as owners of servient tenements in respect of different portions of their properties. The property in dispute ought to be divided between the pre-emptor and the vendee 19 A, L J 869 ref. (*Rafique & Lindsay, JJ*) MOULVI ZIA UDDIN v. MD ABDUL HASAN 1923 A 520.

Religious endowment-khankah, meaning of—Succession of eldest son is not by right See (1922) DIG COL, 834 KAHWAJA MAHOMED HAMID v MIAN MAHOMED 44 M L J 149 4 Lah 15 32 M L T (P C) 52 L R 4 P C 24 25 Bom L R 660 38 C L J 231 27 C W N 701 50 I A 92

Religious endowment — *Mutwalli*, appointment of

By the rules of Mahomedan Law if no rules of succession to the *towlat* are made by the creator of the endowment the right of appointing a *mutwalli* rests, first in the founder, after his death in the executor and in case of failure of the above two, in the Qazi or the officer of the Civil Court (*Gokul Prasad, J*) RAZA ALI v MOAZZAM ALI 70 I C 836 (2) 1923 A 12

Religious office *Sajjadanashin*—*Mutwalli*—Right of females

No doubt the origin of the rule that a woman is not qualified to perform the functions of *sajjadanashin* is based upon the consideration that it is unseemly for a Mahomedan lady to perform duties which bring her in close and intimate association with the general public of the opposite sex, but there seems to be no reason why the disqualification should be confined only to those cases in which the office requires that spiritual instruction should be given by a teacher to his disciples. Whatever may have been the exact nature of the objections upon which the disqualification of a woman to act as *sajjadanashin* was originally based it would appear to have become a settled rule at the present day that no woman is qualified to become a *sajjadanashin* whose office involves the performance of religious and spiritual duties, not only those of *puimuridi* but those of reading the *fateha* and offering prayers and incense in a place of public worship.

The *mutwalli*ship appertained to the office of the *sajjadanashin* and as that office required certain personal qualifications which cannot be performed by proxy the question did not arise in the present case whether a female could be appointed *mutwalli* delegating the performance of religious office to a proxy (*Miller, C J and Kulwant Sahay, J*) BIBI KANIZ ZOHRA v SAIED MUZTABA HUSAIN 1923 Pat 241 4 Pat L T 613

Restitution of conjugal rights—Marriage of minor—Husband neglecting her even after puberty—Effect

Where a Mahomedan girl was married when she was 3 years old as an exchange for her father marrying the sister of the husband, and from that time until 2 years after she attained puberty the husband neglected her he is not entitled to restitution of conjugal rights. (*Shadi Lal, C.*

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*J and Zafar Ali, J*) MT NAWAB BIBI v. ALLAH, DITTA. 73 I C 896

Succession—Co-heirs—Liability for debts of ancestor—Execution sale

Under the Mahomedan Law, the heirs of a deceased person would not be bound by the decree in a suit to which they were not parties but some other heirs had been made parties. Nor would their interest in the estate of the deceased pass by the sale in execution of that decree 43 B 412 foll. (*Macleod, C J and Crump, J*) LALAMIYA SHAIKH v MANUBIBI 47 Bom 712 25 Bom L, R 408 73 I C 246 1923 Bom 411

Succession — Sister and collaterals—right of See (1923) DIG COL 835 MT GHULAM ZOHRA v NUR HASAN 69 I C 1000

Wakf—Construction

A wakf provided —“In the event of slackness, negligence or discovery of misappropriation on their part, I or my heirs shall be at liberty to dispense with the services of the said *mutwalli*, and in case of death or dismissal of any *mutwalli*, if any heir belonging to the *Imamia* sect and competent enough to administer the wakf property be not left to the *mutwalli*, the *naib-mutwalli* shall succeed him as *mutwalli* and a *naib-mutwalli* shall be appointed from his (*naib mutwalli*'s) heirs. In the event of no heir of the *mutwallis* and the *naib mutwallis* being found fit to manage the wakf property, selection shall be made of a competent person from among the heirs of me, the executant. If, God forbid, no heir of mine near or remote be found, the authorities for the time being shall be competent to appoint a suitable person belonging to the *Imamia* sect to administer the wakf property mentioned above. But so long as the *mutwallis* and the *naib mutwalli* aforesaid shall manage the affairs of the wakf estate faithfully and efficiently, no one shall question (the tenure of the offices by the *mutwallis* or be competent to complain (urge their dismissal nor shall they be dismissed) unless the complaint is substantiated before the authorities for the time being”.

Held, it is only in the event of no heir of the *mutwalli* and the *naib mutwalli* being found fit to manage wakf property, that selection is to be made of a competent person from among the heirs to the wakf (*M. Ameer Ali*) AKHTARI BEGAM v DILJAN ALI 45 M L J 359 18 L W 193. (1923) M W N 793

32 M L T (P C) 181 L R 4 (P C) 90 71 I C 621 (P C) 1923 P C 11

Waqf—Dedication—Evidence of—User See (1922) DIG COL 835 SADIQ HUSAIN v KHAN BAHADUR HAKIM MIRZA NAZIR HUSAIN KHAN 26 O C 82

Waqf—Dedication—Moveable property—Government Promissory Notes

Where a Mahomedan Settlor appropriated a sum of money for wakf and appointed himself *mutwalli* and the possession of the property continued with him as before. Held, that this declaration in the deed in the preamble that he had created a *waqf* and that he shall in his lifetime perform every wakf duty and not incur such ex-

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penses or such private transfers for house hold purposes in respect of the waqf property as might tend to a reduction in the waqf property was sufficient to prove a change in the nature of his possession

There is a conflict of opinion among different High Courts in India whether the *waqf* of cash is valid or not *Held*, however such a waqf was valid according to the Muhammadan law (*Daniels and Dalal, A J C*) *MIRZA YAQUB BEG v MIRZA RASUL BEG*

10 O L J. 86  
74 I C 517 1923 Oudh 254

———*Waqf -Dedication- Tomb of Mahomedan saint—Sajjadanashin*

The burden of proving a valid dedication to public religious uses of certain property is on those who assert it. A dedication could not be presumed merely from the facts that a saint was buried at a particular place and that *urs* had been held at the tomb on his death anniversary. There cannot be a *Sajjadanashin* in the absence of a waqf and if a person is so called without any connection with a waqf it is a mere courtesy title (*Shadi Lal C J and Fford, J*) *ALI MAHOMED KHAN v ALI AKBAR KHAN*

4 Lah 133 73 I C, 613 1924 Lah 58

———*Waqf—Dedication—Validity of—Power of sale saved to donor*

The reservation of a power to sell and transfer the property during her life time by the dedicator derogates from the nature of the grant. Such a condition is inconsistent with a valid wakf which must be certain as to the property appropriated and at the same time unconditional, and not subject to an option. There might be a reservation of the annual profit of the donor for her life but a provision empowering the donor to sell and appropriate the proceeds thereof for his own or other's benefit, would make the settlement invalid. 6 B 42, 16 A L J 841 Ref (*Gokul Prasad and Kanhaiya Lal, JJ*) *AMIRUDDIN v MUZAFFAR-UL-HASAN*, 45 All, 107 69 I C, 641 1923 A 55

———*Waqf—Dedication—Validity of—Reservation of life interest—Appointment of trustee*

Under a deed of *wakf* a mahomedan appointed himself as first mutawalli and expressly declared that he was holding the property henceforth as mutawalli and not as a owner *Held* that this according to the accepted rule of Mahomedan Law, was sufficient to constitute a valid dedication to waqf

The mere charge upon the profits of the estate of certain items which must in the course of time necessarily cease, being confined to one family, and which after the lapse will leave the whole property intact for the original purposes for which the endowment was made does not render the endowment invalid under the Muhammadan Law. Where there was admittedly an ultimate dedication of the entire property to religious and charitable uses, the weight of authority is entirely in favour of the validity of the *wakf* (*Ryvs and Daniels, JJ*) *MD. ZAIN KHAN v NURUL HASAN KHAN*, 45 A. 682 • L R 4 A 320 21 A. L. J. 650 : 74 I. C 142

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———*Waqf—Essentials of—Shiah law—Completion of the trust—English law*

There are four essential requisites on which depends the validity of the *waqf* (1) that it must be perpetual, (2) it must not be contingent, (3) that possession must be given of the thing dedicated, or more properly, the properties should cease to be the properties of the donor, and (4) that the right of the donor should be entirely divested therefrom. It is however, recognised in Shia Law that it is lawful for the *waqif* to constitute himself or herself the *mutwalli*, and that, in such a case, a formal change of possession is out of the question, and that all that is required is, not actual delivery of possession, but a change in the character of possession

The Shia Law differs from the English Law on the question of the completion of the trust, though they agree in this that where the trust was in the first instance created, the Court will enforce it and will not enter into the question whether the trust was acted upon. In England, transmutation of possession is not, whereas in Shia Law it is, an essential pre-requisite to the creation of the trust. In England, if the settlor purposes to convert himself into a trustee, then the trust is perfectly created as soon as the settlor has executed an express declaration of the trust intended to be final or binding on him. In Shia Law, the *waqif* must still show that he has changed the character of his possession (*Das and Adams, JJ*) *MT BIBI KANIZ ZAINAB v SYED MOBARAK HOSSAIN* 72 I C 748.

———*Waqf—Gift for perpetual succession—Aggrandisement of family Use of word "wakf"—Effect See (1922) DIG COL 137 KHAJAH SOLEMAN QADIR v SALI MBLLAH BAHADUR* 21 A L J, 1 37 C L J 56 (P C)

———*Wakf—Mutwalli—Alienation—Suit to set aside—Escheppel*

The Courts have paid more regard to the protection of the trust than to the protection of the alienee and it is now settled that even if the grantor has himself been implicated in the abuse of the trust the Courts will interfere at his instance to prevent a repetition of the abuse though his previous conduct might be a reason for excluding him from the administration of the trust property, (*Mullick and Ross, JJ*) *MAULAVI MAHOMED FAHIMUL HUG v JAGAT BALLAV GHOSH* 2 Pat 391 4 Pat. L T. 675 74 I. C 403 1923 P 475

———*Waqf—Mutwalli—Appointment by District judge—Selection and nomination,*

Where a deed of waqf provided that on a vacancy occurring in the office of *Mutwalli*, it should be filled by a pious Mohammadan, appointed by a competent Court on the nomination of five respectable and pious Mohammadans of the village, and five respectable and pious Mohammadans nominated one candidate and five other respectable and pious Mohammadans nominated another candidate, whereupon the District Judge held that both these candidates were duly qualified as pious Mohammadans to hold the office, and after fully considering their respective claims, he appointed one of them as *Mutwalli* *Held*, that the appointment was valid and proper. (*Sunderson*

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*C J and Richardson, J*) MOHIUDDIN CHOWDHURY v AMINUDDIN CHOWDHURY

72 I, C 930

— *Waqf—Mutawalli—Lease of property—Permission—In whom power lies*

Under Mahomedan the power of granting permission to a *mutawalli* to grant leases of wakf property was vested in the *kazi*, now an application for permission must be made to the District Court in the mofussil and to the High Court in the Presidency towns—It is not necessary to file a suit for that purpose (*Mookerjee and Pantan, JJ*) HABIBAR RAHAMAN v, SAIDANNESSA BIBI

38 C L J 365

— *Waqf—Mutawalli—Minor—Selection and appointment*

Although a minor might succeed by inheritance to the office of *mutawalli*, a substitute being appointed to carry out the duties during his minority, it seems to be settled law that where a succession is not by inheritance but by appointment or selection a minor cannot be appointed (*Miller, C J and Kulwant Sahay, J*) BIBI KANIZZOHRA v SAIED MUZTABA HUSAIN

2 Pat 819 (1923) Pat 241 4 Pat L T 613  
1923 P 576

— *Waqf—Mutawalli—Minority of office-holder*

Where the office of *Mutawalli* devolves upon a minor by virtue of the provisions of the trust deed, in such a case the appointment will remain in abeyance until the majority is attained (*Miller, C J and Kulwant Sahay, J*) BIBI KANIZ ZOHRRA v SAIED MUZTABA HUSAIN

2 Pat 819 (1923) Pat 241 4 Pat L T 613  
1923 P 576

— *Waqf—Mutawalli—Powers of leasing*

A *mutawalli* should not lease wakf property, if it be agricultural, for a term exceeding three years, and, if non-agricultural, for a term exceeding one year unless he is expressly authorised by the deed of wakf to do so or where he has no such authority, unless he has obtained the leave of the court to do so (*Mookerjee and Cumming, JJ*) GAJENDRA NATH BLY v MOULVI ASHRAF HOSSAIN

27 C. W. N 159  
69 I C. 707 1923 Cal 130

— *Waqf—Objects of dedication—Maintenance of relatives* See (1922) DIG COL, 838 MUKARRAM ALI KHAN v ANJUMAN UN-NISSA BIBI

45 Ali 152 69 I C 836

— *Waqf—Public purpose—Hujra—Upkeep of*

The upkeep of a *hujra* may to a certain extent benefit the public, but it is an obvious straining of the language to call a *hujra* an institution which advances religion commerce, health or safety, or is otherwise beneficial to mankind A *hujra* is a private guest-house in which a leading man entertains his guests The extent to which he throws it open to all and sundry depends entirely on his personal idiosyncrasies. It is not a public institution in any sense of the word, (*Pispos, J C*) YUSUF KHAN v MISALKHAN

73 I C. 99

Y. D.—62

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— *Waqf—Sajjada-nashin—Appointment.*

The office of *sajjada-nashin* implies the existence of a religious institution the holder of the office being the person in charge of the spiritual affairs of the institution He is the curator of the *Dargah* and is supposed to continue the spiritual line (*Martineau, J*) ALI MUHAMMAD KHAN v ALI AKBAR KHAN

69 I C 415

— *Waqf—Tomb—Dedication*

In the absence of proof of dedication, a tomb by itself does not become *waqf* For this purpose there is no distinction in Mahomedan Law between the tomb of an ordinary Mahomedan and that of a saint (*Martineau, J*) ALI MUHAMMAD KHAN v ALI AKBAR KHAN

69 I C 415

— *Wakf—Valid objects*

Where the provision intended to benefit the family of the settlor was not the preponderating feature of the settlement, nor was the provision made for the perpetuation of religious ceremonies and charitable gifts by any means illusory or unsubstantial, but were equally undoubtedly, the two provisions—that for the upkeep of the mosque and celebration of worship there on the one hand and that for the benefit of the settlor's family on the other—are, as a matter of drafting separate and severable dispositions, there is a valid creation of a wakf If the effect of the deed is to give the property in substance to charitable uses, it is valid wakf, but not if the effect is to give the property in substance to the testator's family When once it is declared that a particular property is wakf or any such expression is used as implies wakf, the right of the wakf is extinguished and the ownership is transferred to the Almighty Neither the *sajjada-nashin* nor the *mutawalli* has any right in the property belonging to the wakf, the property is not vested in him, and he is not trustee in the technical sense. The *wakfnama* does not transfer the property to trustee Such property as is held in wakf is inalienable, except for the purposes of the wakf Where an attempt is made to grant a mortgage for purposes foreign to the necessary purposes of the wakf, which is therefore as such unsustainable, the whole mortgage fails It cannot, for purposes of enforcement, be severed into two distinct charges, one declared for pious uses on one part of the property, and another separate charge declared on another part for the use of the mortgagor only The property itself is not to be regarded as severable and chargeable according to the measure of the interest, which the settlor's family may have in the rents and profits of the whole (*Lord Sumner*) HAJI ABDUR RAHIM v NARAYAN DAS AURORA

44 M. L J 624 50 Cal 329

32 M L T (P C) 153 17 L W 509.

71 I C 646 25 Bom L R 670

38 C L J 242 (1923) M W N 441.

28 C W. N. 121 50 I A 84 (1923) P C. 44 (2).

— *Will—Exclusion of heir—Effect*

Under the Shiah law a will is valid to the extent of one third even without the consent of the heirs if it is a will of the entire property in favour of an heir it will not be valid unless the other heirs assent to it even to the extent of one third (*Banerji,*

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*A. C. J. and Piggoit, J.)* AMRIT BIBI v MUSTAFA HUSAIN, 21 A. L. J. 750 L. R. 4 A 496 1924 A 20

—Will—Executor—Powers of—Sale of estate *See* (1922) DIG. COL. 838 MAHOMED YUSUF v HARGOVANDAS 47 Bom. 291 70 I C 268

—Will—Legacy to heir—Burden of proof of consent *See* (1922) DIG. COL. 839 A E SALAYJEE v FATIMA BIBI 1 Rang. 60 44 M. L. J. 382 28 C. W. N. 31 (1923), M. W. N. 522 18 L. W. 44 2 Bur. L. J. 1 32 M. L. T. (P. C.) 96 25 Bom. L. R. 301 L. R. 4 P. C. 38 37 C. L. J. 302 71 I C 753 (P. C.)

—Will—Legacy of one-third of estate—What is included in

One Y made a will by which he left one-third of the portion of the property, of which he was competent to dispose, to be dealt with for charitable purposes. His executor bought out of the estate certain property and he then sold all the remaining assets. In a suit for a declaration that the gift to the charity was bad and that a portion of the estate should take place the Court of first instance decided that the gift to the charity was good and directed that the charity should be entitled to one-third of the state of the testator as it existed at the date of his death. In other words it assumed that the effect of the will is to give to the charity, not one-third part of the estate, but a sum that would be measured by ascertaining what one-third part of the estate would be at the date when he died. *Held* the will is capable of bearing any such interpretation and that the charity is entitled to one-third of the whole of the estate (*Lord Buckmaster*) MIRZA MAHOMED v THE OFFICIAL ASSIGNEE 18 L. W. 277 38 M. L. T. (P. C.) 370 (1923), P. C. 146

**MAINTENANCE—Suit for—Quantum.**

In all cases where a right of maintenance has been allowed the quantum of maintenance should be decided in the suit itself even though the parties may not have in the first instance provided the Court with the materials. The parties entitled to maintenance who are generally females should not be left to separate proceedings (*MacLeod, C. J. and Crump, J.*) NILAWA IRAYA v REVANSHIDAYA 1923 Bom. 419

**MAJORITY ACT, (IX OF 1875, S. 2)—Mahomedans—Guardian for marriage**

In considering the age of majority for purposes of exercising the right of guardianship for marriage in the case of a Mahomedan, reference should be made to the provisions of Mahomedan Law, as S. 2 of the Majority Act makes the Act inapplicable to such a case. The age of majority under the law is 15, (*Martineau, J.*) YUSUF v MT. ZAINAB 1923 Lah. 102

**S. 3—Guardian appointed—Age of majority.**

Where once a guardian has been appointed under the Guardians and Wards Act (VIII of 1890) the minor cannot attain majority until the

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age of 21 (*Harrison, J.*) MT DURGA DEVI v GUR NARAIN, 69 I C 401

**MALABAR COMPENSATION FOR TENANTS IMPROVEMENTS ACT (I of 1900) S. 5—Improvements—Changes in the property altering its condition—Injunction by Civil Court—Revision—C. P. Code, S. 115 *See* (1922) DIG. COL. 839 KADAN KOLATHIL SAIDALI KUTTI v C. M. GODAN NAMBUDERI 70 I C 718**

**S. 19—Limitation—Tenant's right to make improvements—Provision for payment of fee in respect of trees cut**

The imposition of a small *kutis kanom* (stamp-fee) does not contravene the provisions of S. 19 of the Malabar Compensation Act. If on the other hand the fee imposed is the full value of the trees, it does contravene the provisions of S. 19 of the Act. An agreement to pay some fee on each tree cut during the duration of the lease does not limit the right to claim compensation for improvements. If the trees are in existence at the end of the tenancy the tenant is entitled to compensation but not otherwise and if he chooses to enjoy the benefit of trees by cutting it down during the tenancy, no question of compensation arises. 40 M. 603 F. B. 24 M. 47 32 M. L. J. 541 Ref. (*Ramesam, J.*) KELU NAIR v VIYATHAN MAHADEVI, 69 I C 546 1923 Mad. 238

**MALABAR LAW—Custom—Moolahs—Self-acquired property—Devolution *See* (1921) DIG. COL. 827 KALANDAR v KALANDAR 69 I C 570**

**Junior members—Separate maintenance—Right to**

The junior members of a Malabar Tarwad are entitled to receive maintenance out of the Tarwad house when there is no room for them in the house. If the karnavan makes an insufficient allowance, they can apply to court to rectify the same.

*Prima facie* the junior members living out of the Tarwad should be treated equally, but the circumstances of each may be looked into in fixing the amount. It is for the karnavan to judge what each should get. Such considerations as health, need for education, earning capacity, prior maintenance grants, etc. can be taken into consideration.

What is reasonable maintenance is a question of fact, and a Court will not lightly interfere with the decision of a karnavan as regards the rate he fixes (*Schwabe, C. J. and Wallace, J.*) KOTTAL KUNHALIKUTTY HAJI v KUNHAMAYAN

44 M. L. J. 212 46 Mad. 567 17 L. W. 536 32 M. L. T. (H. C.) 366 72 I C 833 1923 Mad. 280

**Kanam—Renewal during the currency of a prior Kanam—Bona fide Settlement of disputes—Karnavan misappropriating benefit—Liability of Kanomdar**

A renewal of a Kanom by a Karnavan before the expiry of its period, when such renewal is to take effect from the date of expiry, is not valid, unless it is shown to be for necessity or the benefit of the tarwad. Where the renewal is given consequent on a bona fide settlement of disputes among the parties is for the benefit of the tarwad

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the fact that the Karnavan spent the moneys received for the renewal on himself and not for the tarwad's benefit, does not vitiate the renewal (*Phillips and Devadoss, JJ.*) KENATH ACHAN v KALLIANI AMMA 45 M L J 258 18 L W 203 (1923) M W N 807 75 I C 476 1923 Mad 700

**Karnavan—Powers of**

The Karnavan of a Malabar Tarwad is not a mere trustee. His position is that of the manager of an undivided Hindu family (*Oldfield and Devadoss, JJ.*) MEENAKSHI NETHIAR AMMA v CHERIYA PARVATI NETHIAR (1923) M W N 657 74 I C 1012

**Karnavan—Powers of leasing—Kanom—Renewal**

The position of the Karnavan of a Malabar tarwad is higher than that of a Hindu widow and he has in fact greater powers than the manager of a joint Hindu family 3 M 169 Ref. He has full powers of management of the family property and is even allowed to give Kanoms of the tarwad property without necessity, though the Kanom amounts to an alienation of the family property. The reason for holding that necessity must be proved in order to validate a renewal executed before the expiry of the subsisting Kanom is that it is impossible to predicate some years in advance what the state of affairs will be when the original Kanom expires (*Phillips and Devadoss, JJ.*) KENATH ACHAN v KALLIANI AMMA 45 M L J 258 18 L W 203 (1923) M W N 807 75 I C 476 1923 Mad. 700

**Karnavan—Sale of tarwad property—Necessity substantially proved—Sale to be upheld—Form of decree** See (1921) DIG COL 828 KRISHNAN v GOVINDAN 69 I C 302.

**Land tenures—Melcharath—Grant of—Kanom if terminated**

When a melcharath is granted, that does not ipso facto put an end to the interest of the Kanomdar. The latter has his full rights till he is fully redeemed. A melcharath granted without authority can be satisfied by the person who has authority (*Oldfield and Ramesam, JJ.*) KOZHINKOT PATINHARE KOVILAGATH IAMBATTI THAMBURATHI v SANKARA MENON.

73 I C. 376

**Maintenance—Decree against karnavan—Form of**

When a decree for maintenance or arrears is passed against the karnavan of a Malabar Tarwad the proper form is not to make it personally against him but against him as karnavan and against the income of the tarwad properties and the properties of the tarwad (*Schwabe, C J and Wallace, J.*) KOTTAL KUNHALIKUTTY HAJI v KUNHAMAYAN 46 Mad. 567 44 M L J 212 17 L W 536 32 M L T (H C) 366 72 I C 833 1923 Mad 260

**Stanom — Stanomdar — Powers of alienation.**

A Stanomdar is also a manager of the family for the time being, if he grants a lease or makes an alienation to endure beyond his lifetime which is for the benefit of the family, it will be upheld,

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as, on the other hand any such transaction, if prejudicial to the family will be set aside, (*Spencer and Verkalasubba Rao, JJ.*) MEETHALE CHALIL P T KELU KURUP v. K P P RAMAN NAIR 73 I C 275

**Tarwad—Acquisitions of members of family—Devolution on intestacy**

Under the Malabar Law the acquisitions of a member of the tarwad if undisposed of at his death do not go to his nephews but form part of the family properties being managed by the eldest surviving male member (*Spencer and Devadoss, JJ.*) ABUVAKKAR v KUNHIKUTTIYALI 74 I C 27 1923 Mad 153

**Tarwad—Anandavan — Right to sue for redemption**

Only under special circumstances could the anandravans of a Malabar Tarwad maintain a suit for redemption of a Kanom granted by their Karnavan, as such a suit would amount to an act of interference in the karnavan's management of the tarwad. Collusion between the Karnavan and the Kanomdar or prejudice to the tarwad interest by the continuance of the Kanom would be sufficient to entitle the anandravan to redeem 43 M 493 Ref. (*Ayling and Odgers, JJ.*) AMINA UMMA v ANANDRAVAN CHERIYA RAYARAPPAN NAMBIAR (1923) M W N 518

74 I C 1026 1923 Mad. 706

**Tarwad—Tarazhi—Exclusion of male members—Custom**

There is no custom or usage prevailing among the Marumakkattayam Mappillas of the North Malabar, by which property may be settled as *sthisothu* on the female members of tarwad or *tavazi* to the exclusion of the males or so as at least to authorise the female members to sell the family property otherwise than for necessary tarwad purposes without the consent of the males. Held that the evidence was wholly inadequate to prove the prevalence of any custom by which males are treated as having no right to be consulted in the management of the affairs of the tarwad or *thavazi* and no right to participate in the income of the tarwad or *tavazi* properties (*Spencer, Kumaraswami Sastri and Ramesam, JJ.*) MAHOMED KUNHI v PACKRICHU UMMA 46 Mad 650 18 L W 502 (1923) M W N 849

72 I C. 671 1923 Mad 28.

**Thattans in North Malabar following Makhathayam Law—Partition suit—Partibility of property—Presumption—Onus of proof Veetukutti—Right to share in joint family property—Basis of Presumption**

In the case of the Thattan caste in North Malabar, which caste follows Makhathayam Law, the ordinary Hindu Law has in the first instance to be applied, unless and until proof of custom to the contrary is established. Under Makhathayam Law, as under the ordinary Hindu Law, partibility is the rule and impartibility is the exception.

Held, therefore, that in a suit for partition by a member of the Thattan caste in North Malabar, there was no presumption of law in favour of impartibility, and the onus of proving the same lay on the defendant.

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Evidence of witnesses to the effect that they had never known a case of partition does not afford in law sufficient proof of a valid custom of impartibility.

The mere fact that the plaintiff in such a suit is w at is known as a Veetukutti or the son of a Sambhandam wife, does not disentitle him to a share in the joint family property. Assuming he is illegitimate, he may claim to be a Sudra for the purposes of Hindu Law, and to be entitled to a share as in the case of an illegitimate son of Sudra under the ordinary Hindu Law, or he may rest his claim on the ground that his caste follows Sudra custom in the matter of the inheritance of an illegitimate child. If the Hindu Law for Sudras is to be applied to the plaintiff's caste, he will, *prima facie* even if illegitimate, be entitled to a share without further proof or disproof of that custom, while if the case is to rest on proof of a custom by which Sudra's custom is applied to his caste or on proof of independent custom altogether then such custom will have to be proved. (*Solwabe C J and Wallace, J*) *VAZHAYIL PARRUM THATTAM KUNHI KUTTY v RAMAN*

44 M L J 274 46 Mad. 597  
(1923) M, W N 173 72 I C 145 18 L W 525  
1923 Mad. 452

—Uralans—Renewal of kanomby one of the co-uralans—Binding nature of—Minor—Competency to sue *See* (1922) DIG COL 840 *KOTASSERI E V SANKARAN NAMBI v DWAKI ANTHEERJANAM*

73 I C 491

**MALABAR MARTIAL LAW ORDINANCE (I OF 1922), S. 4 (2) (b)—Special Magistrate—Appointment of retired Deputy Collector—Legality of Criminal Procedure Code, Ss. 12 and 40—General Clauses Act S. 3 (31)**

The only persons who under S 4 (2) (b) of Ordinance I of 1922 can legally be appointed Special Magistrates are Magistrates who at the time of their appointment are acting as such and who have exercised the powers of a first class magistrate for not less than two years. The appointment of a Deputy Collector who had exercised first class magisterial powers for over two years but who had retired from public service before his appointment as Special Magistrate, is invalid since his retirement had *ipso facto* determined his magisterial powers.

The definition of "Magistrate" in S 3 (31) of the General Clauses Act is not exhaustive and is inapplicable to the interpretation of an Ordinance. (*Oldfield and Ramesam, JJ*) *KOTTITHODI MAHOMED HAJI In re* 44 M, L J 428

17 L W 426 (1923) M W N 288  
72 I, C 381 (2) 32 M L T (H. C.) 195  
24 Cr L J 381 (2) 1923 Mad 598

**MALABAR (RESTORATION OF ORDER) ORDINANCE (I of 1922), S. 10—Power to examine witnesses on commission**

Reading S. 10 of the Malabar Ordinance of 1922 with S. 503 of the Criminal Procedure Code a special judge under the Ordinance has no power to issue a commission to examine wit-

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nesses (*Ayling and Odgers, JJ*) *AYAVALI POKKER, In re* 45 M L J 305

(1923) M W N. 758 18 L W 899  
74 I C 952 24 Cr L J 840

**MALICIOUS PROSECUTION—Cause of action—Application for sanction to prosecute—Damages** *See* (1922) DIG COL 841 *NARENDRA NATH DAY v JOTISH CHANDRA PAL* 27 C W. N 387  
49 Cal 1035

—Damages—Suit for—Proof of malice—Reasonable belief—Privilege

As a rule, an action lies for the malicious publication of statements, which are false in fact and injurious to the character of another within certain limits, and the law considers such publications malicious, unless, it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs in matters where his interest is concerned. In the latter class of cases the occasion prevents the inference of malice which the law draws from unauthorised communications and a qualified privilege attaches to the statement so made, if fairly warranted by any reasonable occasion or exigency and honestly made or made in good faith for common convenience and welfare of society. There are three elements necessary to make the defence of qualified privilege good, namely, the occasion must be fit, the matter must have reference to the occasion and it must be published from right motive. In deed, it is a duty which every one owes to society and to the state to assist in the investigation of any alleged misconduct and to promote the detection of any crime. When it comes to the knowledge of any one that a crime has been committed a duty is laid on him as a citizen of the country to state to the authorities what he knows respecting the commission of the crime, and if he states only what he knows and honestly believes, he cannot be subjected to an action of damages merely because it turns out that the person as to whom he has given the information is, after all not guilty of the crime. For the sake of public justice charges and communications which would otherwise be slanderous are protected, if *bona fide* made in the prosecution of enquiry into a suspected crime. *Odgers on Libel Slander*, p 272 (5th Edn) 5 W. R 282 19 B 17 3 A 815 referred to (*Kanharya Lal, A J C*) *KISHAN LAL v MOOSI RAZA* 72 I C 67  
1923 Oudh 247

—Suit for damages—Issues arising in the case—Nature of evidence necessary—Conviction by trial Court—Reversal on appeal

If in a suit for damages for malicious prosecution the plaintiff has been convicted in the first instance and ultimately acquitted on appeal, the presumption is against the absence of reasonable and probable cause unless the original conviction is proved to have proceeded on evidence known to the defendant to be false or on the wilful suppression by him of material information, 12 C L J. 410 foll. A Court ought not to try the issue as to malice and the absence of reasonable and probable cause as a preliminary issue, without taking any evidence and on the simple fact that the pliff

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had been convicted by the original Court, although he had been acquitted on appeal 30 A 525 coll. *Das and Kulwant Sahay, JJ*) JAG NARAIN DUBEY v BIDAPAI DUBEY

4 Pat L T 202 72 I C 409  
1 Pat. L R 332 1923 P 344

—————*Suit for damages—Reasonable and probable cause—Malice—Proof of*

To succeed in an action for malicious prosecution the plaintiff must allege and establish both (a) absence of reasonable and probable cause and (b) malice, and must fail altogether if he fails to establish both

An honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accused, to the conclusion that the person charged was probably guilty of the crime imputed

The malice necessary to be established is not, even malice in law, such as may be assumed from the intentional doing of a wrongful act, but malice in fact, *malus animus* indicating that the party was actuated either by spite or ill-will towards an individual or by indirect or improper motives though these may be wholly unconnected with any uncharitable feeling towards any body

In all these questions the burden of proof is on the plaintiff

If, in order to show the absence of reasonable and probable cause, there are minor questions which it is necessary to determine, the burden of proving each of those minor questions lies upon the plaintiffs, just as much as the burden of proving the whole does.

The test as to the burden or onus of proof, whichever term is used, is simply this to ask oneself which party will be successful if no evidence is given, or if no more evidence is given than has been given at a particular point of the case, for it is obvious that as the controversy involved in the litigation travels on the parties from moment to moment may reach points at which the tribunal will have to say that, if the case stops there it must be decided in a particular manner (*Abdul Raoof and Campbell, JJ*) ABDUL SHAKIR v LIPTON AND CO. 72 I C 411 1924 Lah. 1

**MALIKANA—Right to—Transfer of—Proprietary right.**

In a village there were two persons interested in the proprietary right in a village who were known as the Muafidars and Zamindars. The persons who corresponded to the proprietors in the ordinary sense, who collected the rent from the tenant, let out the land and paid the Government Revenue were the Muafidars. The settlement also had been done with them. The only right which the zamindar had was a right to receive from the muafidars a cash payment of ten per cent of the total rental and to hold sir land at a favourable rent which had been fixed by the Settlement Officer. So long as they paid this rent they were not liable to ejectment. The interest of these Zamindars had been sold in execution of a mortgage decree. Held that their right was of a proprietary nature and that it was

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transferable (*Lindsay and Daniels, JJ*) HANSRAJ v BALDEO SINGH 21 A L J 289 71 I C 1028 L R 4 A 155 (Rev) 1923 A 304

**MARTIAL LAW ORDINANCE** (I of 1922), s 16—Order sanctioning prosecution not addressed to specific person—Communication to competent officer—Effect—Prejudice, See CR P CODE ss. 196 AND 537 44 M L J 166.

**MASTER AND PUPIL**—Discontinuance of service in the middle of a month—Salary—Right to See (1922) DIG COL 843 MUNICIPAL COUNCIL, CUDDALORE v T. M PANCHAPAKESA AYYAR 69 I C 767

**MAXIM**—*Falsus in uno falsus in omnibus.* (1923) Rang 30.  
—————*Nemo allegans turpitudinem suam est audierdus*—Applicability to India See HINDU LAW, ADOPTION 32 M L T 349 (H C)

—————*Ut res Magis valeat quam pereat*—Meaning of See DEED—CONSTRUCTION 1923 P C 160

**MESNE PROFITS—Claim for—Period for which mesne profits claimable**

Where a claim is made for mesne profits in a suit for possession without specifying the date from which it is claimed the court may grant such relief calculated from the date of institution of suit (*Brown, A J C*) MAUNG LU GALE v MAUNG LU FO. 1 Bur. L J 267 1923 Rang 110

—————*Decree of trial court affirmed in appeal*—Effect

Where a decree of a trial court awarding mesne profits is affirmed in appeal, it must be calculated from the decree of the trial court. (*Viscount Finlay.*) BAJINATH GOENKA BAHADUR v NANDA KUMAR SINGH 28 C. W N 55 (P. C)

**—————Jurisdiction—Sum claimed in excess of pecuniary jurisdiction—Procedure**

If the plaintiff makes an application in a suit for possession for mesne profits in excess of the pecuniary jurisdiction of the Court, the proper procedure for the Judge is to return the plaint to the plaintiff for presentation to the proper court for decision

The plaintiffs asked for mesne profits to the extent of Rs 3,000 odd. There was an objection made by the defendants at once to the jurisdiction of the Munsiff to try the question.

Held that the plaint in so far as it asked for mesne profits to be ascertained ought to be returned to the plaintiffs for presentation to the proper Court having competent pecuniary jurisdiction (*Walsley and Ghose, JJ*) JAGNESWAR CHATTERJEE v SURENDRA NATH CHATTERJEE 38 C L J 142.

**—————Liability for—Trespasser—Persons not abetting trespass.**

A defendant who has not trespassed upon the property of the plaintiff and who has not joined in abetting the trespass is not liable for mesne profits 6 C L R 357, 24 C 413 referred to. (*Mitra, A J, C*) MT SONI v MRGHASHYAM. 18 N. L E. 195. 1923 Nag. 103 (2).



**MESNE PROFITS**

—Measure of—Rent payable to landholder  
—Deduction of.

In a suit by certain occupancy ryots against their landholder for mesne profits for the period of their exclusion from the land held that in ascertaining mesne profits, the landholder was entitled to deduct the rent which would have been payable to him by the ryots had they remained in possession, notwithstanding the fact that a suit for rent by the landholder against the ryots for the period in question had been dismissed by the Revenue Court (*Oldfield and Venkatasubba Rao JJ*) **GOLKONDA RAMACHANDRUDU v VENKATA NARASIMHA GARU**

44 M L J 486 17 L W 545  
32 M L T. (H C) 364 (1923) M W N 437 (1)  
73 I C 670 1923 Mad 557

—Right to—Immediate possession

Where the plaintiff is not entitled to immediate possession of the land for the period for which he claimed mesne profits his claim is unsustainable (*Walmsley and Ghose, JJ*) **SHEIKH KARIM v SOBEDAR SHEIKH.**

72 I C, 47

—Suit for—Denial of title—Duty to enquire in suit

Where in a suit for mesne profits, defendant denies the extent of the plaintiff's share it is the duty of the Court to enquire into the claim in the suit itself and the Court is not justified in dismissing the suit on the ground of such denial (*Hullis, J*) **JAINNABI v GHULAM MOHIDDIN**

69 I C 545 1923 Nag 55 (2)

—Suit for—Effect of proceedings under S 145, Cr P C.

Where a suit is brought for mesne profits in respect of land by a person who was defeated in proceedings under S. 145, Cr P C, it is not necessary for him to vacate the Magistrate's order or ask for possession. On proof of his title to claim mesne profits, he will succeed in the action, (*Spencer and Devadoss, JJ*) **MUHAMMAD SHAMSGOYA ROWTHFR v OMANDU PILLAY**

(1923) M W N 779 18 L W 649

**MINES AND MINERALS—Mining lease—Damages, measure of**

The rate of interest per year of a leased holding is the measure of damages to be awarded for letting down the surface for mining purposes, (*Ross, J*) **LAKURKA COAL CO LTD v BISSEWAR CHATTERJI**

(1923) P 296

**MINING—Concession—Review of concessions—granted—Railway company**

Where the public are interested in a railway company and the company has invested about 8 lakhs in preparatory work and the preparatory Railway line had been mostly completed, there is less risk of interference with the development of the concession the Company has to deal with one proprietor instead of three (*Moreshead, M. C.*) **LESLIE v. MAHARAJAH BAHADUR**

1 Pat L R 115 (Gr.)

**MINING RIGHTS—Nature of**

In British Columbia, mining rights exist only if the person had an unexpired miner certificate at the time. Where rights of third parties have

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come into existence and have been acted upon, it is not open to a claimant to challenge Govt action (*Lord Shew*) **THE ENGINEERING MINING COY v JAMES ALLEN FRASER**

33 M L T, 228 (P. C).

**MINOR—Award in favour of—Guardian consenting to give up—Duty of Court in which proceedings take place—Jurisdiction of equity courts See ARBITRATION,**

21 A L J 18

—Contract—Equity—Misrepresentation

A Court would at least direct restitution by a minor of such part of the consideration of a void agreement which may be in his hands. Even in the case of innocent misrepresentation, the minor is bound to refund the property over which he has control. This liability attaches to a minor not on the ground of estoppel but on the ground that an infant shall not take advantage of his own fraud. If therefore a contract has been induced by a minor's false representations the contractual obligation is under no circumstances enforced against him but equity may compel him to restore any benefit received by him. If the property which the minor has obtained is still existing in specie he may be compelled to restore it but if he has obtained money which has probably been spent and there is no possibility of tracing it and therefore of restoring the very thing obtained by fraud, it would be enforcing a void contract if he were made to repay it. In other words a distinction must be observed between restitution and repayment (*Kennedy, C J Raymond and Kemp, A J C*) **MT HURI v. ROSHAN KHUDABUX**

16 S L R, 112 71 I C 161 1923 Sind 5.

—Contract by guardian—When binding, See **PARTNERSHIP**

1923 All 17

—Contract by—Void—Misrepresentation as to age. No duty to restore benefit obtained by minor before avoiding contract See **CONTRACT ACT, S 11**

69 I C, 543.

—Decree against—No proper guardian—Proceedings null—Revival

Where a decree is passed against a minor, his guardian *ad litem* having been appointed in an improper manner the proceedings are null and void and the proper procedure is to revive the proceedings by applying for the appointment of a new and proper guardian (*Walsh and Ryves, JJ*) **KIRPA KISHEN KISHORI v BABU LAL**

45 All 606

—Decree against—No representation—Decree void—Appeal presented by persons other than guardian *ad litem*—Legality of

A decree pressed on appeal against a minor without the minor being represented in the Court of Appeal is void and must be set aside. Where the guardian *ad litem* appointed in the Court below did not act for the minor and had gone away, an appeal on behalf of the minor could be presented by another person as next friend (*Broadway and Abdul Qadir, JJ*) **MT FATIMA BEGAM v HASSAN KHAN**

3 Lah. 417

69 I C 561 1923 Lah 271.

—De facto guardian—Power to bind minor's estate—Lease of property,

## MINOR.

A guardian has no power to enter into engagements on behalf of his minor ward making him liable under onerous covenants, such as a covenant to pay a sum of money every year as rent due under a lease 19 C 507, 39 C 232, 11 Bom 551, 27 M, L T 264 relied on. The action of a *de facto* guardian will be binding on the minor's property only if it is for the minor's benefit or necessity (*Krishnan and Ramesam, JJ*) *RARICHAN v RAMAN SOMAJIPAD*

44 M L J 515 17 L W 558  
(1923) M W N 301 32 M L T 107 (H C)  
74 I C 309 1923 Mad 553

———Guardian—Powers of—Expenses—  
Authority to incur

A guardian may be a *quasi* trustee for certain purposes, e g, for money received by him, on behalf of his ward, but it is not clear that he can incur expenses to any extent he likes without seeking the intervention of any Court in the hope that he would be allowed to create a charge on the property of the minor to that extent (*Broadway and Abdul Qadir, JJ*) *GOPI MAL v. PANNA LAL*

72 I C 424

———Interest—Redemption

A property was mortgaged for Rs 1,800 and was to be redeemed in 6 years. Out of the consideration Rs 1,000 was to bear interest Rs 250. Income from property was to be appropriated for interest on the remaining 800 Rupees. Plaintiff who purchased 1/3 of the equity of redemption sued for redemption.

*Held* interest should be allowed on Rs. 333-5-4 i.e., 1/3 of Rs 1,000 on which interest was to be charged according to the original contract of six years at the contract rate and as to post diem interest 18 per cent was a reasonable rate up to date of decree (*Shadi Lal C J and Abdul Qadir, J*) *GHANNU RAM v HOTU RAM*

1923 Lah 54

———Lease in favour of—Guardian acting  
for the minor—Lease when binding

Where a lease is taken on behalf of a minor by his guardian, the minor would not be bound by the lease unless it was for his benefit 11 C W N 207, 44 I A 98 Ref (*Ross, J.*) *MT HAFIZAN v AKHALESWARI PRASAD*

72 I C 36.

———Legal Necessity—Lender's duty.

The doctrine of legal necessity has application only when the minor has an estate or a fund which it is the duty of the Court of equity to protect as against the improvident act of the guardian.

A minor bought with funds supplied by his aunt a property which had been sold in execution of a mortgage deed. As full purchase money had not been paid to avoid confirmation of sale in execution of mortgage decree, the property was mortgaged by the minor purchaser and the vendors became sureties.

*Held*, looking at the two transactions as one, once it is realized that the minor was not in possession of any estate independently of the transaction which he was seeking to challenge, it becomes manifest that the Court cannot extend its protection to the minor by denying validity to

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the transaction which had brought the estate into existence.

If the two transactions are regarded as separate, then in dealing with a guardian of a minor the lender is bound to enquire into the necessities for the transaction into which he is invited by the guardian to enter and to satisfy himself that the guardian is acting, in the particular instance, for the benefit of the ward. No authority imposes upon the lender the further duty of enquiring into the necessity for an altogether different transaction which perhaps has made the proposed transaction inevitable. If the law did impose such a duty upon the lender, then it might be said that he is bound to enquire into the antecedent management of the estate. But it is settled law that, provided the necessity for the loan has not arisen from any misconduct to which the lender is or has been a party he is not affected by the precedent mismanagement of the estate. (*Das and Adami, JJ*) *KANHAI LAL KHEMKA v THAKUR PRASAD SINGH*, 1923 P 268

———Ratification—What amounts to

The mere fact that a minor after majority executes a decree obtained on his behalf by his trustee, does not amount to a ratification of all acts of the trustee or estop the minor from impeaching other transactions (*Piggott and Walsh, JJ*) *FAKIR CHAND v NANUG RAM* 74 I C 721

———Representation of—Mortgage by father

*Debt not binding—Father if proper guardian.*  
In a suit on a mortgage against a Hindu father, when it is found the debt is not a binding one, the father cannot properly represent his minor son's interests as they are adverse. A decree against the son represented by the father is of no effect, as the son is not legally represented. (*Oagers and Hughes, JJ*) *SELLAPPA GOUNDAN v. MASA NAICKEN*

45 M L J 675  
18 L W 838 33 M L T 126 (H C)  
(1923) M W N 775

———Sale by guardian—Avoidance of sale—  
Conveyance of properties to stranger

Property belonging to a minor was sold by his mother and guardian. Subsequently on attaining majority he ignored the sale by mother and conveyed the property to the plaintiff who sued for possession.

*Held* that, by selling the property to the plaintiff on the footing that the prior sale by his mother was not binding on him, the plaintiff's vendor had chosen to avoid the prior sale and that the plaintiff could sue for recovery of possession of the property without a prayer for setting aside the sale 38 M 867 distinguished (*Ramesam and Coleridge, JJ*) *PUTREVU KAMARAJU v CHUNDURI GUNNAYYA* 45 M L J 240 18 L W 233.  
(1923) M W N 756 74 I C 1003.

———Sale of property—Right to have sale set  
aside—Refund of purchase money—See SP REL  
ACT, S 41 1923 Lah 510.

———Seeking relief—Equity—Estoppel

A case of fraudulent misrepresentation by a minor on the subject of his age cannot be given effect to, and the plea of minority would prevail in spite of the minor's fraudulent mis-

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representation. The minor however, cannot seek to set aside the transaction without restoring the benefit that he has received thereunder (*Mohi Sagar, J*) KAPURA v ARIAN SINGH.

75 I C 269 1923 Lah 511

———Specific performance against — When granted See SPECIFIC PERFORMANCE

4 Lah 408.

———*Transferee cannot challenge validity*

Though a minor may sue through a next friend to set aside a transfer even during his minority, he and he alone can exercise this personal privilege. A transferee, is not entitled to question a previous transaction or to assume the privileges which are personal to the minor and to nobody else whether the transfer was effected after or before the minor attained majority (*Le Rossignol, and Harrison, JJ*) MAHOMED HAFIZULLAH KHAN v BULAGI MAL

4 Lah 156 5 Lah L J 355  
75 I C 99 1923 Lah, 299 (1)

**MINORITY**—Decree against minor — Setting aside—Majority at the time of decree—Effect of See (1922) DIG COL 846 GHULAM NABI v BASHESHA MAL

74 I C. 603

———Guardian-ad litem —Refusal to act—Effect of—Court decline to appoint fresh guardian—Decree if binding on minor See (1922) DIG COL 847 JANGI v MUSSAMMAT SUNDAR.

70 I C 589

**MORTGAGE**—Co-mortgagors — Sale by one of equity of redemption—Effect on others

The sale by one co-mortgagor of the whole equity of redemption to the mortgagee is illegal and the latter cannot found upon it a title by adverse possession against those whose shares had been illegally sold (*Scott Smith, J*) AMIR v NADIR ALI

1923 Lah. 74 (1)

———*Consideration—Failure—Effect*

As a mortgage is a mere security for a loan, if there is no consideration for the loan, the mortgage also fails (*Le Rossignol, J*) ARJAN SINGH v. BAKHTAWAR SINGH

69 I C 414 (1)

———*Consideration — Suit for portion of consideration remaining unpaid—If maintainable*

A suit by a mortgagor to recover portion of the mortgage money remaining unpaid is not maintainable (*Wamsley, J*) SAMSAL HAQ v ABDUL KARIM

1923 Cal 567

———*Construction — Agreement not to prosecute—Prior liability—Validity of mortgage* See (1922) DIG, COL 848 ADHIKANDA SAHU v JOGI SAHU

70 I C. 295

———*Construction—Mortgagee creating a sub-mortgage—Effect of — Indemnity clause.* See (1922) DIG, COL 849 SACHINDRA NATH ROY v MAHARAJ BAHADUR SINGH

74 I. C 660 (P C)

———*Construction—Personal Covenant.*

Where a mortgage document recited 'Having paid the principal amount before the 7th July 1917 and having endorsed it in the deed, I shall enjoy the land, . . . If even after the fixed

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time money is paid at the cultivation season of any An, you receive it and deliver the land, Held there is a distinct promise to pay (*Odgers and Hughes, JJ*) RANGASWAMI AYYANGAR v VEERA RAGHAVACHARI

18 L W. 620  
(1923) M W N 789 33 M L T 73 (H C)  
46 M L J 56

———*Construction—Personal liability—Conditions negating* See (1922) DIG COL 850. KUNDANMAL v WASUDEO

19 N L R 67  
69 I C 615

———*Construction—Provision for notice before enforcing mortgage—Covenant not mutual*

Where a mortgage contains a provision that the mortgagee, if he wanted payment of the mortgage money, must give notice before the beginning of the cultivation season in any year, held that the provision did not affect the mortgagor who could bring a suit for redemption at any time (*Krishnan and Ramesam, JJ*) RARICHAN v RAMAN SOMAYAJIPAD

44 M L J 515  
17 L W. 558 (1923) M W N 301  
32 M L T (H C) 107 74 I C. 309  
1923 Mad 553

———*Construction—Provision for sale on default of delivery of possession—Enforceability—Agreement between mortgagor and mortgagee as to the amount of expenses*

A mortgage with possession to secure a sum of Rs 1,80,000 with interest at 12 per cent per annum stipulated that the principal sum was to be repaid in annual instalments of Rs 10,000 for 6 years after which the entire balance and interest was payable. There was a provision under which the mortgagor was to be allowed to remain in possession of the property for two years after which possession was to be delivered to the mortgagee. In case possession was not so delivered to the mortgagee the whole estate was to be sold to him for the entire amount due including principal and interest. Held, that the main object and obligation of the deed was to secure the payment of the instalments of mortgage money and that the other provisions in the mortgage however extensive and far reaching were merely intended as security to enforce the obligation, that the mortgagee was bound to accept a tender of the first instalment though made a few days after the due date, and that the mortgagor, though he did not deliver possession of the mortgaged property after the expiry of two years as stipulated, could sell the property to a stranger and pay up the mortgage there is nothing to prevent a mortgagor and a mortgagee from agreeing as to what sum could be charged annually for the expenses to be incurred by the mortgagee in possession (*Lord Buckmaster*) CHELIKANI VENKATARAMAN GARU v SREE RAJAH VATSAVAYA VENKATA SUBADRAYAMMA.

44 M L J 631 32 M L T 70 (P C)  
40 Mad 108 17 L W 383 25 Bom L R 541  
38 C L J, 34 28 C W N 25 71 I C 1035  
50 I A 41 (1923) P C 26 (P C)

———*Construction—Right to redeem—Interest—If payable before redemption*

A mortgage deed provided for the interest being realised out of a shop of which the mortgagees

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were put in possession, and the balance being paid by the mortgagors and that on payment of the principal amount, redemption should follow *Held* in a suit for redemption, the mortgagees could not insist on payment of interest also before redemption is allowed, (*Miller, C J and Kulwant Sahay, J*) KISHUN PRASAD SAHU v HAKIM CHAUDHARI 74 I C 973

—Construction—Usufructuary mortgage—Deed of further charge—Effect of foreclosure decree—Variation of terms of original mortgage

There was at first a usufructuary mortgage. Thereafter there was a deed of further charge to effect that if the mortgagor did not pay the mortgage money on the due date, the original mortgage was to become an absolute sale. *Held* that the effect of the further charge was merely to add the right of foreclosure to the rights already granted under the usufructuary mortgage (*Ashworth and Simpson, A J C*) SANGAT BAKHSI SINGH v DINDO SINGH 72 I C 263 1923 Oudh 143.

—Decree—Execution—Limitation

The period of limitation for executing a mortgage decree runs from the date of the final decree. A fresh decree is not necessary before the decree holder can enforce his decree against properties other than those mentioned in the decree. (*Walmsley and B B Ghose, JJ.*) HAYATUNNESSA CHOWDHURANI v. ACHIA KHATUN. 74 I. C. 1017 50 Cal 743

—Decree—Form of—Personal decree claimed by debtor *See* (1922) DIG. COL. 851 BHOLANATH SEN v BALARAM DAS,

27 C W N 6071 18 L W 48  
(1923) M W N 525 70 I. C 932

—Decree—Satisfaction in part—Execution as regards rest

Even after the passing of a decree for sale it is open to the mortgagor to satisfy the decree in whole or in part and in the latter case the executing court after ascertaining if there has been satisfaction can direct execution only as to the balance. (*Piggott and Walsh, JJ*) SAHU PARSHOTTAM SARAN v BRAHMA NAND 21 A L J, 818  
L R 4 A 574.

—Extinction—Effect of decree passed

The mere passing of a mortgage decree does not extinguish the equity of redemption, as it subsists until the sale is held and the proceeds distributed (*Das and Kulwant Sahay, JJ*) SARJUG PRASAD MISSIR v HARISCHANDRA CHAUDHURI. 73 I C 661

—Interest—Charge

Where *ante-diem* interest is not charged on the mortgaged property, *post-diem* interest by way of damages cannot be charged on the property. (*Scott Smith and Brasher, JJ*) TULSI RAM v KANSHI RAM 70 I C. 986. 1923 Lah. 254 (2)

—Interest—Court's power of interference with rate—Contract Act, Ss. 16 and 74, *See* (1922) DIG. COL. 861. CHOTA NAGPUR BANKING ASSOCIATION, LTD. v. BHAGWAT BUX RAI 69 I C 697.

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—Interest—Default in payment—Clause for giving up possession—Waiver—Notice if necessary for subsequent default *See* (1922) DIG. COL. 851 PARTAB SINGH v NATHU 69 I C 706

—Interest—Liability to pay after period fixed for redemption

Where in mortgage by conditional sale the mortgagor covenanted to pay interest till the date fixed for payment after which the mortgagee was to become the absolute owner of the property and there was nothing expressed in the document to provide for payment of interest after the due date in case the mortgagee did not institute foreclosure proceedings *held*, that having regard to the terms of the whole document, its general tenor implied an obligation on the part of the borrower on the making of default to be liable for subsequent interest at the rate mentioned in the bond 19 A, 39, 20 A 171, 25 C 246 *Re: Mears, C J and Piggott, J*) MAHADEO PRASAD v. RAJA DHIRAJ SINGH 44 A 762 1923 A 7.

—Interest—Post-diem—Rule of construction

The determination of the right to *post diem* interest in a mortgage transaction must depend, upon the construction of the terms of the document as a whole. There is no fixed construction for all deeds of mortgage 19 All 39 (P, C) follow. (*Wazir Hatan, A J C*) SANT BAKHSI v DILDAR HUSAIN 90 & A L R 667

—Post diem—Interest

Mortgage in entitled to *post diem* damages the rate of interest stipulated in the instrument of mortgage and for the whole period during which the principal sum has remained unpaid 1 L R III Lah 200 Fol. Interest on the cost of repairs should not be given 57 P R. 188 *dig* (*Campbell, J*) RAMJI LAL v SHIBBA 75 I. C 667  
1923 Lah 300

—Moveable property—Standing crops, and cattle—Right of alienation—Notice

Where there is a mortgage of standing crops and cattle without possession and the property is purchased by a third person the mortgagee cannot follow the property into the hands of the purchaser if he had no notice of the mortgage (*Maung Kih, J.*) MAUNG SHWE HNYIN v. LALA FUL CHAND 74 I. C. 52 1923 Rang 60.

—Payment of prior mortgages—Partnership—Effect

Where a partner of a firm on entering into the partnership redeemed a mortgage and kept with him the title deeds, but there was no entry in the account books as to the creation of a mortgage from that date, the transaction must be treated as merely an advance by one partner to another and not a mortgage. (*Viscount Haldane*) HENG MOH AND CO v. LIM SAW YEAN 45 M L J 776 18 L. W. 92.  
(1923) M. W. N. 614. 33 M L T 430 (P C)  
75 I. C 287 1 Rang. 545 1923 P C 87.

—Prior and subsequent—Decree, obtained by one mortgagee without impleading the other—Effect of *See* C P. CODE, O 34, R 15

1923 AH 424.

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—Prior and subsequent—Failure to implead latter—Effect—Release of some properties

A puisne mortgagee who has not been impleaded in a suit for sale by a prior mortgagee has still his right to redeem intact. The latter cannot by releasing from the security one part throw the whole burden on the rest to the detriment of the former (*Das and Kulwant Sahay, JJ*) SARJUG PRASAD MESSIR v HARISCHANDRA CHAUDHURI 73 I C 661

—Prior and subsequent—Omission to implead—Effect on right

Where in a suit by a prior mortgagee the subsequent mortgagee is not impleaded, the decree therein is not binding on him and his right to redeem still subsists, provided he comes within the period of limitation fixed by article 148 of the Lim. Act (*Ryves and Gokul Prasad, JJ*) PRIYA LAL v BOHRA CHAMPA RAM 45 A 268 1923 All 271 (2).

—Prior and subsequent—Prior mortgagee assignee of equity of redemption—Redemption of puisne mortgagee See (1921) DIG, COL 845 SARVOTHAMA RAO v C RAJA ROW 69 I C 942

—Prior and subsequent—Puisne mortgagee disclaiming interest—Effect—Subsequent—suit

Where a subsequent incumbrancer who has been impleaded in a suit on a prior mortgage disclaims all interest in the mortgage properties, he cannot afterwards claim redemption of the prior mortgage in a suit on his own mortgage (*Dalal and Simpson A J C*) DUBER v RAM SAHAI 10 O L J, 305

—Prior and subsequent—Rights of parties—Prior mortgagee purchasing property in execution of decree—Suit for sale by subsequent mortgagee—Form of decree See T P, ACT S, 74 1923 All 457

—Prior and subsequent—Rights of purchasers in execution of decrees on prior and subsequent mortgages

The question in the case was whether the plaintiff respondent who was the purchaser of the property in dispute, under a prior mortgage decree, to which the defendants appellants were no parties, had a right to eject the defendants, the purchasers in execution of a decree, based on a puisne mortgage, to which the prior mortgagees were no parties. It appeared that in the year 1910 the second mortgagees obtained a decree on foot of their mortgage for sale of the property and purchased the property on 20th of April 1912, in execution of such decree. To this suit the prior mortgagee was not made a party. In the year 1916 the prior mortgagee got a decree for sale on foot of her mortgage, but to this suit, neither the puisne mortgagee nor the purchaser in execution of his decree, were made parties. The prior mortgagee got a decree and put the property to sale and, in execution thereof, purchased it herself. She obtained possession over three-fourths of the property and did not get possession over one-fourth which was in the possession of the defendants.

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She brought the present suit for the recovery of possession of the remaining one-fourth also, and, in the alternative, for a conditional decree that the defendant should redeem her mortgage, and in case of his failure, to do so, she should be put in possession of the property in dispute. Held that the plaintiff had no right to possession of the property under the mortgage on which she based her title. It was a simple mortgage and not a possessory mortgage. The suit was misconceived and should be dismissed (*Stuart and Gokul Prasad, JJ*) RAM NARAIN v SOMI 45 A 189 74 I C 277 1923 A 449 (1)

—Prior and subsequent—Suit on prior mortgage without impleading puisne mortgagee—Decree—Rights of purchaser of a portion of the mortgaged property in execution sale—Partial payment of the decree on the prior mortgage Subrogation See (1921) CIG, COL 846 PINGALI VENKATARAMANA REDDI v KOTIGARI RANGIAH CHETTI 70 I C 212.

—Prior and subsequent—Suit for sale—Failure to implead puisne mortgagee—Effect—Rights of parties See T P ACT S, 74 1923 Nag 225

—Priority—Prior mortgagee undertaking to pay subsequent mortgagee—Extent of priority

The owners of certain property mortgaged it first to the defendants and later on to the plaintiff. Subsequent to the plaintiff's mortgage the same property was mortgaged to the defendants and the amount of the first mortgage was added in that deed. The defendants though they undertook to pay off the plaintiff's mortgage never did so. Held that the defendants having undertaken to pay off the plaintiff's mortgage could not claim priority in respect of the sum due on their prior mortgage 33 A, 101 (*Banery and Gokul Prasad, JJ*) MAKKHAN LAL v NATTHI 21 A L J 382 L R 4 A. 412 74 I C 640 1923 A 509

—Putrapoutrade krame—Meaning of See LEASE—CONSTRUCTION 1923 Cal 505

—Redemption—Clog on—Agreement not to redeem prior mortgage without redeeming subsequent one also—Effect See T, P ACT S 16 1923 All 454

—Redemption—Clog—Relief when claimable

Relief against an agreement forming a clog on the equity of redemption can only be obtained if such agreement is impeached within reasonable time. It is an equitable relief which should not be granted as a matter of course (*Batten J C*) BHICKA v SHAIKH AMIR 19 N L R 1 69 I C 511 1923 Nag. 60

—Redemption—Construction of deed—Arrears from tenants—Premia occupancy tenants.

Where a mortgage document provided that on redemption the mortgagor was to pay all sums then due in respect of arrears from tenants, held it could only mean such arrears as have not become time barred but could be recovered by action.

Where the mortgagee had given occupancy rights on receipt of premia he is bound to pay the

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same to the mortgager as otherwise the hypotheca when returned will be burdened with obligations (*Lindsay and Kanhaiya Lal, JJ*) GHASI RAM v BHOLA NATH 21 A L J 886

—Redemption—Integrity, when broken

If a mortgagee releases a portion of the mortgaged property by receiving the amount of money alleged to be due from such portion, he does not thereby break the integrity of the mortgage, nor does it entitle the mortgagor to a redemption of a portion only of the property (*Banerji and Gokul Prasad, JJ*) HAJI ALI JAN KHAN v MAJID-UD-DIN 45 A 524 21 A L J 450 L R 4 A 244 1923 A 493

—Redemption—Invalidity of document—Found in a pre-emption suit—Effect

In a suit brought to redeem, a judgment in a previous pre-emption suit wherein it was found the document was a sham and fictitious one was sought to be relied on as conclusive to show its nature, *Held*, the judgment may be admissible but is not conclusive (*Lindsay and Kanhaiya Lal, JJ*) CHHIDDU v DESRAJ 21 A L J 793.

—Redemption—Irredeemable mortgage—

Onus of proof—Neerozhikkan Oti Kanom (1922) DIG COL 854 RYRU NAMBIAR v KANARA KURUP 70 I C 20 (1)

—Redemption—Onus of proof that the mortgage still subsists

Plaintiffs alleged that certain trees had been mortgaged by their ancestor to the predecessors in-title of the defendants

*Held*, the onus of proving that the mortgage subsists at the date of suit, lies on plaintiffs, in the first instance. If the defendants, admit previous mortgage but allege subsequent sale, the onus is shifted on to them to prove ownership by sale. When they produce and prove revenue records in their favour the onus is re-shifted to the plaintiffs who must prove their case (*Broadway, J*) JOTI PARSHAD v RAHMAT ALI 1923 Lah 243

—Redemption—Partial redemption when allowed *See* (1922) DIG COL 854, DINAVATH MAHISH v, NABAKUMAR HAJRA 70 I C 542

—Redemption—Right to—Occupancy holding—Lessee

The holders of a certain occupancy holding mortgaged their rights with possession before the passing of the Agra Ten Act. After they had done so, they took a permanent lease of the holding from the zemindar and transferred their rights under the lease to a certain person who proceeded to redeem the mortgage. *Held*, that he had a right to redeem (*Mears, C J and Stuart, J*) MAHABIR CHAUBE v, DIP NARAIN CHAUBE 1923 A. 140 (2)

—Redemption—subsequent invalid sale—Contract to sell—If a good defence *See* VENDEE AND PURCHASER, 2 Bur L J. 233

—Redemption—suit for—What a plaintiff must prove

The plaintiff suing to redeem must prove a subsisting mortgage. Where the only evidence of

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the mortgage was that contained in a certified copy of the original mortgage deed, and an entry in the *khasra Abadi* that certain A was then in possession as mortgagee *Held*, the evidence is not sufficient, when no connection is established between A and the present defendant (*Campbell, J*) RALLA RAM v FERAZ DIN 1923 Lah 665

—Revival—Revenue sale—Purchase by mortgagee—Effect *See* TRUSTS ACT, S 90 1 Mys L J 30

—Rights of parties—Mortgagee becoming a part owner—Sale of entire property bad

Where a mortgagee has become a part owner of the mortgaged property which is ordered to be sold under the mortgage decree then in the absence of any direction in the decree to the contrary and of any equities created against himself, he is entitled to sell the mortgaged properties in whatever order he chooses. The purchase of the equity of redemption in a portion of the property splits up the mortgage and the mortgagee becomes entitled to recover only a proportionate share of the mortgage money by the sale of the remaining portion. He is not entitled to sell the remaining portion for the entire debt but the Court cannot compel him to sell the portion in which he has got equity of redemption (*Mullick and Macpherson, JJ*) AULAD ALI v, ABDUL HAMID 2 Pat 715 - 74 I C 102 1923 P. 490

—Sub mortgagee—Rights of—Powers to sell property

A sub-mortgagee can ask for a sale of the original mortgagor's interest in cases and in circumstances which would have entitled the original mortgagee on the date of the sub-mortgage to claim such relief, 20 M 35, 27 A 472 foll (*Kotval, A J C*) SINGHAI KANCHENDILAL v. SHRIDHAR 19 N L R 64 72 I C 427 1923 Nag 222

—Subrogation—Assignment of security if necessary.

A claim to subrogation can be sustained where there is an agreement with the debtor that the lender shall be subrogated to the rights of the mortgagees. Such an agreement may be express or may be presumed from the circumstances of the case. The question to ask will be, whether the new lender was lending money on the personal security of the borrower or on the understanding that he would be substituted in place of the former mortgagee (*Dalal and Simpson, A J C*) LUTAR RAM v LAL RANJIT SINGH 90 & A L R 677 73 I C 113

—Subrogation—Right to—Discharge of prior mortgage—Proof

Where all that appears is that the money advanced by a creditor was probably utilised to discharge a prior mortgage and it is not even shown that the creditor was aware of the prior mortgage, there is no right of subrogation in favour of the creditor. (*Das and Kulwant Sahay, JJ.*) JAI PRAGASH SINGH v. RUP MANJARI 4 Pat L T 91 71 I. C 940 1923 P. 199.

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—Substituted security—Doctrine of when applicable.

The doctrine of substituted security only applies where a possession of a particular property has been awarded to one party in lieu of an undivided share in the whole property which was the subject of partition. It does not apply when the entire property mortgaged belonged to the mortgagors, and a person with no title has subsequently obtained possession of a portion of it behind the back of the mortgagees, (*Ryves and Daniels, JJ.*) *MR AFTAB BEGAM v MAHOMED AYUB*

45 A 653 L R 4 A, 337 21 A L J 607  
74 I C 345

—Suit by based on terms of decree of Settlement Court—If lies—Limitation.

A suit for redemption of a mortgage based on the terms of a declaratory decree obtained in the Regular Settlement Court in Oudh is maintainable and is governed by the 60 Years' rule of limitation (*Wazir Hasan, A J. C.*) *BALDEO v SHER BAHADUR SINGH*

90 & A L R 761  
74 I C 42

—Suit—Parties to—Persons setting up title paramount—Title if can be gone into See C. P. CODE O 34, R 1

73 I C 428.

**MORTGAGOR AND MORTGAGEE—Equity of redemption—Compensation for land acquisition—Appropriation by mortgagee towards the unsecured debts of the mortgagor—Rights of purchaser of the equity of redemption**

Where a portion of the mortgaged property was acquired compulsorily by the government under the Land Acquisition Act and the compensation money was appropriated by the mortgagee towards the unsecured debts due from the mortgagor with his consent it is not open to a subsequent purchaser of the equity of redemption to question the propriety of the appropriation. The purchaser of the equity of redemption stands in no better position than the mortgagor and cannot dispute an appropriation assented to by him before the purchase of the equity of redemption (*Walmsley and Ghose, JJ.*) *THE KUSTEA LOAN OFFICE LTD v ANNADA CHARAN CHAKRABARTHY.*

27 C W N 763 1923 Cal. 681

—Equity of redemption—Purchase of by mortgagee—Validity of.

A purchase of the equity of redemption by a mortgagee is valid and puts an end to the right of the mortgagor (*Dawson Miller and Adams, JJ.*) *BALDEO SINGH v MEGHU SINGH*

74 I C 202

—Improvements Right of Mortgagee to value of improvements

A mortgagee who makes improvement on the mortgaged property is entitled to compensation for improvements on established Principles of equity and not on the principle embodied in S. 51 of the Transfer of Property Act. In valuing the improvements regard must be had to the actual money spent by the mortgagee and not to

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the appreciated value of the property at the date of redemption (*Pipon, J C.*) *JIT SINGH v GURDIT SINGH*

70 I O 1

—Lease by latter—Period of

A mortgagee cannot give a valid lease to take effect beyond the time during which the mortgage subsists, (*Fremantle, S M. and Burn, J M.*) *BOHRA JAGRAM v MT KOKILA*

L R. 4 A 366 (Rev.)

—Mortgagee in possession—Adverse possession—Receipt of rents and profits

So long as the mortgagee is in possession his possession is to some extent that of a trustee, unlike ordinary lessees he is bound to preserve the right, title and interest of a mortgagor and to prevent any invasion of that right by any stranger. The mortgagor having put the mortgagee in his stead in the possession of the property enjoys immunity and believes that so far as his possession is concerned, his interest will be protected by the mortgagee. Therefore, if the mortgagee has either by his neglect or in collusion allowed any other person to come into possession of the property, there will be no invasion of the rights of the mortgagor and when the time for redemption arrives he will be entitled to treat the stranger as a trespasser, and the stranger's right by adverse possession will not commence against the mortgagor unless and until the mortgagor has exercised his rights of redemption and had redeemed the property. This is the case of a complete possession where no right of possession is exercised by the mortgagor. There may, however, be cases where the mortgagor and the mortgagee are both in possession of the property in accordance with the arrangements arrived at by them and set forth in the covenant in the bond. The possession of the mortgagee consists in the appropriation of the usufruct of the property and that usufruct may be enjoyed by both mortgagor and mortgagee for the usufruct and the income of the property might far exceed the interest in lieu of which the mortgagee enjoys the possession of the property. In such a case the application of the principle will be varied, but the principle will apply to that portion of the usufruct which is supposed to be in the possession of the mortgagee.

When *kakajri* or rents and profits are reserved by the mortgage and are payable to the mortgagor there is no reason why the principle of adverse possession should not apply, though in order to take advantage of adverse possession it must satisfy all the conditions required for adverse possession, namely it must be open and hostile and to the knowledge of the mortgagor. A mere non payment of *kakajri* or forbearance to realise it for any length of time would not create any adverse possession nor a mere payment of the same to a stranger by duress, force or compulsion, unless such payment is made with the knowledge of the mortgagor that it was being paid against his interest (*Jwala Prasad and Ross, JJ.*) *BINANAND SAWATE v THURGO MAHTO* (1923) Pat 249 4 Pat L T 659 1923 P 592

—Powers of leasing—Lease granted after institution of suit—If binding on mortgagee.

**MORTGAGOR AND MORTGAGEE**

A mortgagor is not entitled after making the mortgage to grant leases which may have the effect of materially diminishing the value of the security for the remedies of the mortgagee under the mortgage. Where a suit has been filed to enforce the mortgage the rights of the lessee are subject to the result of that suit and no effect can be given to them over the rights which another person may acquire in enforcement of the mortgage. 15 O C 239 Ref (*Kanhaya Lal, J. C.*) MUSSAMMAT BIBI SAIDUNNISSA *v* FAIVAZ HASSAN. 1923 Oudh 1

———*Profits from land—Income from Sindi trees—When to be taken in account*

It cannot be said as a rule that Tadi from Sindi trees is ordinarily a source of income and that the mortgagor of land on which there are Tadi trees can claim any profits on account of Tadi which it is possible to tap from the trees, though he can claim the lease money if it is proved that the trees were actually leased in any year (*Kotwal, A J C*) SHAM RAO *v* PANDURANG. 6 N L J, 93 71 I C 804. 1923 Nag 137 (2)

———*Rights of mortgagee in possession—Suit to enforce mortgage barred by limitation—Effect of*

Once the mortgagee gets into possession of the property mortgaged to him then the property is security for his debt and he is entitled to remain in possession, though as a matter of fact if he endeavoured to recover the mortgage money by suit he might find himself barred by statute of limitation (*Macleod, C J and Crump, J*) RANGAPPA *v* VITHU. 47 Bom. 652. 25 Bom L R 278. 72 I C 404 (1923) Bom 199

———*Rights of mortgagee to sell hypotheca—Rights of purchaser*

The balance of authorities is clearly in favour of the view that a mortgagee decree holder has the conduct of the sale and is entitled to execute the decree against any of the mortgaged properties he pleases and if any question of equity arises between the decree holder and the persons to whom the equity of redemption in the mortgaged properties in or in any of them may have subsequently become vested that equity can only be enforced by an independent suit for contribution and not in proceedings for execution. Though every parcel of the mortgaged properties is liable rateably to its value and the principle applies with equal force where the mortgagee himself buys the equity of redemption in one or more of such parcels or releases any part of the security, such an enquiry as to the rateable distribution of the mortgage debt cannot be made in execution proceedings. (*Das and Adams, JJ*) SURJU LAL *v* BAINNATH PRASAD. (1923) Pat 6. 71 I C 26 1923 P 44

———*Right to proceed against properties—Duty of Court.*

Though it is true to say that a mortgagee can execute his decree against the mortgaged properties in any order he likes, the Courts have jurisdiction at the time of passing the decree to give directions as to the order in which they are

**MUNICIPAL BOARD**

to be sold (*Spencer and Odgers JJ*) NARAYANA-SIVAMI CHETTY *v* VELLAYA PILLAI. 45 M L J 722 33 M L T 181 (H C). (1923) M W, N 831

———*Right to possession—Omission to implead all the persons in possession*

When a mortgagee used for recovery of the whole of the mortgaged property but by an oversight omitted to implead certain persons who had acquired a share in the property subsequent to the mortgage in suit so much only of the claim should be decreed as was proportionate to the interest of the persons who were before the Court (*Batten, J C*) HIRASA *v* ONKAR. 72 I C 458 1923 Nag 234

———*Sale of property by mortgagor—Privy of contract*

Where after creating a mortgage over a certain property, the mortgagor sells the same to another and the vendee retains with him the amount to redeem the mortgage, and the latter in his turn sold to another under like conditions, there is no privity of contract between the mortgagee and the vendee and the latter is not liable for the money in his hands in a suit by the former (*Campbell, J*) MT CHET KAUR *v* GURMUKH SINGH. 1923 Lah 459

———*Sub mortgage—Suit by mortgagor for redemption—Omission to implead one of the sub-mortgagees—Right of sub-mortgagee.*

Certain properties were mortgaged joint to B and C C sub-mortgaged his interests to D and B his interest to R. The mortgagor brought a suit for redemption impleading B C and R only and in that suit R claimed and obtained compensation for a shop on the footing that it was in the portion sub mortgaged to him by B. Subsequently D filed a suit against C and R for recovery of the compensation on the ground that the shop was in the portion sub mortgaged to herself and that the decision in the prior suit was erroneous. It was found that the shop was in the portion belonging to C *Held*, (1) that notwithstanding the decree in the suit for redemption, it was open to D the sub-mortgagee to pursue her rights against any property in the hands of the sub mortgagor into which the security was converted, (2) that the plaintiff was not entitled to a decree against R there being no privity of any kind between them, (3) that the plaintiff sub-mortgagee could, as against R, a stranger, subrogate herself only to such rights as her sub-mortgagor had against him and was bound by the decree between her sub mortgagor and the stranger, (4) and that the plaintiff was entitled to a decree only against C her own mortgagor, for the money due to her. 20 Cal 241, 33 M 429 Ref (*Ramesam, J*) RARICHAN *v* DAMAYANTI. 44 M L J 363 17 L W 380. 32 M L T (H C) 273. 72 I C 638 1923 Mad 440

———*Title to mortgaged property—Denial by mortgagor on the ground that property was endowed to the public—Not permissible. See ESTOPPER* (1923) Pat 49

**MUNICIPAL BOARD—Representation of public rights—Failure to take action—Effect.**



**MUSSALMAN WAQF VALIDATING ACT**

Every Municipal Board represents the public as regards all property vested in them, but any neglect or refusal in asserting or protecting such a right will not affect such rights, and members of the public can in the way provided in the C P. Code take action to safeguard their rights (*Walsh and Ryves, JJ*) **RAM CHAND v MAULA BAKSH** 21 A L J 882 L R 4 A 583

**MUSSALMAN WAQF VALIDATING ACT**—Not retrospective effect *See* (1922) DIG COL 859 **KHAJAH SOLEMAN QUADIR v SALI MULLAH BAHADUR.** 21 A L J 1 37 C L J 56 (P C)

—S 3—Redemption—Mortgagee in possession of cultivating land—Status of *See* (1922) DIG COL 858 **MT ANUPA v BHUSAY**

90 & A L R 202

**MUTATION PROCEEDINGS**—*Question as to possession—Duty of court*

In mutation proceedings the 1st question to be considered is the question of possession. Where the applicant has failed to prove possession it is the duty of the court to reject the application. (*Fremantle, S M, and Burn, J M*) **SALAMAT ULLAHKHAN v PANDIT SITA RAM** L R 4 A 277 (Rev)

**MYSORE C. P. CODE REGN. (III OF 1911), S 80—Suit against Land Acquisition officer—Notice—Necessity for—Injunction**

The suit was in respect of land acquisition proceedings taken by the defendant in his capacity of Land Acquisition Officer, and the reliefs asked for comprised a declaration that those proceedings were all invalid and an injunction prohibiting the defendant from taking wrongful possession of the land from the plaintiffs. *Held* that the suit was really to all intents and purposes one against a public officer in respect of an act purporting to be done by such public officer within the meaning of S 80 of the Civil Procedure Code, and as such two months' notice in writing was required before it was instituted.

The fact that there is a fear of imminent danger if the defendant is not restrained by means of an injunction is not a reason for failing to comply with the very clear provisions of law as to notice.

The notice required by S 80 is imperative and should be served in all cases, even where an injunction is asked for. (*Chandrasekhara Aiyar C J, and Plumer J*) **BRAHMAPP v CHAKRAPANI IYENGAR** 1 Mys L J 1

**MYSORE COURT FEES REGN (III OF 1900), Sch 3, Art 8—Application for review—Court fee payable thereon.**

The proper fee payable on a review application presented after the 90th day is the fee leviable on the memorandum of appeal, that is to say the entire fee payable thereon, irrespective of the scope of the application for review. The fact that the application only refers to a matter of costs makes no difference. (*Chandrasekhara Aiyar, C J, and Plumer, J*) **HUSSEIN ALI SAB v ALLAR DICK** 1 Mys L J 10

**MYSORE COURT FEES REGULATION (VIII OF 1922), Sch 3, Art VII—Order on restitution—appeal from—Court fee**

**MYSORE LIM N REGN (IV OF 1911), S. 20**

An order in restitution under S 144, C P C. is not an order in execution under S 47 but a decree in itself by force of the definition of decree in S 2 (2) and an appeal from a decree generally falls under Sch I Art 1, and *and valorem* fees are payable in appeal. But as Sch II Art 7 as amended in 1922 provides for memoranda of appeals generally and does not contain the exclusion of orders rejecting plaints and decrees and orders having the force of decrees as before, the memorandum of appeal falls under this article and a court fee of Rs 2 is enough. (*Chandrasekhara Aiyar and Ramaswamy Iyengar, JJ*) **BHARMAIYA v CHANDRAGUPTIAH** 1 Mys L J 141

**MYSORE CRIMINAL PROCEDURE CODE REGN (II OF 1904) Ss 380 and 562—Offences under Ss 380 and 457 I, P C—Acquittal by Amildar Magistrate—Effect of**

Where the Amildar Magistrate had acquitted the petitioner of an offence punishable under S 457, Indian Penal Code the District Magistrate has no power to convert the finding into one of guilt. Under S 380 Criminal Procedure Code, it was competent for the District Magistrate to deal with the case on the evidence recorded by the Amildar Magistrate and to either take action under S 562 Cr P Code or pass such sentences on the accused for the offence of which he was found guilty by the Amildar Magistrate as might seem to him proper. (*Plumer, J*) **CHIKRAKATASA v GOVERNMENT OF MYSORE** 1 Mys L J 8

**MYSORE LAND REVENUE CODE, S 79 Para 2—Permanent tenancy—Long enjoyment—Temple lands**

The mere fact that the relationship of land lord and tenant continued for over 40 years when there is nothing to show how the tenancy originated is not sufficient to justify an inference that the tenancy was a permanent one. In the case of temple lands leased out by the trustees of the temple the presumption is against the existence of a permanent tenancy and the burden of proving such a tenancy is upon those who alleges its existence. Where the origin of a tenancy is sufficiently recent to be known and capable of proof there is no room for the presumption in S. 79 (2) of the Mysore Land Rev. Code. (*Chandrasekhara Aiyar C J and Plumer, J*) **SRI DHARMAZTHALA SRI MANJANATHADEVVRU BHANDARA v. SUBBA BHATTAR** 1 Mys L J 3

**MYSORE LIMITATION REGULATION (IV OF 1911), S 7—Proviso in favour minor plaintiff and manager—Limitation.**

Where a promissory note is executed in favour of a minor and the managing member of the family the latter can give a valid discharge and hence a suit brought more than 3 years after the minor attaining majority is barred. (*Chandrasekhara Iyer, C J and Plumer, J*) **SUBBA RAO v SUBBA RAO** 1 Mys L J 34

—S. 20—Payment of interest as such—What constitutes—Havalltha—Effect of

If a mere promise by the debtor himself to pay the interest does not in law amount to a payment of interest as such, it is difficult to see how some other person's promise to pay it, even if it be

**MYSORE MUNICIPAL REGN (VII OF 1906), S. 95**

made so as to discharge the debtor from liability to that extent, can amount to payment. A mere havalitha or substitution of liability, at any rate when unaccompanied by a definite settlement of accounts, does not operate as a payment for the purpose of S. 20 of the Limitation Regulation (*Chandra Sekhara Aiyer, C J and Plumer, J*)

SEETHARAMA BHATTA *v* KOTE VENKATA RAO

1 Mys L J 18

**MYSORE MUNICIPAL REGULATION (VII of 1906) S. 95—Application for building license—Failure to pass orders on—Right to sue for damages.**

Under S. 96 of the Mysore Municipal Regulation when an application is put in for a building license, but no orders are passed on it within one month the applicant is entitled to go on with the construction. He cannot bring a suit for damages against the Municipality for illegally withholding a license, as he has a right to proceed without it thereafter (*Chandrasekhara Aiyer and Ramaswami Iyengar, JJ*)

KRISHNA RAO *v* CITY MUNICIPAL COUNCIL, BANGALORE

1 Mys L J 129

**NEGLIGENCE—Railway accident—Trap—Contribution**

The plaintiff a child of seven sustained injuries by being run over by an engine when crossing a Railway line at a point where to the knowledge of Railway authorities villagers crossed the line as licensees. The driver and fireman did not keep a proper look out on the occasion though they knew of the special danger. *Held* the plaintiff was entitled to damages.

If a Railway Company allows children to spring over its lines it has to take all the precautions which though unnecessary in the case of adults are necessary to protect children against their own thoughtlessness. In their case ordinary negligence is sufficient to maintain an action, while in the case of adults a trap alone would render them liable.

The negligence of parents in allowing children to walk over railway lines unaccompanied by others cannot be imputed to the child as in the nature of contributory negligence (*Coutts Trotter, J*)

JAYAMMAL *v* M S M RY COMPANY

46 Mad 929 45 M L J 545

(1923) M W N 878 18 L W 933

**—Railway Company—Unprotected and unlighted pit on the platform—Injuries—Liability**

Where the plff. fell into an unprotected and unlighted pit on railway platform when he was waiting for a train and trying to get into a latrine, the company is liable in damages for not keeping the place lighted at the time, (*Coutts Trotter, J*)

MACK *v* M S M RY COMPANY LTD

45 M L J 424

33 M L T (H C) 66 75 I C 250

**NEGOTIABLE INSTRUMENT—Foreign Draft—Dishonour by acceptor—Rate of exchange—Due date of payment**

A foreign draft contained the following express stipulation—"Draft to be paid at current rate for Bank Demand rate at date of payment." The bill was dishonoured by the acceptor and in a suit

**NEGOTIABLE INSTRUMENTS ACT, S. 7**

against him. *Held* that the rate of exchange should be calculated at the due date of payment. The date of payment could only mean the day on which the acceptor agreed to pay and not some other day at which he might choose to tender the money or might be forced to pay by an order of the Court (*Macleod, C J and Crump, J*)

MULLER MACLEAN AND CO *v* KADERBHOY MULLA

47 Bom 493 25 Bom L R 177

72 I C 246 1923 Bom 241

**NEG. INSTRUMENTS ACT—Hundi—Substituted unstamped paper—Liability under former**

Defendants executed a hundi which was not duly stamped for the same amount in favour of the plaintiffs by way of renewal of the previous hundi and made an endorsement on the back of the latter hundi that another hundi for Rs 1,000 had been executed in lieu thereof. *Held* the giving of the second hundi would have operated as a discharge of the previous hundi, only if the second hundi was legally enforceable. The question as to the negotiability or non-negotiability of an instrument is quite distinct from the question of a party's discharge from liability of the holder, and that the liability of the drawer of a bill of exchange or of any subsequent party thereto is not in any way affected by the document being negotiable or otherwise. Nor can mere cancellation have the effect of discharging a party from liability unless it is made with the express intention of discharging that party for if it is made unintentionally or is made under a mistake it will be inoperative. The negotiable security by a debtor to his creditor operated as a conditional payment only and not as a satisfaction of the debt. (*Scott-Smith and Moti Sagar, JJ*)

FIRM RAHMAT ALI *v* FIRM DEWA SINGH, MAN SINGH

75 I C 827 1923 Lah 396

**—S. 4—Promissory note—Interest payable annually—Effect**

An instrument in writing containing an unconditional undertaking to pay a certain sum to X or order contained a further clause undertaking to pay interest annually. *Held*, it was inconsistent with the document being a promissory note. Such a note if improperly stamped, is inadmissible for any purpose under S. 35 of the Stamp Act (*Broadway, J*)

BRIJ RAJ SHARAN,

5 Lah L J 148

1923 Lah, 29

**—S. 4—Promissory note—Request to pay—Effect of**

The document in question was in the shape of a request the plaintiff to pay the defendants Rs 500 which the defendants would pay with interest. *Held*, this was a conditional contract. The liability was upon the defendants after an advance of Rs 500 was made by the plaintiff. No doubt the payment had been proved and the liability under the document was clear, but the document as executed was not unconditional contract and was therefore, not a promissory note under the Negotiable Instruments Act (*Jwala Prasad and Ross, JJ*)

SARJU SAHU *v* SUKHI LAL,

4 Pat. L T 577

**—S. 7—Hundi—Oral acceptance—Sufficiency of.**

## NEGOTIABLE INSTRUMENTS ACT, S 8

Where a hundi was not accepted as required by S 7 of the Act, namely, by the drawee signing his assent on the bill, but the court found on the oral evidence that the applicants did accept it verbally and on this basis decreed the suit against them. *Held* this was erroneous in law (*Daniels J*) *FIRM OF DWARKA DAS AJODHYA PRASAD v FIRM OF LACHMI NARAIN GIRDHARI LAL*  
L R 4 A 355 74 I C 692

—Ss 8, 9 78—Payee of *pro-note* prohibited from collecting—Indorsee from payee—If a holder or holder in due course,

Where there is a prohibitory order of court restraining the payee from dealing with or receiving the money due under a promissory note an indorsee from him with knowledge of the prohibition is not a holder in due course under S. 9 of the Neg Insts Act

The title of a holder of a promissory note who is unable to deal with the note or receive money due under it is to that extent defective, and an indorsee from him who is aware of his disability has a sufficient cause to believe that a defect existed in his title and is therefore not a holder in due course.

Such an indorsee is not even a holder of the note as the indorsement under which he derived title was an invalid indorsement, as the maker after the prohibitory order cannot transfer any better title to his indorsee (*Phillips and Deva Dass, JJ.*) *SUBRAMANIA AIYAR v, CHOKKALINGA MUDALIAR*  
46 Mad 415 44 M L J. 206  
17 L W 314 (1923) Mad 317 (2) 72 I C, 189

—S 9—Before the amount becomes payable—Note payable on demand

A promissory note payable on demand does not become payable until a demand is actually made and if there is no evidence to show that the transfer of the note was made after the demand, it is perfectly valid transfer and the transferee is 'holder in due course' 47 Cal 861 Ref (*Campbell and Moti Sagar, JJ.*) *BULAQI MAL v ABDUL RAHIM*  
1923 Lah 638

—S 13 and Act, VIII of 1919, S 3—Negotiable Instrument—Definition

A negotiable instrument means a promissory note, bill of exchange, or cheque payable either to order or to bearer, and a promissory note, bill of exchange or cheque is payable to order which is expressed to be so payable or which is expressed to be payable to a particular person and does not contain words prohibiting transfer or indicating an intention that it shall not be transferable. (*Moti Sagar, J*) *HANS RAJ v EACHEMI NARAIN*  
1923 Lah 388

—S. 20—Omission to state amount of the note in the body of the instrument—Effect of, So long as the amount of a *pro-note* can be found out from the instrument itself without extrinsic aid, the omission to state it in the body of the *pro-note* does not vitiate its character as such. (*Barth J.*) 162 dist (*Duckworth, J.*)  
*MAUNG ROYE v YE CHEIN HONG*  
70 I C 323 1923 Rang. 97.

## NEGOTIABLE INSTRUMENTS ACT, S. 57

—S 28—Hundi—Signing as *mumim*

Section 28 of the Negotiable Instruments Act can have no application to a case where it is found that the defendant signed the Hundi as *mumim* and that money was lent not to him in his personal capacity but to the firm (*Banerji, and Gokul Prasad, JJ*) *FIRM OF HAZARI LAL CHHANGA MAL v SOHAN LAL*  
75 I C 608  
1923 A 407

—S. 43—Failure of consideration for *pro-note*—Obligation to pay

A promissory note given as part of the price of a portion of a house to which the vendor could not convey a good title is not supported by consideration and there is no obligation to pay the amount of the note, (*Pratt, J*) *MO AYOOB v SOWDAGOR*  
1 Bur L J. 261  
1923 Rang. 127 (2)

—Ss 46, 58 and 85—Negotiable instrument—Hundi—Indorsement by holder—Hundi sent by post to indorsee—Hundi taken by stranger—Payment to forged indorsement—Right of plaintiff

If a party primarily liable on a negotiable instrument pays the amount thereof to a wrong person, who holds it under a forged indorsement he remains liable to the true owner. The only exception to this is where the payee's indorsement on a cheque payable to order is forged. In such a case the drawer is discharged if he pays the amount in due course. No holder of a negotiable instrument, though he may be a holder in due course, can acquire a title to the instrument through a forged indorsement. S 58 of the Neg Instrument Act which protects a holder in due course where a negotiable instrument has been obtained by means of an offence does not apply to a case of forgery. 24 B 65, 28 A 428, 36 C 239 Ref

In the case of goods, if a man takes and sells them when he has no right the owner may waive the part and recover the proceeds in an action for money had and received. And equally if a person wrongfully convert a bill and receive the amount, the owner of the bill may either sue in tort, or may waive the tort, and recover the money as received to his use. Where a person forges a name in a hundi and gets payment, he is guilty of a conversion of the hundi and the proceeds of the hundi received by him are the moneys of the true owner. Where a hundi is sent by post, the post office is the agent of the person to whom the bill or note is posted if there be express or implied authority to send by post, but if there be no such authority the post office is the agent of the sender (*Mulla, J*) *THORAPPA DEVANAPPA v UMEDMALJI*  
25 Bom L R 604.

—Ss. 51 and 50—Indorsee for collection—Joint indorsees—Successive endorsements in blank—Effect of. See (1922) Dig COL 860  
*ANNAMALAI CHETTY v MUTHIAH CHETTY*  
70 I C. 590

—S 57—Promissory note in favour of executor—Suit by legatee—Indorsement—Suit on promissory note if maintainable

Defendant executed a promissory note in favour of A one of the executors of the estate of

## NEGOTIABLE INSTRUMENTS ACT, S 58

a deceased person. The executors were subsequently discharged and one of the legatees, in whom the estate vested, assigned the promissory note to the plaintiff. There was no indorsement of the promissory note by the executor in favour of the legatee. In a suit on the promissory note by the plaintiff *held*, that the plaintiff had no valid title to the promissory note and the suit was not maintainable (*Ayling and Odgers, JJ*) KUPPUSWAMI MUDALIAR *v*, NARAYANASWAMI IYER. 44 M L J 510 32 M L T (H C) 192 17 L W 676 (1923) M W N 332 70 I C 670 1923 Mad 593

## —Ss 58 and 85—Inter-relationship

No person can claim title to any negotiable instrument through a forged endorsement except in cases mentioned in S 85 of the Negotiable Instruments Act. The possession of the person with a defective title is different from the person that has no title at all. The endorsements through which the holder in due course can claim must be genuine. Though the pledgee may be ignorant of the fact that the endorsements had been forged still he takes the pledgee at his peril and therefore acquires no title whatever (*Kennedy, J C and Raymond, A J C*) THE KARACHI BANK *v* KODUMAL KALUMAL 1923 Sind 54

## —S 63 and 83—Presentment for acceptance—Hundi payable on demand

The presentment requisite in the case of a Hundi is presentment for payment and not presentment for acceptance. Ss 63 & 83 of the Negotiable Instruments Act regulate the condition under which a presentment for acceptance is valid and the consequence of not complying with these conditions and have no application to hundi payable on demand (*Daniels, J*) NAND LAL *v* FIRM GULAB RAI NARAIN DAS 71 I C 610 1923 A 345

## —Ss 64 and 76 (a)—Loss of Hundi—Presentation—Necessity for

Neither bankruptcy nor death of the party dispenses with the presentment under section 64 of the Neg Ins Act as even the loss of the bill or the note does not excuse non-presentment.

Power to obtain duplicate in case of loss is a part of the mercantile laws of countries and ample scope is given to it by Court of Equity in England both on bills lost before and after maturity and on notes as well.

Indian Courts administering rules of equity, justice, and good conscience will adopt the above as being not only in consonance with the spirit of the section but also as being the rule applied to similar cases in England (*Scott Smith, J*) FIRM OF UDHO RAM CHANDI RAM *v* FIRM OF HEM RAJ TEJ BHAN 72 I C 777

—S. 76 (d)—Hundi—Presentation—Plea of—Subsequent plea that no presentation was necessary—Drawee having no funds of drawer—Effect of, *See* (1922) DIG COL 861 GENDA LAL *v* BALKISHEN 70 I C 596

—S. 87—Material alteration—Name of payee *See* (1922) DIG COL 861 KAMAL KHAN *v* NIZAMUDDIN. 71 I C 412.

## N W F P REGULATION (VI OF 1901), S 3

## —S 118—Consideration—Recital of payment of cash—Variation in details—Effect

Where the promissory note recites payment of consideration in cash there is a presumption in its favour and if defendant does not rebut it a decree can be passed against him. But where the plaintiff himself goes into the box and sets up a story of payment of part in cash and part in some other way but fail to prove the latter, he will fail to the extent of the latter amounts, (*Mears C J and Piggott, J*) LALA SHAMBHU DAYAL *v* LALA LALLU MAI 1 R 4 A, 458

## —S 118—Hundi—Plea that transaction was by way of loan—Onus

Where a person alleges that a hundi was given by way of loan and that the transaction was really one of loan in the form of a hundi the onus of proofs lies on him (*Kothal, A J C*) GOVARDHANDAS *v* HARLAL RAMSUKH, 69 I C 541 1923 Nag 62.

## NON-TRANSFERABLE OCCUPANCY HOLDING—Liability to sale

A non-transferable occupancy holding can be sold in execution of a money decree, (*Das and Kulwant Sahay, JJ*) SURAJDEO NARAIN SINGH *v* PARTAP RAI 2 Pat 739 4 Pat L T 405 1923 Pat 213 75 I C 284 1923 P. 514

## NORTHERN INDIA CANAL AND DRAINAGE ACT (VIII of 1873), S 15—Repairing canals

The words "may execute all works" in S 15 are independent of the preceding words and it is impossible to execute any work as a canal without entering upon the land adjacent (*Harrison and Zafar Ali, JJ*) PUNJAB COTTON PRESS COY *v* SECRETARY OF STATE FOR INDIA 4 Lah. 428.

## N. W F P REGULATION (VI OF 1901), S 3—Hazara Settlement Rules—Effect and scope of

It is difficult to regard section 60 of the Hazara Settlement Rules of 1872 as laying down anything more than a rule of evidence.

It is perfectly clear that the Legislature intended that Regulation VI of 1901 should be retrospective. It must be remembered that this Regulation goes beyond a mere repeal of the Regulation of 1872 and adds in section 3 a very definite pronouncement that entries made in the Regular Settlement of 1871 shall be regarded as having no mere force than entries made in any other Settlement. It would be difficult perhaps to describe this provision as having a retrospective effect, as its object is to prescribe a rule of evidence for Courts adjudicating upon cases which arise after its enactment. It could only be regarded as retrospective if it be assumed that Regulation I of 1872 not only prescribed a rule of evidence for the guidance of Courts, but also conferred an absolute title irrespective of the evidence upon which a title was based. If this latter view of Regulation I of 1872 be accepted, it is clear that the Legislature in putting into law Regulation VI of 1901 deliberately intended a retrospective effect, *i e*, that even if a valid title had been conferred by Regulation I of 1872, such a title should no longer be considered valid by the Courts and should be open to challenge exactly as any other title recorded in the Settlement is so open (*Pirbon, J. C*) GHULAM HAIDAR SHAH *v* BAZID SHAH, 72 I C 989

## N W. F. P. RENT ACT (1881), S. 30

N W F P RENT ACT (1881), S. 30 (D) *Acquisition of under-proprietary right—Planting grove inland—Payment of rent.*

In a suit for a declaration under S 158 of the Tenancy Act that the plaintiffs had acquired under proprietary rights under that section on the ground that the land in suit had been held rent free for over 50 years, it was found that the land was granted to the predecessor of the plaintiffs under a written "dampatra" about 100 years ago. The grant gave the grantee the right either to use the land for cultivation or to plant it with a grove. The grantee planted a grove in it. There was evidence of the payment of rent by giving a half share of the produce of the grove. Held that the land in question not having been let or held for agricultural purposes within the meaning of S 4 of the Tenancy Act, the plaintiff's suit was unsustainable (*Ryves and Daniels, JJ*) KESHU DAS v HANUMAN PANDAY

45 A 640 21 A L J 576 L R 4 A 203 (Rev.).  
74 I C 924 1924 A. 53

OATHS ACT, S 1—*Party agreeing to abide by oath of his opponent—Power of Court to go into evidence*

When a party agrees to abide by the oath of the other party or any particular witness, he clearly takes the risk of the witness swearing falsely. What he says in effect is "whatever this witness states on oath, I am prepared to accept as true and to have the case decided on the basis of it." In such a case the court acts illegally and with material irregularity in entering into evidence on the question of consideration. If a Court notwithstanding such an agreement is to be at liberty to enter into evidence as to the truth or falsehood of the statement made, the effect in substance is to wipe out the agreement altogether, it might not as well have been entered into (*Daniels, J*) MITHU LAL v SRI LAL

45 A 724 21 A L J 637.  
L R 4 A 596 74 I C 918

—Ss 8 and 9—*Scope of—Reference to referee—Court discretion to refuse—Pleader's power to refer.*

Where the parties to an arbitration agreed merely to abide by the statement of a referee even though not "on oath or solemn affirmation" then neither Section 8 nor Section 9 of the Oaths Act would be applicable. Section 9 is by no means mandatory and it seems that under certain special circumstances the Court may have discretion to refuse to refer the matter to the referee. If no judicial proceeding had been recorded it might very well have been that the so-called agreement was an informal talk not reduced to writing, and in any case looking at the fact that the respondent had the very next day withdrawn from the agreement and revoked it, it cannot be said the Court was wrong in exercising its discretion and in ordering that the case should be disposed of on the merits. A party's agent binds the party by an agreement under Section 9 as much as a party himself. A vakalatnama gives sufficient authority to a pleader to agree to make a reference under S 9 3 A L J 654 Ref (*Sulaiman, J*) MT. MASITA BIBI v. KHUDA BAKSH.

1923 A 65

## OCCUPANCY HOLDING.

—S. 14—*Child witness*

The Court should only examine a child of ten or twelve years as a witness after it has satisfied itself that the child is sufficiently developed in intellect to understand what it has been and to afterwards inform the Court thereof. If the child was sufficiently developed intellectually to describe what she had suffered and, therefore, her testimony or account of it before the Magistrate cannot be brushed aside as inadmissible merely because no oath is administered to her, (*Jafar Ali, J*) HUSSAIN KHAN v EMPEHOR

1923 Lah 332.

OCCUPANCY HOLDING—*Ejectment—Notice—Requisites of*

On the death of the tenant of an occupancy holding, his two sons succeeded him in the holding but the name of one only was entered in the papers. The zamindar issued notice of ejectment to the person whose name was found in the papers. Held that the notice was adequate (*Burn, J M*) RAMESHWAR v. MIR TALIB ALI

L R 4 A 63 (Rev.)

—*Mortgage—Abatement—Right of landlord*

Where a tenant mortgages his occupancy holding which is not transferable by custom the mortgage is not invalid and does not confer any right on the landlord to have it declared invalid or not binding on the mortgagor. If the landlord acquires the interest of the mortgagors in the holding the mortgagee is entitled to enforce the mortgage against the landlord (*Walmisley and Ghose, JJ*) SAJEDHAR RAHMAN v RAKHAL CHANDRY KOY.

70 I C 71,

—*Mortgagee—Dispossession by Zemindar of fixed rate tenant—Effect on mortgagee's right*

A fixed rate occupancy tenant mortgaged his holding and subsequently died. He was succeeded by his nephew whom the Zamindar forcibly dispossessed. The nephew took no steps to recover the holding from the zamindar. In a suit by the mortgagee to enforce the mortgage held that the inaction of the tenant amounted merely to a surrender of the holdings and that surrender did not affect the rights of the mortgagee to enforce the mortgage (*Mears, CJ and Bauer, J*) RAM KHELAWAN v BRIJ LAL.

21 A L J 296  
L R 4 A 169 (Rev) 71 I C 991 (1).  
1923 A 295 (1).

—*Mortgage—Rights of mortgagor and mortgagee*

Even though a mortgage of an occupancy holding be illegal, still the mortgagor cannot take advantage of its illegality (*Fremantle, S. M. and Burn, J M*) BHUPAT v DOLA RAM

L R 4 A 94 (Rev.)

—*Mortgage under the Tenancy Act—Relinquishment—Suit to eject mortgagee*

An occupancy tenant mortgaged his holding and subsequently relinquished the holding. This was after the passing of the Agra Tenancy Act. In a suit by the Zamindar to eject the mortgagee *H. L. J.*, that the mortgagee's title being based on an illegal transaction, the knowledge of the Zamindar

## OCCUPANCY HOLDING

was immaterial and he was entitled to eject (*Burn S M and Pearson, J M.*) ZUBAIR AHMAD v SUBRATI L R 4 A 75 (Rev)

———Mortgage—Validity of—Right of Malguzar

As between the mortgagor and mortgagee the mortgage of an absolute occupancy holding is valid unless and until it is avoided by the malguzar. A mortgage ultimately assented to by the malguzar has priority over a subsequent mortgage consented to by the malguzar before the consent to the first mortgage (*Batten, J C*) KUNJILAL v PANNALAL 19 N L R 10 71 I C 325 1923 Nag 91 (1).

———Non transferable - Execution sale by ordinary creditor

Having regard to the decision of the Full Bench in 42 Cal. 172 it must be held that a non transferable occupancy holding is liable to be sold in execution of a money decree notwithstanding the objections of the riyat 48 Cal 184 (*Chatterjee and cuming, JJ*) KENARAM PAL v KINU MANDAL 50 Cal 508 75 I C 379

———Non-transferable—Sale of share—Rights of landlord to eject

In the absence of proof of abandonment a sale of a share of a non-transferable occupancy holding does not entitle the landlord to khas possession. (*Woodroffe and Ghose, JJ*) SARAT CHANDRA DE v MANORAMA DEBI 1923 C 181

———Purchase by co-sharer landlord—Status of purchaser

The plaintiffs and defendant were co-sharers in a taluq which comprised the disputed lands as an occupancy holding. The first plaintiff purchased the occupancy holding in execution of a mortgage decree. Held that the legal effect of this purchase was that the holding ceased to exist as an occupancy holding in the hands of the plaintiff as co-sharer landlord and the plaintiff held the land as non occupancy riyat. (*Hookerjee and Chotzani, JJ*) ABINASH CHANDRA BHATTACHARJEE v AMAR CHANDRA DE 27 C.W.N. 760 70 I C 328

———Relinquishment of tenant—Effect

Where an occupancy tenant relinquishes his holding in favour of the zemindar the latter also becomes the transferee of any mortgagor's right which might have been created and is entitled to redeem. (*Stuart and Ryves, JJ.*) KUMAR SANTHWAR v BISHUN MOHAN SAHAI 21 A. L. J. 120 73 I C 631 1923 A 263 (1)

———Sub-Tenancy — Tenant allowing collateral to share in cultivation.

Where a tenant allows a collateral relation to share in his cultivation such possession does not confer on the collateral any share in the occupancy holding. But it does not necessarily imply that a sub-tenancy has been created. (*Fremantle, S. M and Burn, J, M.*) GUR CHARAN v SAMAIN DIN L R 4 A 65 (Rev).

———Succession — Order directing entry in papers—If binding on Zemindar.

## OCCUPANCY RIGHTS.

An order directing an entry regarding succession to occupancy rights made without information to the zemindar and without his knowledge is not binding on him. (*Burn, S M and Pearson, J M*) HIRA LAL v KESHO L R 4 A 78 (Rev)

———Surrender — Relinquishment — Necessity for—Agreement to relinquish—Enforcement

Unless a relinquishment of occupancy right is accompanied by actual surrender to the land, it is not operative. A mere agreement to relinquish occupancy right, whether or not consideration, passes cannot be legally enforced. (*Kanhaya Lal, J C*) MT. BIBI SAIDUNNISSA v FAIYAZ HASAN 1923 Oudh 1.

———Transfer of—Abatement—Suit for ejectment—Right of landlord

Where a tenant transfers an occupancy holding not transferable by custom, and the transferee gets into possession of the property and remain in such possession for 9 years, the original tenant not making any arrangement for payment of rent of the landlord, there is an abandonment of the holding entitling a landlord to sue in ejectment. The landlord's rights of re-entry cannot be defeated by the transferee putting an original tenant in ostensible possession of a portion of the holding or pleading defects in his own title. The landlord in such a case need only prove that there has been a transfer of the entire interest of the tenant and that the transferee is in possession of the entire holding by virtue and in pursuance of such transfer. (*Woodroffe and Suhrawardy, JJ*) SASHI BHUSANJHA v AHMADULLAH CHOWDHURY. 69 I C 1005

OCCUPANCY RIGHTS—Accrual of—Joint tenants —Relinquishment—Period of joint occupation if counts

Where one of two occupancy tenants of a holding resigns his rights this relinquishment does not affect the rights of the other.

Where the occupancy rights are in the course of accrual the position is however different. The relinquishment effects a change in the tenancy and consequently the period before the relinquishment cannot be counted towards the accrual of occupancy rights.

(*Per Burn, S M.*) — If a joint tenant relinquishes the holding but continues to be a member of the joint cultivating partnership there is no change in tenancy. If the relinquishment is genuine and there is no longer any sharing in the cultivation of the holding there is a change in the tenancy. (*Fremantle, S M and Burn, J M*) SETH PREM NARAIN v. GANGA. L R 4 A 269 (Rev).

———Acquisition of—Allotment of land—Payment of rent

During the pendency of partition proceedings the plot in dispute was allotted to the defendants who was also a co sharer at that time and he was recorded as paying rent. Held that the defendant was entitled to count the period between the allotment and enforcement of partition towards the acquisition of occupancy rights. (*Fremantle S. M*) BELLAR SINGH v. JAFAR KHAN L. R. 4 A. 267 (Rev).

## OFFICE

## OFFICE—Resignation—When takes effect

An office does not become vacant on the resignation of the office holder, but only on the acceptance of the resignation. This applies to the case of an Honorary Magistrate also (*Ramesam, J*) AKULA SUDARSANA RAO v CHRISTIAN PILLAI, 45 M L J 798

## OFFICIAL REFEREE—Power of—Rules determining

The official Referee in Madras is only a permanent Commissioner. His powers must be determined with reference to the Civil Procedure Code and the Original Side Rules and not the Rules of the Supreme Court with regard to Referees and Masters (*Kumarasamy Sastry, J*) ABDUL WA HAB SAHIB v ROKIA BIBI SAHIBA 73 I C 903 (2)

## OPIUM ACT (I OF 1878), S. 3—Specially empowered—Hut is—Cr P Code, S. 39

Where a government notification empowers second class Magistrates of a particular locality mentioned in a list appended to it, to try cases under the opium Act, that meets the requirements of S 3 opium Act (*Ahng and Olgers, JJ*) ALAGA PILLAI v EMPEROR 74 I C 958

24 Cr L J. 846

## S 9—Rules under—Preparations for admixture of opium—Meaning of—Rule 57 (d)

The word preparation in R 37 (d) of the Excise Rules framed under the Opium Act designates a completed or manufactured article and not an article in process of manufacture, the test being whether the stage has been reached at which it can be used. So also the word "admixture" refers only to a completed article, and can only be applied after the mixing has been finished and not earlier. In the intermediate stage an offence has only been committed in the amount of opium used in the manufacture is more than that permitted by Law. (*Harrison, J*) MT. HAMIRI v EMPEROR, 4 Lah 12

73 I C 700 24 Cr L J 668

## S 9 (c)—Possession of opium—Offence—Visitor to a house

Where the accused was a visitor to a house and inside the bed used by her there was found a quantity of opium she could not be convicted of an offence under S 9 (c) of the Opium Act in the absence of proof that the bed belonged to her, (*Young, J.*) MA MI v EMPEROR 2 Bur L J 16

75 I C 358 (1) 24 Cr. L J 934 (1)  
1923 Rang. 152

## Ss 11 and 12—Order of confiscation—No opportunity to show cause—Illegality—Fine in lieu of confiscation See (1922) DIG COL 862

MANGHAN DASS v RAHIM BUX  
1 Pat. L R (Cr) 32 69 I. C 635  
23 Cr L J 747

## ORISSA TENANCY ACT, S. 236—Shikmi tenant—Ejectment See (1922) DIG COL 865 KANDURI SAHU v. ARJUN SAHU 70 I. C 356

## OUDH CIVIL DIGEST PARA, 272(XI)—Pleader's fee—Taxation

Where one pleader appears for the respondent at an earlier stage of the case and another pleader

## OUDH ESTATES ACT

appears at the hearing of the appeal, full fee should be allowed and not merely half the full scale (*Daniels and Lyle, A J C*) RAHU INDRAPRATAP SAHI v RAJA ABU JATAR 1923 Oudh 55 (2)  
70 I C 99 (1),

## OUDH ESTATES ACT—Amendment Act of 1910—Estate—Transfer to a person not an immediate successor—Effect

A transfer of an estate prior to the Oudh estates Act Amending Act, 1910, to a person who is an immediate successor, even though he is in the line of succession, operates to take the estate out of the special limitations of descent (*Lord Phillimore*) LAL RAM SINGH v DEPUTY COMMISSIONER OF PARTABGAR 45 A 596

21 A L J 777 33 M L T 355 (P. C.)

26 O. C 257 90 & A L R 746 50 I A 265  
(1923) M W N 591 1923 P C 160

Primogeniture—Reversioner See (1922) DIG COL 865 KUAR NAGESHAR SAHAI v KUAR MATA PRASAD 69 I C 730

Primogeniture—Reversioner, See (1922) DIG COL 865 THAKURAIN HARNATH KUAR v THAKUR INDAR BAHADUR SINGH

44 M L J 489 90 L J 652

27 C.W.N. 949 90 & A L R 270 18 L W 383  
26 O C 223 33 M L T 216 (P. C.)

37 C L J 346 71 I C 929  
50 I A 69

## Summary settlement—Object of

The first summary settlement in Oudh did not finally decide the proprietary title of the person who had engaged to pay the fixed revenue to the British Government. To allay mis-giving in the minds of the landholder it was considered necessary to settle proprietary rights after confiscation. All such proprietary rights were grants from the British Government and started fresh titles to the property, but it does not follow that these titles were free from the personal law of the grantees as regards succession and title of heirs. This settlement gave finality and perpetuity in respect to the proprietary right in the soil. Subsequently to emphasize this fact of the grant of a proprietary title sanads were issued to Taluqdars in accordance with letters of the Governor General in Council. These letters were subsequently given the force of legislation under Act II of 1869. They declare that every Taluqdar with whom a summary settlement had been made since the re-occupation of the Province, thereby acquired a permanent hereditary and transferable right in the Taluqa for which he had engaged including the perpetual privilege of engaging with the Government for the revenue of the Taluqa. The Chief Commissioner proposed a form of sanad and the approved form was sent to him by the Governor General with his letter dated 19th October 1859. The Sanads were given by Lord Canning at a Darbar held on 26th October 1859. The Sanad conferred no new rights but only declared the rights already determined in the 2nd Summary Settlement of 1858. Where a grant is made to a person and his heir for ever, the

# **OUDH ESTATES ACT, S. 13**

grantee takes an absolute estate (*Simpson and Dalal, A J C.*) RAM RATAN v. GANGA BUKHSH SINGH

26 O C 245 10 O L J 193  
9 O & A L R. 222 71 I C 581  
1923 Oudh 265

## **S. 13 (1) —Object and scope of**

Section 13 was devised to impose restrictions on sudden freaks of impulse. It insisted upon certain formalities in the case of gifts and devises and fixed certain time limits for the performance thereof in order that the strongest possible proof might be available of a disposing mind of deliberate intention in case the donee or legatee happened to be a person who was not the legal heir to the estate under the special rules of succession or the ordinary law applicable to such estates or one of his younger sons (*Kanharya Lal J C and Dalal, A J C.*) CHAUDHRAN TARIF-UN-NISA v CHAUDHRI SHAFIQ UZ ZAMAN. 26 O C 133

75 I C 626 1923 Oudh 185

## **Ss 22 and 13—Succession to estates—Rules governing**

The special provisions embodied in section 22 of the Oudh Estates Act govern the succession to the estates mentioned in the second, third, and fifth of the lists, while the ordinary law to which persons of the donor's or testator's tribe and religion are subject govern the succession to the estates who would succeed to cases entered in the 4th and 6th lists. In the former class of estates the person who would succeed to the estates, if the taluqdar or grantee were to die intestate, would be the person to whom the special provisions of section 22 would apply. In the latter class of estates the person who would succeed to the estate, if the taluqdar or grantee died intestate, would be the person whom the ordinary law of the tribe or religion of the taluqdar or grantee would select. If the estate is one entered in lists 2, 3 and 5 the succession to which is regulated by primogeniture or the special rules of succession laid down in S. 22, the ordinary rules of the tribe and religion of the taluqdar or grantee would obviously be inapplicable, because, the heir to such an estate would only be one individual, and the ordinary law may point to many. If the estate was one entered in lists 4 and 6 the ordinary law of the tribe and religion of the testator would govern the succession to such an estate, and the person entitled to succeed to the same may be one or more but they must be persons of equal degree. In other words S. 19 provides an exception in favour of a person who would have succeeded to the estate if the taluqdar or grantee had died intestate under the special provisions relating to succession embodied in the Act, if the estate was one to which those special provisions relating to succession were applicable or under the ordinary law of the tribe and religion of the taluqdar or grantee, if the special provisions relating to succession so laid down, were not applicable. The person in whose favour the exception has been made would in any case be the person who would have been the immediate heir or the heir at law of the taluqdar or grantee, had the latter died intestate according to the law applicable to his estate. A

# **OUDH LAWS ACT, S. 14**

similar exception is made in favour of the younger son of the taluqdar or grantee, if the estate was one entered in the 3rd or the 5th of the lists mentioned in S. 8, because by rule of primogeniture or impartibility applicable to such estate, such a younger son would be out of the pale of immediate succession and a gift or devise in his favour would not divert the estate out of the line (*Kanharya Lal, J C, and Dalal, A J C.*) CHAUDHRAN ZARIF UN-NISA v CHAUDHRI SHAFIQ-UZ-ZAMAN. 26 O C 133

75 I C 626 1923 Oudh 185.

—S. 23—Ordinary Law, meaning of—Male primogeniture sanad—Estate entered in list 4—Succession See (1922) DIG COL 865 BADRI NARAIN SINGH v THAKURAIN HARNAM SINGH. 21 A I L J 13 44 M L J, 337  
37 C L J 305 9 O & A L R 49 (P. C)

—OUDH LAND REVENUE ACT (17 OF 1876), Ss. 162 and 165—Statement by Deputy Commissioner—When binding

Statements made by the Deputy Commissioner or the Board of Revenue in derogation of a person's rights while his estate was in the possession of the Court of Wards under Ss 162 and 165 of the Oudh Land Revenue Act are not to be considered as made on behalf of the proprietor (*Kanharyalal, J C and Dalal, A J C.*) CHAUDHRAN ZARIF UN-NISA v CHAUDHRI SHAFIQ-UZ-ZAMAN. 26 O C 133

75 I C 626 1923 Oudh 185.

—OUDH LAND REVENUE ACT (XII of 1901), Ss 117 and 124—Proceedings—Compactness—Duty to secure See (1922) DIG COL 866 SHAIKH WAHIDALI v. BASHIR UD-DIN.

9 O. & A. L R 370.

—OUDH LAWS ACT, S. 9—Pre-emption—Right to Nature of—Pre emptor's property subsequently sold Rights of heir of pre emptor and vendee from him—Gift to son—Donee if entitled to pre emptor's share—Right—Pre-emption a Personal Right See (1922) DIG COL 866 MIRZA SADIQ HUSAIN v MAHOMED KARIM. 70 I C, 53

—S. 9—Preferences on account of relationship—Pre-emption

If every khata in the village is distinct without any joint right or joint obligation with the other khata every khata would be in the position of a separate mahal and the co-sharers of every khata would be separate and independent. The parties who are members of the village community so far as the right of pre-emption is concerned have no preference given on account of relationship. 22 O. C 97 Cons (*Dalal, A. J C.*) RAM ADHIN v GAYA PRASAD. 1923 Oudh 159

—Ss 14 and 15—Pre-emption—Failure to deposit amount in time—Effect—Appeal.

Under Ss 14 and 15 Oudh Laws Act, when the plaintiff pre emptor fails to deposit the amount in court within the time limited, the right is lost. The period cannot be extended under S. 148, C P Code, nor can an appeal be preferred thereafter (*Dalal, J C.*) IMAM DIN KHAN v ABDUL SATTAR KHAN. 74 I C 62.



# ODDH LAWS ACT, S 15

—S 15—*Presumption—Appeal—Decree—Increase in amount Deposit of balance deducting costs*

The respondent obtained a pre-emption decree subject to payment of Rs 80 which he duly deposited. He was awarded his costs by the Court of first instance and he subsequently attached and withdrew on account of the amount due to him for costs a sum of Rs 22 out of the amount he had deposited. An appeal was filed against the decree and the final decree increased the amount payable for the property to Rs 106-6-0 and directed that the plaintiff do pay into Court the balance within one month from the date of this decree after deducting what had already been deposited by him in compliance with the decree of the Court below. Each party was ordered to bear his costs. He accordingly paid the balance of Rs 26-6-0 and obtained possession of the property.

*Held*, that there was a sufficient compliance with the decree to entitle the plaintiff to be put in possession of the property, though the amount of costs withdrawn was deposited beyond the time fixed, (*Daniels, J C*) *HINDA PRASAD v BABU BANARSI DAS*, 10 O L J 206 1923 Oudh 27

ODDH RENT ACT (XXII OF 1886), S 3 (3)—Right to take leaves of trees—Notice of ejectment See (1922) DIG COL, 868 *THAKUR RAGHUNATH PD SINGH v SHEIKH BANDHU* 9 O & A L R 215

—S 3 (8)—*Under proprietary right—Acquisition of*

Where the conditions imposed on a lessee and the provision for resumption on failure to satisfy the conditions, are no longer operative there is nothing to prevent the lessee from getting under proprietary rights 1 O L J 389 foll, 17 O C 299 dist, (*Kanhaya Lal, J C and Dalal, A J C*) *SHAIKH RUTAB ALI v MAHOMED ZAMAN BEE* 1923 Oudh 47.

—Ss. 3 (10), 48—*Heir—Meaning of*

The expression "heir of a tenant" does not exclude the heir of a tenant. The word "heir" is used to denote the sense of representation of the first tenant through his successors in inheritance for the whole term of the tenancy (*Wazir Hasan, A, J C*) *RAM NAKESH SINGH v DALPAT SINGH* 10 O L J 357 9 O & A L R 614

—S 7 (a)—*Proprietary Rights—Sale of—Sir in possession of mortgagee—Accrual of co-proprietary rights*

Even though the land was in possession of the mortgagee at the time of a sale of proprietary rights that does not prevent the accrual of proprietary rights in Sir land *KALI DIN SHUKUL v. BINESHRI SHUKUL* L R 4 A 64 (Rev)

(XII OF 1881), S 9—*Occupancy holding—Widow in possession—Remarriage, effect of*

The rights of a Hindu widow succeeding to an occupancy holding under the Rent Act of 1881 are not affected by her remarriage (*Burn, S M*) *REDA v. MT. AFZAL FATIMA* L R 4 A 44 (Rev).

Ss. 36 and 37—*Ejectment of tenant—Procedure—Expiry of the term*

# ODDH RENT ACT, (XII OF 1881), S 108

A statutory tenant holding over at the expiry of a term of 10 years laid down by Ss 36 and 37 of the Act is still a statutory tenant and the procedure to eject him is governed by S 62 (A) and not by S 62 of the Act (*Fremantle S M and Burn J M*) *ZORAWAR v MIRZA MD RAZA BEG* 9 O & A L R 882 L R 4 A, 279 (Rev)

—S, 36—*Small exactions by Zemindar—Nature of*

Small casual exactions by a zamindar from a tenant do not constitute a change in the rent within the meaning of S 36 of the Oudh Rent Act and do not bar the zamindar's right to eject the tenant, (*Fremantle, S M*) *GAADHAR v JAHNDAH BAHADUR SINGH* 9 O & A L R 701 L R 4 A 246 (Rev).

—S 55—*Ejectment suit—Finding as to possession—Resjudicata*

Where in a suit in ejectment defendants produced an unstamped patta dawan and the court admitted it on payment of stamp duty and dismissed the suit in ejectment, the prior finding as regards possession of the defendants operates as *res judicata* (*Fremantle, S M and Burn, J M*) *MT. KAUSILLA v KAI BAJRANG BAHADUR* L R 4 A 142 (Rev).

—S 56—*Ejectment—Suit to contest—What Plaintiff should prove*

In a suit contesting the validity of a notice in ejectment plaintiff must either claim occupancy rights or state he has a *prima facie* claim to under proprietary rights (*Fremantle, S. M*) *MT. JAFRI BEGAM v THAKUR JAIPAL SINGH* L R 4 A 323 (Rev) 9 O. & A L R 895.

Ss 61 and 145—*Period of limitation for execution—Application under S 61—Effect of*

An application under S 61 of the Oudh Rent Act cannot extend the period of limitation provided for execution of a decree by S 145 of the Act (*Kanhaya Lal, J C*) *KHUSHAL SINGH v THAKUR CHANDRA PAL SINGH* 70 L C 966 (1) 1923 Oudh 42 (1).

—S 62—*Sub—Letting—Ejectment*

A suit lies under S 62 of the Oudh Rent Act if the holding is sub-let at the time of institution, and it is immaterial how long it was sub-let. The plea of limitation has no force (*Fremantle S M and Burn J M*) *AMIK HAIDAR KHAN v KAM PATAN* 9 O & A L R 804 L R 4 A, 286 (Rev)

Ss 108, 124—*Suit for profits—Lambard—Liability—Suit in wrong court—Appeal*

A lambard in a suit for profits under S 108 is liable to account on the basis of gross rental if he fails to produce accounts. If such a suit is filed in a wrong court but decided on the merits, an appeal lies to the District Court under S 124, just as if it had been filed in the proper Court (*Simpson, A J C*) *MT JAGRANI v IQBAL NARAIN* 9 O & A L R 485

S 108 (10)—*Civil Court—Jurisdiction—Suit in ejectment—Possession not with plaintiff*

A suit by a landlord not in possession of lands to eject a person who forcibly got into possession under an alleged sale deed is cognizable by a civil

# OUDH RENT ACT (XII OF 1881), S 108

court and not by a revenue Court under S 108 (10) Oudh Rent Act (*Dalal, A J C*) *ASHIQ ALI v. GHULAM SARWAP* 90 & A L R 521 74 I C 533

—S 108 (10)—*Claim of ex-proprietary rights—Suit for possession—Maintainability of*  
For a suit under S 108 (10) of the Oudh Rent Act for recovery of possession, it must be shown that the plaintiff was in possession actually or constructively within a year of the suit (*Burn, J M*) *RAM PRASAD v COURT OF WARDS* L R 4 A 74 (Rev)

—S 108 (10)—*Ejectment—Suit for recovery of possession—Nobis*

The mere fact that an ejectment was effected by an order of the Court would not bar a suit for recovery of possession 20 C. 83, 12 O C 94 foll Where a person who is not liable to be ejected is ejected by notice under the provisions of the Oudh Rent Act, the ejectment is illegal. (*Burn, J M*) *RAJNARAIN SINGH v RATA PARIAB BAHADUR SINGH*. L R 4 A 123 (Rev) 90 & A L R 662

—Ss 108 (10)—*Illegal ejectment—Meaning of—Landlord and tenant—Disputes between*

A dispute between two parties both claiming to be tenants of the same land under the same *Zamindar*, where the claimant has never held possession of the land, is within the jurisdiction of the Civil or of the Revenue Court

The words 'illegally ejected' imply that the plaintiff must have been in possession and are not applicable to a case in which he had never been in possession (*Daniels, A J C*) *GAYA DIN SINGH v. CHAUHANJA PANDE* 10 O L J 178 73 I C 238 90 & A L R 87 1924 Oudh 14

—S, 108 (10) *Statutory tenancy—Preamble in possession—Nature of right*

No right in statutory tenancy before 1921 passed by inheritance on the death of a female holder, her husband's heirs cannot succeed and a suit for possession under S 108 (10) Oudh Rent Act cannot be maintained by them (*Fremantle, S M, and Burn, J M*) *BHAIYA CHANDRA BHAN DAT RAM v MAHABIR PRASAD* L R 4 A 443 (Rev.)

—S 108 (15)—*Suit for profits—Members of joint Hindu family*

A suit for profits by a recorded co-sharer of a specific share is maintainable even against another member of a joint Hindu family (*Daniels A J C*) *MT SOHBAI KUAR v MT. RAJ DEVI* 90 & A L R. 236 73 I. C 688

—S 108 (16)—*Pattidar—Suit for recovery of revenue paid—Jurisdiction of civil Court*

The parties to the suit were not co-sharers The defendants were described as sub *pattidars* of the plaintiffs They occupied a position similar to that of subordinate proprietors Held that the Civil Court ought to have entertained the suits for recovery of revenue paid by the *pattidar* from the sub *pattidars* (*Kanharya Lal, J C*) *BENI MADHO v. SHAMSHAD ALL.* 26 O C 56 74 L C. 253 1923 Oudh 238.

# OUDH RENT ACT (XII OF 1881), S 154

—S 119—*Appeals under—Powers of court*

In an appeal under S 119 Oudh Rent Act from the appellate decree of a Collector, the provisions of S 100 C P C, will apply and the powers of the Court are confined as indicated therein (*Dalal, J C*) *JAGANATH PERSHAD v BECHU* 90 & A L R 931

—S 119 B—*Amendment—Decree of District Judge on appeal—Revision*

The power of the Court of the Judicial Commissioner to interfere in appeals from the decrees of Revenue Courts is defined by and limited to the cases provided for by section 119B and no power of revision from the appellate decrees of the District Judge is reserved to that Court (*Kanharya Lal J C*) *KALI BAKSH SINGH v BHAGWAN DAS* 10 O L J 191 72 I C 1023 90 & A L R 848 1924 Oudh 16,

—S 126—*Authority to collect rent—If can be oral*

Under S. 126 Oudh Rent Act authority to collect rent may be oral or written (*Dalal, J C*) *DEBI PRASAD v LAKHRAJ* 90 & A L R 642

—S 127—*Sir land—Sale of—Sub-tenant Continuing in possession—Status of—Ejectment*

S 127 of the Oudh Rent Act applies to a person who formerly had a right to the land and maintains his occupation though his right to hold it has expired. After the sale of *sir land* the sub-tenant continued in possession without any agreement express or implied, with the new proprietor, and was not recognized as a tenant by receipt of rent or otherwise Held, he was a mere trespasser and not a statutory tenant and was liable to ejectment as such (*Fremantle, S M and Burn, J M*) *JAI CHAND SINGH v GOKARAN SINGH* L R 4 A 126 (Rev). 90 & A L R 664

—S 127—*Trespasser in possession—Tenant's right to eject*

A tenant can under S 127 of the Oudh Rent Act treat a trespasser as his sub-tenant and sue to eject him (*Burn, J M*) *UMRAO KHAN v RAM BALI* L R 4 A 348 (Rev.) 90 & A L R. 915

—S, 138—*Proviso—Scope of*

Parties to a suit in the Revenue Court, including the intervenor, can agitate their rights in appeal The proviso to S, 138, Oudh Rent Act does not affect this right (*Dalal, A. J. C*) *RAJA SURAJ BAKSH SINGH v MUNNU LAL* 10 O L J 229 90 & A L R 577

—S 154—*Under Proprietor—Lease by—Liability for payment of rents.*

S 154 (2) of the Oudh Rent Act renders a lessee from an under proprietor liable for the rent due but it nowhere says that the under-proprietor himself shall cease to be liable for the rent. Whether he would cease to be liable or not must depend on the nature of the transfer. (*Daniels, A J C*) *THE SPECIAL MANAGER, COURT OF WARDS v GULZARI LAL* 10 O L J 45 90 & A L R 121. 1923 Oudh 175

# **OUDH RENT ACT (XII OF 1881), S 159**

## **—S 159—Notice—Statutory tenant.**

S 159 of the Oudh Rent Act refers to notice issued on statutory tenants under the Old Act and the words 'statutory tenant' must be taken to mean a statutory tenant under the old Act and not the Amendment Act IV of 1921 (*Fremantle S. M.*)  
**THAKUR DRIGPAL SINGH v MAHABIR SINGH,**  
 L R, 4 All 360 (Rev)  
 90 & A L R 998

## **—S 186—Service of notice—Affixture**

Service by affixture is sufficient under S. 136 of the Oudh Rent Act where the person to be served with notice was not in the village and his whereabouts were not known for some years (*Burn, J M.*)  
**JAGDISHWAR SINGH v AMBAR SHUKLA**  
 L R 4 A. 73 (Rev)

## **OUDH RENT ACT, (IV OF 1921) S 68 A—Subletting—Ejection suit**

A statutory tenant is liable to be ejected if he sub-lets for more than 2 years, nor can he sublet within two years of the last subletting. (*Fremantle, S M.*)  
**PRAG NARAIN v DULLOO**  
 90 & A L R 709

## **—S. 127—Effect of amendment—Suit in ejection—Civil or Revenue Court**

S 127 of the Oudh Rent Act only provides a suit remedy for collection of rent through the Revenue Court, and there is nothing in it to prevent recourse to civil courts in ejecting a trespasser. Under the Act, a trespasser could be treated as such or as a tenant, in the latter case he could be ejected only through a Revenue Court (*Dalal, J. C.*)  
**RAM CHARAN v CHAMPAT SINGH**  
 90 & A L R 770

## **—S. 127—Trespasser—Ejection**

S 127 Oudh Rent Act provides for the ejection of a trespasser and prevents it being taken out of the jurisdiction of Revenue Courts. Even when arrears of rent are claimed, the court can order ejection (*Dalal, J. C.*)  
**PARMESHWAR LAL v. MT. KURMIN.**  
 90 & A L R 871

## **OUDH SUB-SETTLEMENT ACT (1866)—Under-proprietary tenure—Shankalap Koshist**

Where the statement of the agent of a Talukdar showed that the land was held as *shankalap koshist* rent free by the ancestors of the plaintiffs from a time long before the year 1877 when a claim was made by the taluqdar for assessment of rent only and when the settlement decree therefore did not for the first time create the tenure of *shankalap koshist* but merely recognised it as a pre-existing tenure on the admission made by the taluqdar's agent and where the assessment of rent was made on the tenure. Held the holding had been all along treated as an under-proprietary tenure (*Wazir Hasan, A J C.*)  
**MANOHAR LAL v. ANJUTANAND**  
 74 I C 340 90 L J 618  
 1923 Oudh 27.

## **OUDH TALUKDARI TENURE—Sanads—"Successor" meaning of See (1922) DIG, COL 873**

**MAHOMED ABDUL GHANI KHAN v FAKHR JAHAN BEGAM.**  
 37 C. L. J. 1 (P. C.).

# **PARTITION.**

**PAPER CURRENCY ACT (1910) S 26—Promissory notes—Contravention of the Act—Mortgage in renewal of promote—Enforceability See (1922) DIG COL 873 NATARAJULU NAIDU v SUBRAMANIA CHETTIAR**  
 69 I C 939.

## **PARTITION—Common and not joint property—Exclusion of some items—Effect.**

A suit for partition of common property, not joint property, is not liable to dismissal on the ground that all the joint property in respect of which it might have been brought has not been included. The objection as to partial partition is not available in such a case. It is always open to the defendant in such a case, if he thinks himself prejudiced by the exclusion of any property, to bring a suit himself in respect of it and have it tried with the other suit (*Oldfield and Devadoss JJ.*)  
**PAKKIRI KANNI v HAJI MOHAMMED MANJOOR SAHIB**  
 45 M L J 321  
 18 L W. 345 (1923) M W N 565  
 33 M L T, 44 (H C) 75 I C 334  
 46 Mad. 840

## **—Compactness—Interference.**

It is a sound rule of practice not to interfere with a partition in the interests of compactness when the areas of the patus formed less than 5 acres (*Fremantle S M, and Burn, J M.*)  
**GOPI NATH NAIR v MUJAT NABI KHAN**  
 L R 4 A 179 (Rev)

## **—Confirmation of—Right to appeal.**

Where in a partition case the party had no opportunity of appealing to the Collector before the order was confirmed, the order is illegal (*Fremantle, S M and Burn, J M.*)  
**KAMTA PRASAD CHAUDHRY v HARPAL PANDEY**  
 L R 4 A 175 (Rev)

## **—Co-shares—Rights after partition—Imperfect partition**

The co-sharers in a *mahal* have a right to effect a partition by private arrangement amongst themselves and it may be the most convenient method of effecting such a partition to assign the entire holding of a particular tenant to a particular group of co-sharers. The only difference effected by a private arrangement and one properly carried out under the orders of the Court is that the incidents of the private partition are difficult to prove, and that confusion and litigation may arise afterwards owing to the preparation of village records which are at variance with actual facts. After partition it is open to the sharer to eject tenants at will continuing on the land (*Mears C J and Piggot J.*)  
**HAWAL RAI v, HAR PRASAD**  
 45 A 711 21 A L J 634  
 L R 4 A 437 (Rev.) 1924 A 57

## **—Co sharers—Shamlat—Apportionment**

Where the Commissioner directed the partition to take place by giving to the parties the patus already recorded in their names and dividing shamlat according to the shares recorded in the khewat, the division is proper. (*Fremantle S. M.*)  
**GAYA PRASAD MISRA v JAG PRATAP SINGH,**  
 90 & A, L R. 999 . L. R. 4 A. 215 (Rev.).

## PARTITION

*Decree—Right of defendant to carry on pending execution*

Where the plaintiff applies for execution of a partition decree but proposes to drop the execution proceedings on the building which was the subject of the partition being burnt down it is open to the defendant to insist on the execution being carried on and the site being divided and put in possession of the parties according to the decree (*Macleod, C J and Coyajee, J*) CHUNI LAL JAMNADAS v. MUL CHAND HARIVANDAS

1923 Bom 23 (2)

*Decree—Assignment of—Rights of purchaser*

Where an assignee of a partition decree executes it and obtains possession of the property he has a good title to the property partitioned and does not require a conveyance for perfecting his title 3 C W N 30 dis. (*Pratt, J*) MA THA v MAUNG PO KIN.

70 I C 843 (2)  
1923 Rang. 45 (2).*Equities—Transfer of undivided—Shares to different persons—Prior transfer of Specific plots—Mode of allotment*

Where separate rights created in favour of different persons can all be exercised without encroaching upon each other they must be treated as relating to different portions of the property. The owner of certain property mortgaged an undivided half share in it to A, who subsequently foreclosed the mortgage and became the owner. Subsequently the remaining half share was sold to B. It was found as a fact that prior to the mortgage the owner had sold certain plots of land but this was not known to A or B. On a question arising at a partition between A and B it was held that the plots so sold should be allotted to B's share of the property (*Daniels, A J C*) QAZI WALIUL HAQ v MT BIGGAN

1923 Oudh 42 (2).

*Minor—When bound—Bona fide allotment—Full knowledge of facts—Guardian's act when binding*

Though a partition can be entered into during the minority of some of the members of a joint Hindu family it is open to the minor members to show that the partition was unfair or prejudicial to their interest and their not binding on them. In the case of a co-owner who is only interested along with a minor in one or more items of property, when division is effected, such division must be a fair one and not prejudicial to the interests of the minor. Wherever an adult person deals with a minor through the minor's guardian it is his duty to see that the transaction is a fair one and that the minor is not prejudiced in any way by an act or omission on his part. The duty is all the greater when the minor's guardian is a young widow having no independent advice and the adult co-owner knows everything about the property. (*Spencer and Devadoss, JJ*) PARAMASIVAM PILLAI v MEENAKSHISUNDARAM PILLAI

73 I. C. 863 · 1923 Mad 96

*Partial partition—When allowed—Co-tenants.*

Y. D—65

## PARTITION

The general rule is that all property held in cotenancy and nothing but property held in cotenancy should be included in a partition suit. A co-tenant, whose title to an undivided share of joint property is admitted as clear is entitled to partition as a matter of right. A difficulty in making a division of the subject-matter or a resulting prejudice to some of the co-tenants, is not a sufficient ground for refusing a partition, and it has sometimes been maintained that partition may be claimed, even though it be impossible to divide the property without materially impairing its value or even totally destroying it. Since partition can be claimed as a matter of right, a co-tenant is not required to make demand or to agree upon terms prior to institution of suit. But although, as a general rule, all joint property of the co-tenants must be included in a partition suit it is within the power of co-tenants, by mutual agreement, to make partition of a part only of the joint property, retaining the rest in common. The principle that a partition suit should include all the property of the co-tenancy is widely recognised, and it has been pointed out that if the rule were not enforced, a co-tenant might institute as many suits to partition the property as his caprice dictated. Consequently, a partial partition cannot, as a general rule, be compelled against co-tenants who do not consent thereto. But if some of the co-tenants desire to continue holding their moieties together and undivided the Court may permit them to do so, and instead of making a separate allotment to each, set apart to all who so desire an allotment to be held by them jointly. If it appears, however, that all the defendants have already received all that is equitably due to them, the remainder may be awarded to the plaintiff, this is not partial but complete partition. Exceptions to the rule that a suit cannot lie for partition of a portion of the family property have been recognised when different portions of the family property are situated in different jurisdictions, and separate suits for separate portions have sometimes been allowed, where different rules of substantive or adjective law prevail in the different Courts. Again, a suit for partial partition has been allowed when the portion excluded is not in the possession of co-partners and may consequently be deemed not to be really available for partition. A suit for partial partition has also been allowed when the portion excepted is impartible property. In another class of cases, the rule has been relaxed, namely, where the portion excluded is held jointly with strangers who have no interest in the family partition. But although partial partition by suit is allowed where different portions of the property lie in different jurisdictions, or some portion of the property is at the time incapable of partition or is from its nature impartible or is held jointly with stranger who cannot be joined as parties to a general suit for partition, these exceptions must not be taken to have frittered away the fundamental rule that a partition suit should embrace all the joint property (*Mookerjee and Cumming, JJ*) RAJENDRA KUMAR BOSE v BROJENDRA KUMAR BOSE.

37 C L J, 191 1923 Cal 501.

*Parties to suit—Co-sharers—Transfer of a share, if necessary*

## PARTITION

The transferee from one of several co-sharers can bring a suit for partition without his impleading his transferor, though the latter may be a proper party (*Coutts and Das, JJ*) **NANDKESHWAR MISRA v SUDARSHAN** 1923 P 162

— *Proceedings for—Entry as sir—Objection*

At a partition the fixed rate tenancy of a co-sharer was included as sir in the mahal of other co-sharers without any objection from the former

*Held*, that he was debarred from subsequently raising any objection to it (*Fremantle, S M*) **LACHMI SINGH v HANUMAN SINGH**

**L R 4 A 244 (Rev.)**

— *Recording of land in the name of Puttidar—Presumption*

According to an agreement between the parties the actual possession of all sir and khudkast had been left undisturbed, the holder being recorded as a tenant of any such land as fell in patti other than his own

The Amin at first entered a land as the defendant's khudkast in the plaintiff's patta. Such a state of things is of course an impossibility and the officer who made the partition ordered the Amin to correct the entry, it was accordingly corrected into an entry showing the land as the plaintiffs' khudkast and the jamabandi containing this entry was accepted and signed as correct by the parties,

*Held*, The general statement of the Revenue Officer that the actual possession of sir and khudkast had not been disturbed by no means excludes the possibility of exceptions having been made and barely indicates a slight probability that an exception that appears on the face of the record was really due to a slip of the pen (*Hallifax, A J C*) **NARSING v KHEMU**

1923 Nag 81

— *Suit for—Compromise among some of the parties—Effect of*

There can be no compromise binding upon all the parties to, a partition suit until and unless all the parties have joined in the compromise 27 I C 242 Rel (*Mookerjee and Rankin, JJ*) **TARA PRASANNA SARKAR v. KALIKA MOHAN SARKAR**

38 C L J, 111 75 I C 319

— *Suit for—Essentials of action*

In order to succeed in a partition action there must be not only unity of title but also unity of possession (*Coutts and Das, JJ*) **NANDKESHWAR MISRA v SUDARSHAN** 1923 P 162

— *Suit for—Omission of item by mistake—Failure to amend plaint—Effect*

After preliminary decree in a partition suit, one more item of family property was brought to light and it was directed to be added to the list of properties on payment of court fee but the plaint was by over rights not amended *Held* the property could still be included in the final decree—(*Wyling and Odgers, JJ*) **RAMASWAMY CHETTY v PALANIAPPA CHETTY**

18 L W 656  
(1923) M W N. 841

— *Suit for—Parties—Maintenance—Held that a necessary party—Mother.*

## PARTITION ACT, § 2

In a suit for partition of joint property all the shareholders must be represented before the court. But a person who has no present interest in the property but who would become entitled to a share in lieu of maintenance is not a necessary party (*Mookerjee and Chotzner, JJ*) **JADU NATH SARKAR v HARAN CHANDRA SARKAR** 49 Cal 1043 70 I C 687 (1923) Cal 221

— *Suit for—Plaintiff withdrawing—If defendant can claim to be transferred*

A suit for partition was filed by one of two brothers against his uncles and though the suit was filed on behalf of both the brothers, the other brother was impleaded as a defendant. The plaintiff withdrew the suit whereupon his brother applied to be transposed as plaintiff and to be allowed to go on with the suit. *Held*, he was not entitled to do so. (*Ramaswamy Iyengar, J*) **RANGE GOWDA v RANGANNA** 1 Mys L J. 133

— *Suit for—Preliminary decree—Dismissal of suit therefore—Impropriety of*

In a suit for partition the court passed a preliminary decree and directed a Commissioner to partition the joint properties. The commissioners partitioned some lands which were other than the joint property and the Court thereupon purported to dismiss the suit. *Held*, that the Court acted illegally in dismissing the suit after passing a preliminary decree and that Commissioner ought to be directed to partition the lands directed to be divided under the preliminary decree (*Das and Kulwant Sahay, JJ*) **RANJIT SAHI v MAULAVI QASIM** 2 Pat 432 4 Pat L T 257 72 I C 916 (2) 1923 P 342.

— *Suit for—Questions to be considered*

Considering that partition suits are always extremely complicated any question regarding disputes with regard to particulars, such as between a mortgagor and mortgagee should be kept out of the main partition suit or if they are taken up in the course of the trial, very great care should be taken to keep such question separate as far as possible (*Macleod C J and Crump J*) **BABUSING NARAYANJI v. SAMBHAJI SHIWAJI** 1923 Bom 294.

— *Suit for—Reliefs to be claimed—Separate suits for accounts for anterior period—Not allowed* See (1922) DIG COL 877. **VISHNU MORESWAR v GANGADHAR GANESH**

69 I C 399

— *Waste land—Land allotted to one and trees to another—Suit to remove trees—Limitation*

Where on a partition of waste land, trees are allotted to one and the land to another, a suit by the latter within 12 years of the partition for the removal of the trees and vacating of the lands is maintainable (*Kanhaya Lal, J*) **SHAIKH NIAMAT ULLAH v MT SHAFUTUL NISSA BIBI**

**L R 4 All 314 (Rev.) 73 I C 768.**

PARTITION ACT, § 2—*Applicability*

Under § 2 of the Partition Act, action can be taken not only when the property is wholly impartible but also when a partition cannot conveniently be made. (*Broadway and Martineau, JJ*) **MOHAMMED MAJID ULLAH KHAN v. MAHAMMAD HAMID ULLAH KHAN** 69 I C 196

## PARTITION ACT, s 2.

—Ss 2 and 3—*Application for sale—When to be made.*

The provisions of the partition Act apply to the stage at which the suit is in the Court of 1st Instance. The various provisions of the Act manifestly indicate that, if any action can be taken under the Act, it can only be taken in the Court of first instance before a decree for partition has been actually made. After a decree for partition has been made, after one of the co-shares in the property has remained quiescent in both the Courts below, he could not be allowed to ask the final Court of Appeal to do for him what the Court might have done if he had moved the Court when the case was under trial (*Banerji, J*) **ABDUL HAQ v MOTILAL,**  
71 I C 983 1923 A 293 (1)

—Ss 2 and 9—*Order for partition and sale—Order for sale of item set apart for the share of one of the parties*

If in suit for partition there are two parcels of land one capable of partition and the other not so capable, the court can order the sale of the latter. But an order directing the sale of one of the allotments obtained after partition is not within S 2 or S 9 of the Partition Act (*Mookerjee and Chotzner, JJ*) **JADUNATH SARKAR v HARAN CHANDRA SARKAR** 49 Cal 1043  
70 I C, 687 1923 Cal 221

—S. 4—*Option, when to be exercised—Whether it is taken away* See (1922) DIG. COL 878. **KIRODI NARAIN BASU v. MRINALINI DAS**  
69 I C 785

—S 4—*Scope of*

S 4 of the Partition Act refers to cases where a share of a dwelling house belonging to an undivided family has been transferred to a person who is not a member of such a family the principle being that property must so far as possible be left in the possession of the person, in occupation (*Pipon, J C*) **GHULAM HAIDER KHAN v SARDAR ALI KHAN.** 73 I C, 748

**PARTNERSHIP—Debt due to—Death of partner—Rights of surviving partner** See CONTRACT ACT, S 45 71 I C. 957

—*Dispute as to terms—Reference of whole case to official Referee—Order if valid Nature of—Not appealable—If can be questioned Duties of Court and Commissioner*

In a suit for dissolution of partnership on the Original side of the Madras High Court the Judge referred the whole suit to the official Referee to determine shares, take accounts and submit report. Held the order was not appealable as it was neither a decree under S 2 (2), C P C, nor a judgment within Cl 15 of the Letters Patent.

The court has no jurisdiction to refer questions as to terms of partnership shares etc., to the Referee and the order is bad. But in the course of the suit itself the order and report cannot be treated as a nullity, the remedy of the aggrieved party being by way of appeal or review.

Functions of Judge and Commissioner in partnership suits considered. (*Kumaraswamy Sastry, J.*) **ABDUL WAHAB SAHIB v. ROKIA BIHI SAHIBA**  
73 I C 908 (2).

## PARTNERSHIP.

—*Minor—Admission to benefit of the partnership—Effect—Whole transaction to be looked into*

In considering whether admission to a partnership is for the benefit of the minor, what we have to consider is, not the benefit to the minor of an isolated clause of the partnership agreement but the total benefit which would result to him. There cannot be the least doubt that the rescue of a family business from its perilous financial situation was a benefit to the minor which far outweighed any restriction which might be placed upon his activities. It is straining to call the restriction upon competitive business as personal liability to and obligation of the firm (*Pipon, J C*) **MIR AHMAD SHAH v MUSHARRIF SHAH** 72 I C 996

—*Patent rights—Minor—Guardian's act if beneficial binds minor.*

The Court, which is bound to determine and to determine finally and to dispose of questions arising in the partnership suits, cannot shirk its duty in deciding how the partners intended the patent rights to be dealt with, merely because special powers have been given to litigants to apply to another Court. The special Court under the Patent Act would be bound in deciding any matter in relation to a patent in accordance with the sections of the Patent Act, to decide the controversy with reference to what had been established by the findings of the Court in the dissolution of the partnership which would be binding upon the parties in any controversy under the Patent Act. Where the contracting party is a minor represented by a guardian, and the contract was clearly for the benefit of the minor and was made at the request of the guardian for the convenience and benefit of the minor's interest, it binds the minor (*Walsh, J*) **JWALA PRASAD v RAGHUBIR PRASAD**  
70 I C 333. 1923 A. 17

—*Suit for accounts against another firm The second firm suing for dissolution—Effect*

Where a partnership doing business with another firm which was the sole property of one of its own partner, sues for accounts and there is also a pending suit for dissolution and accounts by that partner, the former suit should be dismissed as the same relief is included in the latter action (*Shah, A C J and Crump, J*) **KRISHNA ANNAPPA v. GANPAT SAKHARAM**  
25 Bom L R 1307,

—*Suit for accounts barred—Assets realized later—Suit for share—If barred* See (1922) DIG. COI, 880 **GOPALA CHETTY v. VIJAYA RAGHAVA-CHARIAR.** 74 I C. 621

—*Suit for dissolution—Various defendants impleaded as having interest at different times—Other business—Multifariousness*

Where in a suit for dissolution of partnership, various people were impleaded as having had an interest at various stages of the business and accounts demanded of various other businesses, which were connected with it, there is no multifariousness or misjoinder (*Jwala Prasad and Doss, JJ*) **LIMAYA v. WATVE** (1923) Pat 276,

## PARTNERSHIP

———*Suit in the name of—Suit by one of the partners—Maintainability*

It is competent to one of the partners to bring a suit in the name of the partnership and it is not necessary that all the partners should have been named in the plaint as plaintiffs or should have signed the plaint (*Dhobley, A J C*) *SHIRAM SHANKERLAL v MADHO PATIL*, 1923 Nag 137 (1)

———*Suit—Interest.*

Interest is not allowed in partnership suits except on sums advanced in excess of the capital agreed to be contributed (*Scott Smith and Abdul Raoof, JJ.*) *MT. RAM PIARI v SULTAN BAKSH* 1923 Lah 115

———*Suit—Parties for the recovery of a debt due to the partnership*

As a general rule all the members of a partnership firm ought to be joined as plaintiffs in a suit in respect of a transaction with a partnership. It is not open to the surviving partners alone to sue for recovery of a debt due to the firm (*Ayling, J*) *MUTHAYYA CHETTY v SOMA-SUNDARAM CHETTY*. 1923 Mad 85 (1)

———*Suit for recovery of share in one item of assets—Maintainability*

Neither a partner nor his legal representative can bring a suit for his share in one item of debt due to the partnership, where there has been no final settlement of accounts of the partnership (*Phillips and Venkatasubba Rao, JJ*) *SUBRAMANIAN CHETTY v LAKSHMANAN CHETTY*, 18 L W 613

33 M L T 71 (H C).

### PART PERFORMANCE — Applicability of doctrine

The application of the rule of part performance is not restricted to cases where at the date of the suit a suit for specific performance is not barred by limitation. (*Phillips and Venkatasubba Rao, JJ*) *THE VIZAGAPATAM SUGAR AND DEVELOPMENT CO LTD v MUTHURAMA REDDY*, 45 M L J 826

———*Doctrine of—Applicability*

The doctrine of part performance is only applicable where specific performance could have been obtained (*Woodroffe and Cumins, JJ*) *LAKHI PRIA GUHA v NANDA KUMAR BASU* 1923 Cal 345

———*Doctrine of—Applicability—Unregistered agreement to convey—Delivery of possession—Effect of* See T P ACT, S 54 26 Bom. L R. 381

———*Doctrine of—Landlord and tenant*

The tenants surrendered their holdings to the landlords and it was found that the consideration in each case was a debt due to the landlords, that they obtained possession with the consent of the tenants, and that they had been in possession ever since. In a suit by the tenants for recovery of possession *Held* that as between the parties to those transactions, there had been such a part performance on both sides as to leave the tenants no room, in equity, for

## PATNA HIGH COURT RULES, CH. 9, R. 7

recovery of the lands (*Miller C J and Foster, J*) *RAM DHEYAN SINGH v BHULOTAN SINGH* 72 I C 705.

———*Document invalid for want of registration—Evidence alunde if can be let in.* See EVIDENCE ACT, S 95 4 Pat L T 657

———*Plea of specific performance though barred, remedy in tact—Limitation*

Limitation will only commence to run from the date when the vendee becomes aware that the vendor refused to complete the contract. When plaintiff agreed to sell certain property to defendants, who were already in possession, and defendants paid up, the purchase money, but omitted to take a registered conveyance, plaintiff is entitled to recover possession, even though the right to obtain specific performance of the agreement to sell had become time-barred (*Pratt, J*) *MAUNG SHWE HMON v MAUNG THA BYAW* 72 I C 6 1923 Rang 125

———*Promise to mortgage land—Promissee has a charge on the land for money advanced*

A person who has advanced money on the strength of a promise to mortgage land and who has actually received possession of the land as part of his security for the money advanced cannot be ousted from that possession by the person who made the promise and put him in possession of the land or by any other person claiming under him with notice of the payment, i.e. he has a charge or lien on the land so promised to be mortgaged to him (*Heald, J*) *AUNG DUN v. MAUNG TUNYA* 1 Rang. 261 1923 Rang 222

———*What constitutes* See T P ACT, S. 54. 73 I C 30

### PATENT ACT—Scope of—Partnership

Where a dispute regarding the ownership of a patent arises in a partnership suit, the provisions of the Patent Act are a guide to the determination of the dispute (*Walsh, J*) *JWALA PRASAD v RAGHUBIR PRASAD* 70 I C 333 1923 All 17

### PATENTS AND DESIGNS ACT, S 29—Validity—Novelty and prior use

In the preparation of 'Banslochan' the Respondent had been given patent in respect of the imprisonment discovered by him, viz, patent "banslochan" had been prepared for the market by another process, *Held*, that the claim is invalid for want of novelty and user *Held*, further that it was necessary to adjudicate on each claim independently and not to construe the above specification as it was one for a combination and not for subject matter which were distinctively claimed (*Lord Carson*.) *GOPI LAL v LAKHPAT RAI* L R 4 P C 155. 18 L W 141 (1923) P. C. 103.

### PATNA HIGH COURT RULES, CH. 9, R. 7—Paper book—Appeals in execution of decrees—Printing of decree.

Where the appeal is from an order of the Subordinate Judge refusing to execute a decree, it is obvious that the decree is part of the record and it is not necessary for the applicant to tender

## PATNA HIGH COURT RULES, CH 9, R. 7

the decree formally in evidence. Consequently the decree should be included in the paper book (*Das and Kulwant Sahay, JJ.*) **NRIPENDRA NATH CHATTERJEE v. JHUMAK MANDER**

4 Pat L T 512 75 I C 681 (1).

—R 45 E, Ch XI, Vol 1—*Vakalatnama*  
See (1922) DIG COL. 881. **BANAMALI DAS IN THE MATTER OF**

1 Pat. 689 4 Pat L T 235  
1 Pat L R. (Cr) 57 71 I C 209  
24 Cl L J 81.

**PATNI REGULATION (VIII of 1819)**—*Creation of patni over the head of another—Assignment of right by patnidar to Zemindar—Rights of assignee—Sale of assignee's interest—Right to object—Creation of fresh patni—Effect of*

The idea of a patni being created over another patni is absolutely foreign to the scheme of the Patni Regulation and the position resulting therefrom would be anomalous. In the Patni Regulation a patnidar has been given certain rights as against the Zemindars. The patnidar is described as talukdar of the first degree and a tenure cannot be created over a talukdar of the first degree. There can be no objection to the assignment of the right to the Zemindar to receive rent from the patnidar which he is entitled to get under the patni settlement. In such cases the assignee of the Zemindar's interest would be entitled to recover rent from the patnidar by virtue of the assignment. The whole scheme of the Patni Regulation is that the patnidar is the only person whose interest could be sold under the Regulation and not the interest of the so called sub-patnidar. Where a sale under the Regulation is held without jurisdiction even a person not affected by it could question it (*Walmsley and Ghose, JJ.*) **RAJENDRA NARAIN CHAUDHURI v. KHAN BAHADUR MOULVI ABU NASOR AHIYA**

27 C W. N 189  
37 C L J 141 50 Cal. 146  
71 I. C 327 1923 Cal 189.

—S 11—*Applicability of—Interest of occupancy raiyat—When protected*

The terms of S 11 Cl 1 are not satisfied unless at the least the right of transfer is expressly stated in the lease or other engagement to be a right to make transfers which shall not be mere encumbrances. That seems to be the natural meaning of the first paragraph of the first clause and that construction is borne out by the emphatic language of the 2nd paragraph. No transfer is to bar the indefeasible right of the Zemindar unless it is made with the condition that it shall not amount merely to an incumbrance and such condition can only be annexed where express authority for that purpose has been received from the Zemindar or superior landlord (*Richardson and Suhrawardy, JJ.*) **GOPAL CHANDRA PODDAR v. DWARIKA NATH DUTTA**

69 I. C 655

**PATNI SALE**—*Setting aside—Creditors of defaulting patnidar drawing out sale proceeds—Liability to refund*

The plaintiff who was the Zemindar, sued for the rent of a patni and, under Regulation VIII of 1819, the patni was sold for arrears of rent. It was purchased by one Peary Mohan Roy for Rs 15,000 on the 18th May 1900. The surplus sale

## PENAL CODE, S 21

proceeds were Rs 13,614-11 annas. Out of this amount the defendant Nos 1 to 9 withdrew from Court a sum of Rs 4,469-9 annas. These defendants were the creditors of the defaulting *patnidars*. Meanwhile the defaulting *patnidars* brought a suit for the setting aside of sale and the sale was set aside on the 14th August 1900. The Zemindar was then obliged to refund to the purchaser Rs 15,000, and he sued to recover the amount which the defendant Nos 1 to 9 took out of Court.

*Held*, that the plaintiff had a cause of action against the defendants Nos 1 to 9. They took out a portion of the surplus sale proceeds at a time when there was a suit pending, in which the question of the validity of the sale was involved. They therefore took out the money, subject to the result of that suit; and the sale was set aside, there was an implied obligation on their part to return the money to the Court. They did not do so and consequently the Zemindar had to re pay to the auction-purchaser Rs 15,000 the whole of which he would not have been obliged to pay, if the defendants Nos 1 to 9 had fulfilled the implied obligation which was upon them to return the surplus sale proceeds to the Court (*Rampin and Woodroffe, JJ.*) **BEHARI LAL SEAL v. MAHARAJA DHIRAJ BUOY CHAND MAHATAB**

38 C L J 137

**PATWARI'S RECORDS**—*Entries in—Evidentiary value—Errors—Burden of proof* See EVIDENCE  
L R 4 All 1414 (Rev.)

**PENAL CODE**—*Sentence—Imprisonment and fine*

When the Penal Code in any case says that in addition to Substantive imprisonment there shall also be a fine, it means in such cases punishment of fine alone cannot be awarded, but there must be a sentence of substantive imprisonment. (*Dalal, J. C.*) **MUNWA v. EMPEROR**

90 & A L R. 779.

—S 4—*Offences committed in Native States—Jurisdiction of British Courts.*

S 4 of the Indian Penal Code gives certain extra-territorial jurisdiction in respect of acts committed outside British India by certain classes of persons including the Indian subjects of His Majesty, but it does not affect the nature of the act. The act alleged must amount to an offence punishable under the Code before a British Indian Court can take cognizance of the case. There is no provision in the Indian Penal Code which constitutes it an offence to lodge a false complaint in a foreign court or to give false evidence before such court where the oath is not administered under the provision of law in force in British India, but under the law of that state in relation to proceedings before that court (*Shah and Kaji, JJ.*) **RAMBHARTHI HIRABHARTHI In re**

47 Bom 907 25 Bom L R 772.  
1924 Bom 51.

—S 21 (8)—*Public servant—Agent of the Society for Prevention of Cruelty to Animals—Madras City Police Act, S. 53*

An agent of the Society for the Prevention of Cruelty to Animals appointed a member of the City Police under Act III of 1888 is a public



## PENAL CODE, S. 21

servant within the meaning of S. 21 (8) I P. C.  
3 C. L. J. 475 Rel. (Wallace, J.) NATARAJA  
PILLAI *In re* 46 Mad 90  
69 I C 464 23 Cr L J 736  
(1923) Mad 188 (1)

—S. 21 (9)—Inspector of finger print bureau—If a public servant

An inspector in the finger print bureau being in the service and pay of Government is a public servant, even if he is not performing the ordinary duties of a police officer (Abdul Qadir, J.) KARAM CHAND *v* EMPEROR 69 I C 445  
23 Cr L J 717.

—S. 21 (10)—Public servant—Patwari of a village—Berar Land Revenue Code, S. 158

The patwari of a village entitled to collect cesses as if they were land revenue is a public servant (Batten, J. C.) LOCAL GOVERNMENT *v* MADHO PATWARI 1923 Nag 146

—Ss. 23 and 379—Trespass by cattle—Seizures—Wrongful loss—Cattle Trespass Act, S. 22

Where a cow is found trespassing on a field and doing damages to crops, it is no offence for the owner of the field to seize the cow and detain it for a period less than 24 hours with promise to release the cow on a payment of a compensation not exceeding the pound charges which would have to be paid had the cow been impounded (Batten, J. C.) RAM RATAN *v* EMPEROR 1923 Nag 64 (2)

—S. 27—Possession of servant.

Where there is nothing to show that a pistol is a sort of article that one can reasonably expect to be for sale in the shop of the accused, possession by servant of the accused of the pistol is not possession on account of master (Ryves, J.) CHHOTAY *v* EMPEROR, 90 & A L R 27  
69 I C 457 23 Cr L J 729  
1923 All 33 (2)

—Ss. 32 and 269—Burma Act, III of 1897, S. 3—Outbreak of cholera—Omission to report—Offence.

Where the licensee of a brickfield kept it in an insanitary condition as a result of which there was an outbreak of cholera and the licensee omitted to report the outbreak of cholera, held that he was not guilty of an offence under S. 269 I P. C. but under S. 43 I P. C. if the omission was illegal (Duckworth, J.) EMPEROR *v*, RANGALAL SINGH 2 Bur L J. 11 1923 Rang 140

—Ss. 34—Applicability—Common intention.

Where S. 34 I P. C. is sought to be applied, it must be shown that the criminal act for which the accused are to be made responsible was committed in furtherance of their common intention. All the persons charged must have consented to and contemplated the commission of the particular crime committed. The existence of a common intention is the sole test of joint responsibility and what the common intention is, must be proved. (Robinson, C. J. and Duckworth, J.) MAUNG GYI *v* EMPEROR 2 Bur L J. 142 1923 Rang 268

## PENAL CODE, S. 34

—S. 34—Applicability of—Evidence of distinct acts

In order to justify the application of S. 34 evidence of some distinct act by the accused, which can be regarded as part of the Criminal Act in question, must be required (Oldfield and Ramesam, JJ.) AYDROSS *v* EMPEROR 17 L W 21 72 I C 360 (1)  
24 Cr L J 360 (1) (1923) Mad 187 (2)

—Ss. 34 and 326—Assault—Accused armed with deadly weapon—Injury—Offence

All the four accused were armed with sticks to which they fixed *chhavi* blades when they began the assault in question and, no matter what part of the body any of them struck, they all joined the assault. Held that having regard to the nature of the weapons, it could not be said with regard to any of them that he did not mean to cause serious injuries. There was very little to differentiate between them, S. 34, Indian Penal Code, made them equally responsible in such cases (Abdul Qadir, J.)INDER SINGH *v* EMPEROR 72 I C. 513 24 Cr L J 401

—S. 34—Common intention—Compulsion to divorce a woman—Subsequent beating.

The accused went with the object of asking the complainant to get his son to divorce a certain woman without any intention of beating the complainant. Held they had gone for what might be described as a lawful purpose. But when the complainant refused to take any steps in the matter and a quarrel ensued, to call one of the accused and his companions to beat the complainant and the joining of the other accused in beating him constitute a common object which ought to be taken into consideration in fixing their common responsibility for the crime (Kanharya Lal, J. C.) MIAN JAN *v* EMPEROR 90 & A L R 1007 73 I C, 61  
24 Cr L J 525.

—S. 34—Intention—Several persons joining together—Common intention

Where a criminal act or series of acts is done by several persons in combination it is essential to consider first, the common intention and secondly the individual intention of each of the accused as disclosed by the circumstances.

Where S. 34 has to be applied it must be shown that the criminal act for which the accused are to be made responsible was committed in furtherance of their common intention. The words "when a criminal act is done in furtherance of the common intention of all" mean that all the persons charged must have consented to and contemplated the commission of the particular crime committed. The existence of a common intention is the sole test of joint responsibility and what the common intention is, must be proved. It is of course but rarely that there could be direct evidence of a common intention which must be judged and decided by a consideration of all the facts proved, and the circumstances surrounding the case. It is not sufficient to say that such and such an act was likely to occur, but it must be found on a consideration of all the circumstances available what the common intention was (Robinson, C. J. and Duckworth, J.) MAUNG GYI *v* EMPEROR 2 Bur L J. 142 1923 Rang 268

## PENAL CODE, S. 34.

—S. 34—*Joint acts—Offence*

If two or more persons join in the commission of an act which amounts to an offence and they have a common intention to do that act, they would all be equally liable for the consequences (*Krishnan and Wallace, JJ*) C. KUNHAMMAD, *in re*, 18 L W 715

—S. 34—*Joint attack but distinct act,*

Where two of the 3 accused refrained from using a deadly weapon and causing grievous hurt while the third killed the deceased but where they had the common intention *Held*, they must be presumed to have intended to have caused grievous hurt (*Campbell, J*) INDAR SINGH v EMPEROR 73 I C 932 24 Cr L J 708 1923 Lah 326

—Ss 34, 149 and 300—*Murder—one of several persons committing the act—Criminal act—Direction to jury—Elements of offence*

Where two persons go to a place with the common intention to rob a third person and it necessary, to kill him and one of them fires a fatal shot in furtherance of that common intention, then both of them are equally guilty of murder S 34 of the Penal Code does not create a distinct offence, it only lays down a principle of liability Under this section when a criminal act is done by several persons, each is liable as if he did it alone, provided the act is done in furtherance of the common intention of all.

Per *Richardson, J*—S. 107 of the Penal Code does not contemplate the abettor being present when the abetted criminal act or offence is committed The aid given at the time of commission referred to in Explanation, 2 means aid given at the time but at such a distance from the scene that the abettor cannot be said to be present

Where an accused is liable under S 34 of the Penal Code as an accessory at the fact and therefore as a principal, a charge simply of the offence of murder under S 302, without express reference to S. 34 is sufficient.

Per *Cuning, J*, S. 149 of the I P C, is wider in its scope than S 34. (*Mookerjee, Richardson, Ghose, Cuning, and Page, JJ*) EMPEROR v BARENDRA KUMAR GHOSE 28 C. W N. 170 38 C L J 411

—Ss 34, 149—*Rioting—Members of mob—If constructively guilty of all offences—Test.*

In cases where there is no direct evidence of the actual participation of the accused in a specific act of violence if persons proved at particular points of time to be members of a mob but not shown to have taken part in the specific act are to be found guilty of that act by force of S 34, it must be clearly found that the act was in furtherance of the common intention of the mob while the accused were in it, or if S 149 is used, it must be clearly found that that act was also in prosecution of the common object or such as the accused knew to be likely to be committed in prosecution of their common object

In such a case the court ought to consider first what was the original intention of the mob and which of the offences naturally were inherent or likely to have occurred in the prosecution of that intention, secondly at what stage of the riot the accused were present, and what was the

## PENAL CODE, S. 71

temper, the intention and common object of the mob while they were present, and thirdly, whether if they had left the mob at any stage they could nevertheless be guilty of any of the acts committed by the mob after they had left.

A court cannot presume that any and every person who is proved to have been present in a riotous mob at any time or to have joined it at any stage during its activities is in law guilty of every act committed by it from the beginning to the end or that each member of such a mob could from the beginning have anticipated and completed all that subsequently happened (*Wallace, J*) *In re* GANAPATHI SARMA, 17 L W 197

(1923) M. W N 104 73 I C 147  
24 Cr. L J. 531 1923 Mad. 369 (2).

—S. 34—*Scope of*

S. 34 of the Penal Code does not create an offence Its provisions merely lay down a rule of Law applicable to a case where a criminal act is done by several persons, of whom the accused charged thereunder was one, and not where the act is committed by other persons than the accused. (*Sanderson, C J Panton, J*) EMPEROR v PROFULLA KUMAR MAZUMDAR 50 C 41

74 I C 267 24 Cr. L J 763 1923 Cal 453.

—Ss 34, 395—*Use of deadly weapons by some—Conviction of all, if legal*

Where in the course of a commission of dacoity, some alone use deadly weapons, S. 34 applies to the case and all are liable to conviction under S. 397 (*Brasher, J*) DANGAR KHAN v EMPEROR 5 L L J 224 1923 Lah 104

—S. 44—*Injury—What is—See PENAL CODE Ss 383 AND 44* 21 A L J 150.—S 54—*Recurring lunacy*

Where the accused used to get recurring attacks of lunacy but there was no such attack for six years before the crime and he ran away, avoided and resisted arrest, and to all appearances he was perfectly sane during the investigation, in the committing Court and the Sessions Court *Held* that he was not devoid of knowledge that he was doing what was wrong and contrary to law Nevertheless since there was distinctly a possibility that, at the time, he was suffering from temporary mental derangement of some sort, the capital sentence was altered to one for transportation for life. (*Shadr Lal, C. J. and Campbell, J*) MAULU v EMPEROR 1923 Lah. 619.

—S 71—*House breaking and rape*

House breaking by night is not a necessary concomitant of the offence of rape though it may be the main and in fact the only object, the accused may have in view (*Moti Sagar, J*) LABH SINGH v EMPEROR 75 I C. 77 24 Cr L J. 877 1923 Lah 291

—S 71—*Separate offences—Abetment.*

Where the petitioner was charged with abetting two carriers who were separately charged with criminal breach of trust in respect of goods entrusted to them, separate sentence to run consequentially would be quite legal as he abetted an offence by each carrier separately (*Walmesley, and Suhrawardy, JJ.*) SHEIKH BABUJAN v EMPEROR. 1923 Cal. 403 (1).

## PENAL CODE, S 73

## —S 73—Cumulative sentences—Solitary confinement

Under S 73 I P C, solitary confinement must be a portion of the substantial sentence of imprisonment and if the substantial sentences are to be consecutive, the periods of solitary confinement cannot possibly be concurrent

Cumulative sentences of solitary confinement are contrary to the intention of S 73 I P C (*Heald, J*) EMPEROR v NGA SEIN PO

1 Rang 306 · 2 Bur L J 92 1923 Rang 197.

—S 73—Solitary confinement—If can be ordered—Conviction under criminal Tribes Act See CRIMINAL TRIBES ACT S. 22

21 A L J, 914.

## —S 75—Offence under S 369

Conviction of offence under S, 369 of the Penal Code is insufficient for enhancement (*Shadi Lal, J*) FATTU v, EMPEROR 75 I C 368

24 Cr L, J 944 1923 Lah. 286 (1)

## —S 80—Applicability

Where a person in trying to hit another who was carrying a baby in her shoulder, actually hit the baby and as a result thereof the baby died, he cannot escape under S, 80 I P C, as he was not then doing a lawful act in a lawful manner by lawful means (*Dalai, A J C*) JAGESHAR v EMPEROR. 90. & A L R 203 74 I C 583

24 Cr L, J 769

## —Ss 81, 97, 100, and 105—Drunken and disorderly conduct—Power of private citizen to arrest—Madras City Police Act S, 21

The rule of English Common Law that it is open to a private citizen to arrest any person who is reasonably apprehended to commit a breach of the peace is not applicable to India. In this country the law is to be found in the Code of Criminal Procedure and the Indian Penal Code and the Court is not entitled to invoke the Common Law of England in the matter at all 44 M 913 referred Ss. 96 and 97 of the Penal Code and Ss 102 and 105 define the limits within which a private citizen can place restraint on another citizen (*Schwabe, C J Phillips, Devadoss, Venkatasbba Rao and Wallace, JJ*) GOPAL NAIDU *In re*

46 Mad. 605 · 44 M L J 655 17 L. W 592

32 M. L T. (H C) 352 73 I C 343

24 Cr. L. J. 599 1923 Mad 523 (2) (F B)

## —S. 84—Insanity—Test of.

To come within S. 84 I P.C the burden lies on the accused to show that his unsoundness of mind was of such a nature and degree that by reason thereof he was incapable of knowing the nature of the act or of knowing that he was doing what was either wrong or contrary to law

Reference can be made to prior and subsequent conduct of the prisoner to find out the state of his mind at the time of committing the offence.

(*Dalai V. C*) BHAGWATI PRASAD v EMPEROR,

90 & A. L. R. 850 74 I C 69 24 Cr. L. J 741.

## —Ss. 84 to 86—Intoxication—Plea not taken—Sentence.

The accused who was a habitual ganja smoker murdered a boy who was an absolute stranger to him and for which there was no motive. The plea

## PENAL CODE, S 79.

of unsoundness of mind under S 84 of the Penal Code was not taken. *Held*, under the circumstances the case fell under S. 86 and the case was one in which the capital sentence should not be passed. (*Ghose and Cuming, JJ*) EMPEROR v. TINGOURI DHOPU

27 C. W N. 290 : 1925 Cal. 460.

## —S 84—Plea of insanity

The plea of insanity being of a nature of a general exception must be proved by the accused. (*Daniels, J*) CHANDU LAL v, EMPEROR

21 A. L. J. 776 L. R. 4 A 234 (Cr.).

## —S 86—Intoxication if ground for leniency

Insanity is no excuse for the commission of a crime, but may in some cases be taken into consideration when awarding punishment for a crime committed in a state of drunkenness (*Broadway, J.*) JAIMAL SINGH v EMPEROR. 1923 Lah 294.

## —S 86—Security under S, 110, Cr P C.

The fact that an accused had been bound down under S 110, Criminal Procedure Code does not render him liable to enhanced punishment. (*Broadway, J.*) JAIMAL SINGH v EMPEROR

1923 Lah 294.

## —Ss. 81, 92, and 344—Offence under—Fits of insanity—Confinement in chains

The accused was a person of education and wealth and he lived in a town where medical attendance could easily be procured. He caused his brother, who was subject to fits of insanity to be chained in an unnecessarily cruel way for over three months and would have continued to confine but for the intervention of the district Judge *Held*, that the accused was guilty of an offence under S. 344 I P C (*Ryves, J*) SAIMBUH NARAIN v EMPEROR

21 A. L. J. 391

## —S 97—Extent of right

There is no obligation upon a person entitled to exercise his right of private defence to retire merely because the assailant threatens him with violence. As regards the extent of the right, a man acting under an apprehension of death cannot be expected to judge too nicely the force of his own blow. He is not bound to moderate his defence step by step according to the attack before there is reason to believe the attack is over. He is not obliged to retreat but may pursue his adversary till he finds himself out of danger and if in a conflict between them he happens to kill, such killing is justifiable (*Mullick and Adam, JJ*) NARESH SINGH v EMPEROR

2 Pat 595.

## —S 79—Private defence—Extent of right—Maintaining possession—Safety of person.

If a man is entitled to protect his own life by using a lathi it is impossible to weigh the force of the blows which he used for that purpose as it is said in "golden scales" and to adjudicate with great nicety as to the exact amount of force which would be justified. This, of course, provided that no undue advantage is taken. There is a distinction in law between enforcing a right and maintaining a right. The accused who were tenants of the land were in peaceful possession of their

## PENAL CODE, S 99

land but that possession had for sometime been threatened by the complainant and his party. On one occasion the accused apprehended the forcible seizure of the land by the complainant's party and as they were fewer in number, they went to their field armed with lathis to protect themselves as well as their property. When the accused were ploughing their field they were suddenly attacked by the complainant's party. The accused returned the injuries with their lathis and caused injury to a large number of the complainant's party. *Held*, that the accused were entitled to use force in self defence and that they had not exceeded the right of private defence (*Ryves, J*) *HIRA v EMPEROR* 71 I C 605 24 Cr L J 189

—S. 99—Amount of force required to keep within right

Where the person injured was obstinate and had received 12 blows all causing only simple hurt, *Held* it probably required all the blows which he received to enable the accused to effect their purpose. When once the Court has found that a right of private defence exists it is very difficult to expect the accused to weigh 'with golden scales' what maximum amount of force is necessary to keep within that right (*Ryves, J*) *RADHE v EMPEROR*

73 I C 975 (2) 24 Cr L J 735 (2)  
1923 A 357 (1)

—S 99—Right of Private defence—Police constable unlawfully confining accused—Assault of constable if an offence See PENAL CODE S 323 1923 A 34

—S 99—Right of private defence of property

The right of private defence of property does not avail a man when he has had time to have recourse to civil authorities. He cannot take possession by force or shew of criminal force even against a trespasser (*Macpherson, J*) *JASURAM MARWARI v EMPEROR* 74 I C 73 24 Cr L J 745

—S 100—Extent of Right of private defence

One Mt Saidan was converted to Sikhism from Mahommedanism while she was already married to a Mahomedan. She then married one of the party of the accused. Her previous husband's relatives forcibly took her away against her will from the party of the accused. During the fight one of the party of her first husband's relatives received a fatal blow. *Held*, the accused did not exceed the right of private defence in the circumstances (*Martineau, J*) *JAGAT SINGH v EMPEROR* 1923 Lah 155 (1)

—Ss. 100 and 304—Fatal blow—Doubt as to which accused struck the blow—Offence

Where it is impossible to say which of the two appellants struck the fatal blow the offence committed by them falls under S 325, Indian Penal Code (*Broadway, J*) *WARYAM SINGH v EMPEROR*, 72 I C 611 24 Cr L J 451

—S 100—Private defence—Extent of

A man who is assaulted is not bound to moderate his defence step by step, according to the

Y. D.—66

## PENAL CODE, S 106

attack before there is reason to believe the attack over. He is entitled to secure his victory, as long as the contest is continued. Where the assault has once assumed a dangerous form, every allowance should be made for one, who, with the instinct of self preservation strong upon him, pursues his defence a little further than to a perfectly cool bystander would seem absolutely necessary. The question in such cases will not be whether there was an actually continuing danger but whether there was a reasonable apprehension of such danger.

The appellant and his companions seeing a murderous assault made upon one of them who was struck down and rendered senseless in their presence, and further more seeing that the members of the other party intended to pursue the attack against him also, had certainly a reasonable apprehension that if they did not defend themselves they would be killed or would suffer grievous hurt.

*Held*, in such circumstances they were entitled voluntarily to cause the death of their assailants and to continue to exercise their right as long as they had any reasonable apprehension of danger particularly when the assailants outnumbered them (*Scott Smith and Harrison, JJ*) *DALIP SINGH v EMPEROR* 1923 Lah 155 (2)

—S 100—Private defence—Right of—Extent of

According to S. 100, Indian Penal Code, the right of private defence of the body extends under the restrictions mentioned in S 99, to the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the exercise of the right be such an assault as may reasonably cause the apprehension that death or grievous hurt will otherwise be the consequence of such assault (*Scott Smith, J.*) *MAHOMED AKBAR v EMPEROR* 72 I C 520. 24 Cr L J. 408

—Ss 100 and 335—Private defence—Right of Scope.

Where the deceased was the aggressor, and both he and his friend not only followed prisoner but inflicted injuries upon him and the deceased felled prisoner to the ground and caught him by the throat and the latter then inflicted one wound with the knife on his assailant. *Held* the act of prisoner in taking out the knife and the stabbing his adversary was covered by the provision of S 100 (*Shadi Lal, C, J*) *CHHABIL DAS v EMPEROR* 1923 Lah 172 (1)

—S 100—Scope of

An accused person, who pleads the benefit of the provisions of the Indian Penal Code regarding the right of private defence, has to satisfy the court affirmatively, by evidence which the court can believe and act upon that he is entitled to the benefit of these provisions (*Piggott and Walsh, JJ.*) *EMPEROR v GAYAN SINGH* 1923 All 277

—Ss 106, 141 and 148—Rioting—Use of violence—Injury to property

Where it was found that a number of persons joined together and pulled down a toddy shop and also cut off a number of toddy trees, the

## PENAL CODE, S 109

accused are guilty of offences under Ss 141 and 146 even though there was no proof of violence or force having been used against any person (*Odgers, J*) MARIMUTHU NAIDU *In re*

17 L W 577 32 M L T (H C) 315  
1923 Mad 606

— — — Ss. 109 and 120 B—*Conspiracy—Picketing with a view to stop the sale of intoxicants—Threat and intimidation*

A number of national volunteers went to a small village bazaar for the purpose of picketing the sale of country liquor, etc. The shop-keepers and the agents of the Zamindar told them that no interference with the bazaar would be tolerated. The volunteers finding themselves too few in numbers retired but their leaders distinctly told the bazaarmen that they would return on the following market day. After this a large meeting of the volunteers convened by the leaders at which it was resolved to stop the sale of intoxicants, etc., at the bazar. *Held* that the agreement was an agreement to commit the offence of criminal intimidation and amounted to a criminal conspiracy, what ever might be said in defence of peaceful picketing when undertaken in the market of a large town by individuals or by small groups of earnest and enthusiastic men or women it had no application to the present case where it was proposed to flood a small village bazaar by a body of men whose mere presence there would put a stop to all business (*Mars, C J and Piggott, J*) ABDULLAH v EMPEROR L R 4 A, 145 (Cr)

— — — Ss. 109, 176 and 189—*Conviction under S 189—Alteration into a conviction under Ss 109 and 176*

The petitioners were charged with and convicted of an offence under S. 189 I P C the allegation being that they held out threats to the Chaukidar for the purpose of inducing him to refrain from reporting the death of a boy to the police. On appeal the District Magistrate *held* there was no offence under S. 189 I P C as a village Chaukidar was not an officer of Government and was therefore not a public servant within the meaning of S. 21 I P C. He found that the petitioners and the lambardars who had been convicted in a separate trial for an offence under S. 176 I P C had entered into a conspiracy in pursuance of which the latter had omitted to report the boy's death and he accordingly altered the conviction of the petitioners into convictions under Ss 176 and 109 I P C. *Held* that the offence which the petitioners were alleged to have committed under Ss 109 and 176 I P C by entering into a conspiracy with the lambardars not to report the boy's death was one of a different nature from the offence under S. 189 with which they had been charged and was a constituted by an entirely different set of facts and as the petitioners were not called upon in the trial Court to answer a charge of an offence under Ss. 109 and 176, the District Magistrate was not justified in appeal in altering the convictions under those sections. A further reason for not altering the findings was that a prosecution for an offence under Ss. 109 and 176 I P C required sanction under S. 195, Cr. P. C. which was not

## PENAL CODE, S 120.

necessary for a prosecution for an offence under S. 189 I P C (*Martineau, J*) ARJAN MAL v EMPEROR 3 Lah 440 69 I C 487  
23 Cr L J. 709. (1923) Lah 260

— — — Ss 114 and 494—*Bigamy—Unauthorised disposal of Mahomedan Minor girl in marriage—Re marriage*

A Mahomedan minor girl was married by her mother who was a widow's with the consent of one of the husband's brothers. Subsequently another brother of the widows husband brought the girl to his house and married her to his own son. *Held* that the widow as well as the person who had the subsequent marriage were guilty of bigamy. Though the mother was not the proper person to give the girl in marriage on the first occasion still the consent of the brother of the girl's deceased father and his presence at the marriage validated it (*Daniels, J*) HUB ALI v EMPEROR L R 4 A 73 (Cr.) 1923 A 329

— — — Ss 114 and 302—*Charge under Ss 34 and 302 I P C—Conviction under Ss 302 and 114*

Where an accused person is charged under Ss 114 and 302 I P C. and tried therefor he must be convicted under Ss 114 and 302 I P C (*Sanderson, J*) EMPEROR v. PROFULLA KUMAR MAZUMDAR 50 C 41 74 I C 267  
24 Cr L J 763 1923 Cal 453

— — — Ss 120 (B), 420 and 511—*Criminal conspiracy—Cheating—Overt acts—Charge of cheating—Particulars of—Presentation of fraudulent bills—Payment by one cheque—Delay in trial—Sentence—Joinder of charges—Cr P Code, S 237.*

The accused were charged with a conspiracy to cheat Government of large sums of money in the matter of the supply of some goods during the war. The charges were made under Ss 120 B and 420 I P C. *Held* though the charge was not clearly framed yet the accused were put upon sufficient notice of a charge of a conspiracy to commit an offence or offences under S. 420, I, P C. The transactions alleged were mentioned as instances of overt acts from which the conspiracy might be inferred. The mere fact that the transactions alleged were independent and occurred on different dates, is not inconsistent with a general conspiracy. A charge under S. 420 I P C should contain an allegation of the person or persons deceived and induced to issue the cheque in payment of the alleged fraudulent bills. The omission is not a fatal defect, in the charge when it did not mislead the accused and there was no failure of justice by reason of it. Though five bills were presented at different dates, they did not constitute different offences for an offence under S. 420, I P C would not be complete until the cheque was issued and as only one cheque was issued through the inducement of the five fraudulent bills, there was only one offence of cheating. *Held*, on the facts that an attempt to cheat had been established though not the completed offence of cheating. The offence of attempt to cheat was complete as soon as each of the bills was presented and an accused person could be convicted of

## PENAL CODE, S 124 (A).

attempt, though not charged therewith under S, 237 Cr P Code

The long protraction of the trial for which the accused was not wholly responsible and the strain, anxiety and mental suffering to which the accused must in consequence have been subject were taken into account in mitigation of the sentence (*Sanderson, C J and Richardson, J*)  
*BIJLINGHURST v BLACKBURN*  
 27 C W N 821 1924 Cal 18

## S 124 (A)—Seditious speech—Test.

In order to decide whether or not a speech constituted an attempt to excite hatred, contempt or dissatisfaction, it should be viewed from the standpoint of the type of persons to whom it was primarily addressed. On the one hand, their limitations, if any, have to be taken into account. On the other, the fact that the words may convey to them a literal meaning must not be lost sight of, the time and place are also factors which should be considered. The Court must not look to a single sentence or any isolated expression, but take the speech as a whole to give it full, free and generous consideration (*May Oung, J*)  
*U DAMADAYA v EMPEROR*  
 74 I C 954 24 Cr L J 842  
 1923 Rang 212

## S 141—Acquittal of some out of five—Others do not form unlawful assembly

In order to sustain a conviction under S, 141 it is necessary to find that the person accused of that offence was a member of an unlawful assembly, and that he used force or violence in prosecution of the common object of such assembly. Where two out of five accused are acquitted, the conviction of the others cannot stand (*Mohi Sagar, J*)  
*ATA MAHOMED v. EMPEROR*  
 1923 Lah 692

## S. 141—Common object—Resistance to execution of law—Overt act

Where a person is charged with contravening an order of the Superintendent of police prohibiting the collection of an assembly without a licence, overt act must be proved to show resistance under S, 141, I. P. C. Mere words when there is no intention of carrying them into effect will not be sufficient (*Mullick, Coutts and Das, JJ*)  
*EMPEROR v ABDUL HAMID*  
 1 Pat L R. 199 (Cr) 2 Pat 134 1923 P 1

## S 141 (3)—Harassing Hindus—If within section.

Where the common object with which members of an unlawful assembly were charged was that of "harassing Hindus" the charge is not too general, but falls within S 141 (3) I P Code, (*Ayling and Odgers, JJ*)  
*PARAKUSHIYIL AYAMAD*  
 18 L W 350  
 74 I. C 1044 24 Cr L J 852

## S, 141 (3)—Unlawful assembly—Obstruction of police in discharge of his duty—Offence

The immediate object of an assembly, as it reached the Police Station, was to threaten and obstruct the police in the discharge of its duty. Held that the object in itself and apart from any other clauses of section 141 of the I P C, was

## PENAL CODE, S 147

sufficient to bring the case within the purview of the 3rd clause of S 141 (*Mears, C J and Piggott J*)  
*ABDULLAH v EMPEROR*  
 L R 4 A 145 (Cr.).

## S 141 (4)—Preventing trespass—If an offence

Persons who are assembled together to resist a trespass over property in their possession, which has been expected for a long time do not constitute an unlawful assembly. Persons in such a position are not enforcing rights, but preventing wrongs. Case law reviewed (*Simpson, A J C*)  
*PARMESHAH DIN v EMPEROR*  
 1923 Oudh 167.

## Ss 143, 147 and 447—Compounding offence under S 447—Effect on other charges

The accused were charged with offences under S 143, 147 and 447 I P C. The accused and the complainant in respect of whose field the offence under S 447 I P C was alleged to have been committed compounded the charge and put into Court a petition to that effect. Held, that the compounding on the offence under S, 447 I P C did not prevent the prosecution for the offences under Ss 143 and 147 I P C. W N 948 referred to. The essence of an offence under S 143 I P C is the combination of several persons united in the object of committing an offence the purpose being an offence in itself (*Hallace, J*)  
*MATHI VENKANNA In re*  
 17 L W 451.  
 46 Mad 257 71 I C 242 24 Cr L J 114  
 1923 Mad 592

## S 146—Violence—Meaning—S, 349—Force—Meaning—Use of force against inanimate objects—Conviction under S 146 for—Legality

Where it was found that the accused had gone and beaten on the door of the complainant's house when the latter fled away to save himself from being beaten and shut himself up in a room held that the accused used violence which was sufficient under S 146, I P C to make their offence rioting.

Quære whether the action of the accused came within the definition of "force" in S 349 I P C. The word "violence" in S 146 is not restricted to force used against persons only but extends also to force against inanimate objects (*Krishnan, J*)  
*VENKATASUBBIE In re*  
 44 M L J 407 17 L W. 535.  
 32 M L T (H C) 190 72 I C 356 (1)  
 24 Cr. L. J. 356 (1) 1923 Mad 603.

## Ss 147, 323—Alteration of charge

A charge under Ss 147 and 323, I P C cannot be altered into one under S 160 without a proper charge being framed and the accused tried thereunder (*Kishnan, J*)  
*MAHANKALI SRIRAMALU v. EMPEROR* (1923) M W. N 814 18 L W 741

## S 147—Common object—Failure to prove—If another can be substituted

Where the common object as stated in the charge is not proved the court of appeal or reference cannot substitute another to sustain the conviction (*Mookerjee and Chatterjee, JJ*)  
*EMPEROR v AKBAR MOLIA*  
 38 C L J 379

## S. 147—Large number of accused—Conviction of four—Legality

## PENAL CODE, S 147

Where the court thinks that a large number of persons took part in a rioting but there was doubt as to the identity of all except four, a conviction under S. 147 is not illegal. (*Sulaiman, J*) *RAM ADHIN v EMPEROR* 21 A L J 839  
L R 4 A. 240 (Cr) 90 & A. L R 1085

—Ss. 147 and 355—Offence under — Same transaction—Separate sentence—Illegal

One K was found guilty by a panchayat, of having enticed away a married woman, and was sentenced to pay a fine or in default to have his face blackened and to ride round the village. The accused executed the sentence against K's will and he was found guilty of offences under Ss 147, 342 and 504, I, P C and a separate sentence was passed under each section. *Held*, that the offence committed by the accused was only one offence *viz.* that of carrying out the sentence of the panchayat and the several convictions were wrong (*Harrison, J*) *KARAM SINGH v. EMPEROR*

1923 Lah 91

—S 147—Possession of the accused

Where the accused were in the actual possession of the land, though some years back the land was sold at a rent sale the accused were held not to be guilty of the charge under S. 147 of being members of an unlawful assembly, their object being to enforce their right to the standing crops (*Ross, J*) *GAJADHAR SINGH v EMPEROR*

1923 P 299

—S 147—Possession—Dismantling house

Where there is a finding that first party never parried with possession of the disputed house and that the second party was not given actual possession of that house, the men of the second party who dismantle the disputed house and plough it up in the absence of the servants of the first party are guilty of an offence under S 147 I P C. 3 P L T 335 Dist (*Kulwant Sahay, J.*) *TANAK CHAUDHRY v EMPEROR*

1 Pat L R. 242 (Cr) 1923 P 361 73 I, C 158  
24 Cr L J 542

—Ss 147 and 448 — Rioting — Charge against nine accused—Criminal trespass—No case against five of the accused—Effect of

Where nine accused are charged with rioting and house trespass and five of them are found to have had no common object, the conviction of the rest for rioting is unsustainable (*Ramesam, J*) *SINNASWAMI MUDALI In re* 1923 Mad 94

—Ss 147—Rioting—Conviction—Common object—Difference in—Conviction if legal See (1922) DIG COL 886 *AMINULLA v EMPEROR*

72 I C 355-24 Cr L J 355

—S. 147—Rioting conviction for—Finding of fact essential for See (1922) DIG COL 880 *RAMASWAMI THEVAN In re*

69 I C 380 (1) 23 Cr L J 700

—Ss 147 and 325—Separate sentences for riot and hurt. See (1922) DIG COL 887 *BISHNA v EMPEROR* 73 I C 517 24 Cr L J 629

—S 147—Specific charges under Ss. 452 and 325—Separate Sentence under Ss 147 452 and 325.

## PENAL CODE, S 149.

Where the accused has been punished for the specific Acts which consuted the object and purpose of the riot. The sentence under S. 147 was cancelled. (*Harrison, J*) *RAM SINGH v, EMPEROR* 1923 Lah 160

—Ss 147 and 302—Unlawful assembly—Attack on police—Dispersion by force—Murder

A crowd, part of the common object of which was to attack the police in certain circumstances, was passing by the Police Station and the Police attempted to disperse it by force. Upon this whistles were sounded and the crowd turned round and began to throw stones at the police and after the police had shot down some of the crowd and injured a number of persons it attacked the Police Station and murdered the policemen there. *Held* that charges under section 302 and 149 of the Indian Penal Code were fully established as against any one of the accused persons who was proved to have continued an active participation in the riot after the moment when stones began to be thrown unless it could be inferred that he had separated himself from the rest before the offence of murder had been committed by one of them (*Mears, C J and Piggott, J*) *ABDULLAH v EMPEROR* L R 4 A 145 (Cr)

—S 147 — Unlawful assembly — Common object—Presumption—Assault

Even though it was not proved that the object of the accused who were more than five in number was as suggested by the prosecution namely to take forcible possession of the house, yet when it is found that they came to the place and some of them assaulted the complainant the presumption is that the assault took place in prosecution of the common object, that assault was not the original common object with which the accused came to the place it must be presumed from the circumstances that it was formed at the time the assault took place (*Kotwal, A J C*) *BIRJUBHUKAN v JANRAO* (1923) Nag 100  
69 I C 633 23 Cr. L J 745

—Ss. 148 and 322—Charge under former but conviction under latter section—Legality

A conviction under S 323 I P C while the charge was one under S 148 is not illegal (*Campbell, J*) *INDAR SINGH v EMPEROR* 73 I C 932 24 Cr L J 708 1923 Lah 326

—Ss 148 and 149—Rioting — Charge against several accused—Contents of judgment

Where there is considerable divergence between the case for the prosecution and the case for the accused in a case of rioting and there were several accused it is the duty of the Trial Court as well as the Appellate judge to examine the evidence carefully so as to show that he was fully convinced upon the consideration of the pros and cons of the case that the prosecution story was true. It is the duty of the appellate Court to go into evidence and to refer to it with reference to the individual case of each of the accused (*Jawala Prasad and Coulls, JJ*) *JIWANRAUT v EMPEROR* 4 Pat L T 502 1 Pat. L R (Cr) 55  
72 I C 519 24 Cr L J 407.

—Ss 149 and 302—Common intention not proved—Effect

## PENAL CODE, S. 149

Where it cannot be held that the common intention was to cause death, but was to cause grievous hurt or that all the members of the unlawful assembly at least knew that grievous hurt was likely to be caused the accused can only be convicted under S 325 read with S 149 (*Scott Smith and Harrison, JJ*) DADU v EMPEROR 1923 Lah 43

## S 149—Conviction by implication,

If the members of an assembly act with the common object of exceeding their right of private defence, then they are not only all generally guilty of rioting but also of the particular offence constituted by such excess of user. If one member exceeds that limit every other member shares with him the guilt of his act (*Mullik and Adams, JJ*) NARESHI SINGH v EMPEROR 2 Pat 595

## S 149 and 302—Each member guilty of the offence

Each member of an unlawful assembly is guilty of murder if that murder was committed in prosecution of the common object of the assembly (*Martineau and Moh Sagar, JJ*) ALLAH DITTA v EMPEROR 1923 Lah, 441,

## S 149—Offence under special acts if within the section

The definition of "offence" in S, 149 I P C does not cover offence under special Acts (*Oldfield and Ramesam, JJ*) AYDROSS v EMPEROR, 17 L W 21

72 I C 360 (1) 24 Cr L J 360 (1)  
1923 Mad 187 (2)

S 149—Rioting—Members of mob—If constructively guilty of all offences committed—Test, See PENAL CODE Ss 34 AND 149 17 L W 197

## Ss 149 and 34—Scope of

Where a number of accused were charged with murder, rioting, causing grievous hurt etc and the evidence showed that the death was caused by one below with a lathi, the other accused cannot be responsible unless the principles of Ss 34 and 149, I P, C are applied to their case. The sentences for grievous hurt and the fatal injury should be concurrent as they were caused in the course of the same transaction (*Zafar Ali, J*) RAHMAN v. EMPEROR 1923 Lah 322

## Ss, 149 and 302—Unlawful assembly—Offence by principal member—Constructive liability of other members—Extent of

If a member of an unlawful assembly is to be found constructively guilty of an offence under S 149 I P C, it must be the same offence of which the principal is guilty and not some other offence. If the rest of the accused or not constructively guilty of the same offence as the principal offender, they cannot be found guilty under S 149 at all (*Coutts and Das JJ*) RAM PRASAD SINGH v EMPEROR 1 Pat 753

4 Pat L T 213 71 I C 113  
24 Cr L J 65 (1923) P 50.

## PENAL CODE, S 173

## S. 160—Affray—How differs from rioting

The offence of affray is not a component part of the offence of rioting. Its essence is the disturbance to the public peace, caused by two or more persons fighting in a public place. A riot need not be in a public place, it must be by 5 or more persons and there need not be any fighting, (*Plumer and Subbanna, JJ*) GOVT. OF MYSORE v VENKATAPPA 1 Mys L J 147

## Ss 161, 116—Offer of bribe to public servant—Essentials of offence

The accused in the course of a conversation with the Municipal Commissioner of Bombay, after thanking him on behalf of his cousin for some departmental concessions shown to him by the Commissioner said "my cousin wishes to give you Rs 5,000". On his being prosecuted under Ss 116 and 161, I P C held, under the circumstances there was no offer of a bribe, or any instigation to the Commissioner to do anything forbidden by S 161

*Per Macleod, C J*—To bribe or attempt to bribe a public servant is only punishable under the I P. C as an abetment of the substantive offence of a public servant accepting or attempting to obtain an illegal gratification

Illustration (a) to S 116 is only an example of abetment of an offence under S 161. There are many other ways of instigating a public servant to commit an offence under S. 161, besides by means of a direct offer of a bribe.

The words used in conversation, did not legally amount to an offer—But they did indicate a state of mind in the cousin which could result in bribery. The distinction between an offer and an invitation for offers to be made is well recognised in the law of contracts; and there is no reason why the same distinction should not apply in criminal law

A person is said to instigate another to an act when he actively suggests or stimulates him to the act by any means or language direct or indirect, whether it takes the form of express solicitation or of hints, insinuation or encouragement

*Per Shah, J*—Where the inference suggested by what happened is equivocal and where the explanation put forward by the accused is reasonably possible, the theory of innocence cannot be said to have been sufficiently negatived by the prosecution (*Macleod, C J. and Shah, J*) EMPEROR v AMIRUDDIN SALEBHOY TYABJEE 1923 Bom. 44 (2)

## Ss 163, 116—Offering bribe to an inspector in the Finger Print Bureau

Offering bribe to an inspector in the Finger Print Bureau, in order to make him give favourable evidence in court is an offence under S 161 of the Penal Code, read with S 116 (*Abdul Qadir, J*) KARAM CHAND v EMPEROR.

69 I C 445 23 Cr L J 717,

S 173—Refusing to receive summons—Under S 144, Cr P C if an offence



## PENAL CODE, S 173

Since service of a summons can be effected by tender, a refusal to accept a summons when tendered does not amount to prevention of service. What S 173 I P C requires is some act of opposition offered to the officer serving the process. (*May Oung, J*) U THADAMAWAYA v EMPEROR, 1 Rang 49 2 Bur L J 22 74 I C 65 24 Cr L J 727 1923 Rang 146

—S 174—*Intentional meaning of*

What is made punishable by law under S 174 is an intentional disobedience to the summons of a Court. The word, 'intention' does not appear to have been defined in the I. P C, but it has been interpreted to mean non-attendance which amounts to wilful disobedience. 10 W R (Cr) 33, 22 P R 1880 foll. (*Abdul Quadir, J*) MUL SINGH v EMPEROR 72 I, C 593 24 Cr L J 433 1923 Lah 163

—S 174—*Summons case — Barrister— Summoned as a witness—Liability to appear— Representation by another counsel*

A conviction under S 174 I P C cannot be sustained unless it be shown that there was an intentional omission to appear in answer to the summons. The accused, a barrister was not served till 5 p.m. on the day previous to that fixed for the trial and he was due to appear as counsel in a case before the High Court the next morning, and there was no time to make other arrangements. He therefore instructed an advocate to appear on his behalf before the Magistrate and to apply for an adjournment of the trial. His advocate did appear and described the situation in which his client was placed and the trial was put off for a week. Held, that the accused was not guilty of an offence under S 174 I P C. It does not appear to be generally understood that an advocate is, in a sense, an officer of the Court and it is his duty no less to the Bench than to his client to be ready when the case in which he has been briefed is called. It may happen that he is required at two different places at the same time in which case it is his duty to make suitable arrangements so that he may be represented. In the case before the court it was clear that the petitioner did not intend to disobey the summonses but placed as he was he found himself unable to abandon his client's interest and therefore instructed another Barrister to represent the circumstances to the Magistrate. There had thus been no offence under S 174, I P C. (*May Oung, J*) J R DAS v EMPEROR 1 Rang 549 2 Bur L J 146

—S, 182—*False information—Burden of proof—Belief in truth of information*

On a prosecution for an offence under S 182, I P C the mere fact that the information was shown to be false does not throw the burden of proof on the accused that when he gave the information he believed it to be true. It is incumbent on the prosecution to show that the only reasonable inference was that he must have known or believed it to be false. (*Simpson A J, C*) GAYL BARRAI v EMPEROR

26 O. C 44 1923 Oudh 4.

## PENAL CODE, S 188

—S 182—Giving false information to Police—Subsequent proceedings under S 379 and 411. See (1922) DIG COL 889 INCHA RAM v EMPEROR 71 I C 216 24 Cr L J 88

—Ss 182, 193 and 211—*Offences under— Prosecution for offences in the Court of a Native State—Giving false evidence—Offence triable in British India*

There is no provision in the Indian Penal Code which constitutes it an offence to lodge a false complaint in a foreign court or to give false evidence before such court where the oath is not administered under the provisions of law in force in British India, but under the law of that state in relation to proceedings before that court. The criminal proceedings and false charges contemplated by S 211 I P C mean proceedings instituted and charges made according to the provisions of criminal law in force in British India. No offence under S 182 I P C is committed in respect of a false information given to a police officer of a Native State or under S 193 I, P C in respect of false evidence given before a court of that state. (*Shah and Kajiji, JJ*), RAMBHARTHI HIRABHARTHI In re

47 Bom 907 25 Bom, L R. 772 1924 Bom 51

—S, 182—*Village Magistrate — False information to—Sanction—Revocation*

A Village Magistrate is not subject to the authority of a Sub-magistrate as a public servant and the latter has no authority to grant sanction in respect of false information given to the former.

Quære whether a Dt Magistrate revokes an order of a Sub-magistrate granting sanction under S 182 I, P C, he does so in his executive capacity. (*Krishnan and Wallace, JJ*) PALLIKUDATHAN v BUDDU GOUNDAN 45 M L J 553 (1923) M W, N 745.

—S 186—*Public servant—Obstruction to—Assault on persons helping public servant*

The Naib Tahsildar of Income Tax visited the village of the petitioners where he was told by the Lambardars that the petitioners kept several shops and ought to be assessed. A dispute then took place between the Lambardars on the one side and the petitioners on the other and it is alleged that the Lambardars were in the course of the quarrel, assaulted and beaten.

The Magistrate did not find that the petitioners either assaulted the Naib Tahsildar or made any gestures. Held, that the mere fact that the Lambardars who were assaulted, declined to render any help to the Naib Tahsildar in his investigation cannot be viewed as an obstruction caused by the petitioners. (*Shadi Lal, C J*) MATU RAM v EMPEROR 73 I C 838

24 Cr L J 594.

—S 188—*Scope of*

The question whether the order disobeyed is a legal order is an entirely distinct question from whether an offence has been committed in disobeying it. If the order is legal, the court has only to see whether the accused disobeyed it and if so, such disobedience caused or tendered to cause the effects specified in the second and third

## PENAL CODE, S 193

paragraphs of the section (*Daniels, J*) BHURE  
MAL v EMPEROR 45 A 526 73 I C 801  
24 Cr L J 689 1923 A 606

—S. 193—*Contradictory statement—Sanction for*

Where contradictory statements are made before the same person, sanction to prosecute under S 193 I P C should be granted (*Zafar Ali, J*) EMPEROR v WARYAM SINGH  
5 Lah L J 407

—S 193—*Deposition of witness—Omission to interpret—C. P. Code, O 18, Rr 5 and 6—Non-compliance with—Perjury—Evidence Act, S, 91*

A person can be charged and convicted for perjury even though his prior deposition has not been taken down in strict compliance with O 18 Rr 5 and 6 C P Code.

The provisions of O 18, Rr, 5 and 6, C P C are directory and non compliance with them does not render the deposition inadmissible at a subsequent trial of the deponent for perjury. If the deposition has not been read over to the witness in the presence of the presiding Judge it does not prove itself under S 80 of the Evidence Act but may be proved in some other way. The judge who recorded it can prove it or the accused can admit it 45 C 825 foll (*Prideaux, J C.*) MIRABUX v EMPEROR 1923 Nag 39

—S 193—*Evidence—Nature of*

No man can be convicted of giving false evidence except on proof of facts which if accepted as true, show not merely it is incredible, but that it is impossible that the statements, of the accused made an oath can be true (*Mac Coll, J*) GUPTA v EMPEROR 1 Rang 290 1924 Rang 17

—S 193—*Perjury—False affidavit—Filing of*

The intention to commit perjury must be clearly present before a person charged with the offence can properly be convicted of it and a statement capable of being construed in any reasonable way that does not show a clear intention of committing perjury or a deliberate attempt to make a false statement does not *per se* contain the elements of the offence and where a prosecution for perjury is sought to be based on an affidavit filed in Court the Court should take a broad view of the facts and where the language may convey a meaning indicative of falsity as well as one which may amount to an inaccurate description of events which have happened, a prosecution for perjury is unsustainable (*Bucknill, J*) RAMGOBIND RAM v EMPEROR  
1 Pat L R (Cr) 17 72 I C 887  
24 Cr L J 471

—S 193—*Perjury—Proof of—False statement—Contradiction between two depositions*

To convict a person of perjury it must be shown that the statements made by the accused are on their face deliberately false or that they are so from extrinsic circumstances. Statements which only attract suspicion or which are made recklessly should not form the basis of conviction, (*Bucknill, J*) LALMONI NONIA v EMPEROR  
4 Pat. L T 683 1 Pat L R 142 (Cr.)  
72 I C 161, 24 Cr. L J 321

## PENAL CODE, S. 211

—S. 199—*Affidavit—Assertion not based on knowledge—Sanction*

Assertions made by a deponent to an affidavit, not from his personal knowledge, but from what he had been told and which had not been provided to be incorrect cannot be made the subject of a sanction for perjury.

A District Judge cannot sanction a trial for perjury in respect of an affidavit sworn before him as District Registrar as S 195 Cr P Code has no application (*Stuart, J*) DINA NATH v NEK RAM 21 A L J 88 L R 4 A 6 (Cr)  
74 I C 75 24 Cr L J 747  
1923 A 175 (1)

—S 199—*Perjury—Particulars of charge*

The accused is entitled to know the exact words which are alleged to have been used by him and which are sought to be made the subject of a charge of perjury. An inaccurate expression in an affidavit supporting an application for transfer of a case to another Court does not warrant a prosecution for perjury 14 A L J 851, 15 A L J 517, 18 A L J 381 referred to (*Ryves, J.*) ABDUL WAHID KHAN v ABDULLAH KHAN  
21 A L J 211 L R 4 A 69 (Cr) ·  
71 I C 661 24 Cr L J 197 1923 A 325

—Ss 204 and 477—*Valuable security—Destruction of—Offence*

The accused were alleged to have committed an offence under S 477, Indian Penal Code, by wilfully and dishonestly destroying two documents one said to be a written contract, by which the complainant's firm sold to the accused or to his firm certain quantity of shellac and another spoken of sometimes as a tender and sometimes as a delivery order bearing endorsement in favour of the complainant's firm made by a certain person.

Held, that even though the documents were found not to be valuable security within the meaning of S 477 of the Indian Penal Code S. 204 and other sections of the Penal Code might be applicable to the case (*Teunon and Ghose, JJ*) DEBENDRA NATH UPADHAYA v BHAGIRATHI MAHTO 38 C. L J 158

—S 211—*Complainant evidence not fully taken—Prosecution*

Where a criminal case is compromised before the full evidence of the complainant is given, it is not proper to direct a prosecution under S 211, I. P. C (*Macpherson, J*) BANSIDHAR MARWARI v. EMPEROR.  
74 I C 1054 (2)  
24 Cr. L J 862 (2).

—S 211—*False charge—Charge to whom to be made—Complaint*

To fall under S 211, I P. C. the false charge must be made to some person in authority (i.e.) to a person who is in a position to get the offender punished. The charge must be embodied either in a complaint to a Magistrate or in a report of a cognizable offence to a police officer. 6 C 520, 30 C 415, 26 B 150, 32 M 8 Ref (*Simpson A, J C*) GAYA BARHAI v EMPEROR  
26 O C 44 1928 Oudh 4

—S. 211—*Offence under.*

Unless there is an intention to set the law in motion against anybody, no offence under

## PENAL CODE, S 215

S 211 I. P. C. is committed (Kotwal, A C)  
 RAMRAO v. EMPEROR, 6 N. L. J 202  
 75 I. C 158 24 Cr. L. J 910 1923 Nag 313

—Ss 215 and 420—Offences under—S 215,  
 I P C also falling under S 420, I P C—Penalty

Where a cattle dealer takes a ransom for the restoration of stolen cattle and fails to restore that property to the owner in spite of the promise he is guilty of an offence under S 420, I P C and not of the minor offence under S 215 I P C

Per *Robinson C J*.—The general rule which should guide the courts is to convict and punish for the most serious offence that is established provided of course that the accused has been charged with and has had an opportunity of meeting the charge of that offence (*Robinson, C J. and McGregor, J*) *NGA SHAN v EMPEROR*  
 73 I C 145 24 Cr L J 529 1923 R 37

—Ss 215 and 511—Stolen property—  
 Promise of recovery in lieu of payment of money—  
 Theft not detected

Where some time after the commission of a theft the accused proposed to find out the stolen articles on their being paid some money but took no steps after receiving the money to find out the thieves they are guilty of an attempt to commit an offence under S 215 I P C 20 A 389 not foll (*Rafiq and Stuart, JJ*) *HARGIAN v EMPEROR*  
 L R 4 A 1 (Cr) 45 A 159  
 1923 A 83

—S 216—"Harbour" meaning of—When the offence is complete

The word "harbour" does not only mean to provide shelter, food and clothing but includes "the assisting of a person in any way to evade apprehension" There is no time limit for the duration of this offence which is complete as soon as it is committed It is immaterial whether the evasion lasts six hours or six years (*Scott Smith and Harrison, JJ*) *EMPEROR v SARWAN SINGH*  
 5 Lah. L J 329  
 73 I C 691 24 Cr L J. 659 1923 Lah 223

—S. 216 B.—"Harbouring"—What constitutes—Giving of a warning if an offence

S 216 (B) lays down that the word "harbour" includes the assisting a person in any way to evade apprehension The idea that it, nevertheless, does not include giving false information to the Police with a view to assisting an outlaw to escape appears little short of a negation of the law, and one might almost say that such a view constitutes a direct encouragement to defeat the forces of law and order in dealing with what can only be described as a menace to the public A warning given to a proclaimed offender of the approach of the police is an offence under S 216 B. I. P. C. (*Pipon, J C*) *AKBAR ALI v. EMPEROR*  
 72 I C 949 24 Cr L J 485

—Ss 225, 186 B and 352—Warrant of arrest—Rescue of person arrested and tearing up warrant—Improper warrant—Effect of issue

Where a woman had been arrested in pursuance of a warrant but the accused rescued her and tore up the warrant and it was found that the warrant had not been properly issued Held that the accused was guilty of an offence under S. 352

## PENAL CODE, S 247

I P C but not under S 225—B, I P C. (*Stuart, J*) *GOKUL v EMPEROR*  
 45 A 142  
 71 I C 503 (2) 24 Cr L J 151 (2)  
 1923 A 87.

—Ss 225 B and 172—Absconding not sufficient to justify conviction

In order to justify a conviction of a person under S 225 B, for the offence of intentionally offering resistance or illegal obstruction to the lawful apprehension of himself, something more than mere absconding is required there must be an overt act of resistance or obstruction, some active opposition by show of force (*May Oung, J*) *EMPEROR v ANNAWADIN*  
 1 Rang 218 2 Bur. L J 246 74 I C 960  
 24 Cr L. J 848 1923 Rang 231

—S 225 B—Release of arrested person—Surrender—Offence

Where the accused who was arrested by a process server was released by a number of his friends but he subsequently surrendered the next morning Held, that the accused having gone away when rescued by his friends was guilty of escaping from lawful custody (*Maung Kim, J*) *ATTIYA v EMPEROR*  
 2 Bur L J 19  
 72 I C 67 24 Cr L J 307  
 1923 Rang 133.

—S 228—Scope of

This chief ingredient in the offence contemplated by S 228 is the intention of the offender Where his behaviour may have been objectionable but it could not be said that the prisoner pushed or detained the witness with the intention of insulting or causing any interruption to the Magistrate when he only told him not to go, as he had to cross-examine him, Held no offence was committed (*Abdul Raoof, J*) *POHU RAM v EMPEROR*  
 1923 Lah 88

—S 228—Threat by accused to witness—If an offence,

An accused person who during the hearing of a case, makes an impertinent threat to a witness in the box, clearly commits an offence under S 228 I. P. C. (*Stuart, J*) *ALLU v EMPEROR*  
 45 A 272 21 A L. J 72 L R 4 A 8 (Cr) ·  
 74 I C 260 24 Cr L J 756  
 1923 A 193 (2)

—Ss 232 and 235—Counterfeiting coin—Possession of implements for counterfeiting—Conviction of both offences—Separate sentences—Legality of

Where the accused was convicted of and sentenced for an offence under S 232, I P C, that is to say, for counterfeiting coin on a second count for having in his possession implements and materials for the purpose of using the same for counterfeiting King's coin under S. 235, I. P. C held that the possession of such implements and materials being part and parcel of the transaction of counterfeiting coin the sentence for the second offence was illegal (*Abdul Raoof, J*) *BISHAN DAS v EMPEROR*,  
 5 Lah L J 272  
 71 I C 700 24 Cr. L. J. 236

—S. 247—Acquittal—Second trial for same offence on same facts—If lies See CR P CODE, S. 403  
 1923 All 360

## PENAL CODE, 268

—S 268—*Necessity to prove annoyance*

In order to establish a charge of committing nuisance in a public place to the annoyance of the public, it must be proved that somebody was annoyed. Such annoyance can be presumed when a person concerned in preventing such matters complains about it. (*Wallsh, J*) **LALLU RAM v EMPEROR** 21 A L J 772 L R 4 A 218 (C1)

—S 272—*Noxious as food—Mixing ghee and pig's fat—If offence*

The expression "noxious as food" means unwholesome as food or injurious to health and not repugnant to one's feelings. Mixing ghee and pig's fat with intent to sell it is not an offence under S 272 I P C. (*Sulaiman, J*) **RAM DAYAL v EMPEROR** 21 A L J 875 90 & A L R 982

—Ss 289 and 323—*Dog bite—Hunt caused by—Offence*

Where owing to the negligence of the accused his dog bit the complainant in his arm causing three incised wounds the accused was guilty under S 289, I P C. (*May Oung, J*) **MG SHWE ZIN v MG PO NGWE** 2 Bur L J 8 (1) 1928 Rang 147

—S 294—*Offence—Trial by village headman—Conviction—Bar*

The Burma Village Act has conferred on the village headman the power to try, as a Court of offences under S 294 I P C and other offences. Where the accused had therefore been once tried by a Court of competent jurisdiction for an offence and had been convicted of such offence, that conviction remains in force and he is not therefore liable to be tried again for the same offence. (*May Oung, J*) **NGA E v EMPEROR** 1 Rang 449 2 Bur L J 149 1924 Rang 23

—S 294—*Sentence*

A sentence of three months' rigorous imprisonment for an offence under S 294 I P C is unduly severe. (*Heald, J.*) **PARLIAM v EMPEROR** 2 Bur L J 98 1923 Rang 253

—S. 294 A—*Offence under keeping a lottery—What constitutes*

Where it is shown that the accused kept an office where they carried on the necessary preliminary work for running a lottery and received the lottery moneys and which they held out to the public as the place where the lottery would be drawn, they are guilty of an offence under S 294—A I P C even though the lottery was not actually drawn. (*Krishnan, J*) **RAMASWAMI MUDALIAR In re**, 44 M L J 595 32 M L T (H C) 340 1923 Mad 187 (1) 69 I C 272 (1) 23 Cr L J 688 (1)

—S 297—*Having sexual connection in a mosque—Offence*

Persons who have sexual connection in a mosque commits an offence under S 297, I P C. (*Ryves, J*) **MAQSUD HUSAIN v EMPEROR** 45 A 52 21 A L J 455 L R 4 A 79 (Cr) 73 I C 935 24 Cr L J 911

—S. 297—*Local inspection—Magistrate's opinion opinion, not evidence*

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## PENAL CODE, 298

In a case under S. 297, the Magistrate went to the alleged burial ground, accompanied by pleaders representing both parties and proceeded to have the ground removed at various spots which were pointed out to him.

He unearthed, two small bones which he thought were human collar bones, and also found some matting and some pieces of bamboo. On this inspection he came to the conclusion that the place was a burial ground and convicted the accused.

Held that this proceeding was entirely irregular. If he had desired to have very sure evidence adduced as to whether this land was a grave-yard it is possible that an investigation of the character which he himself conducted personally as to the results of which he himself in effect gave evidence, might have with due reverence been carried out by properly qualified official persons and their evidence in Court afterwards might have been of great assistance and value to him. Judicial officers cannot and are not legally permitted to find out for themselves the facts of a case they have to decide. (*Bucknill, J.*) **JAILAL JHA v EMPEROR** 1 Pat L R 256 (Cr) 1923 P 537

—Ss 297, 441 and 504—*Offences under—Trespass—Mosque—Entry for worship—Unlawful conduct—Finding and conviction under S 297 altered into one under S 504 I P C*

The petitioner was convicted by the Court below on a charge under S 297, I P C in that he "with the intention of wounding the feelings of the moulvi and the congregation committed trespass in a place of worship". The evidence established that he had gone to the mosque for midday prayer as usual, when the service was over, he was asked by some others why he had, on former occasions, abused the moulvi and the congregation, on his attempting a denial, witnesses were sent for, and an altercation followed, the petitioner then began to abuse all and sundry, employing obscene epithets and uttering threats. Held on these facts that the accused was guilty of a cognate offence under S 504, I P C and that the conviction should be altered accordingly.

The word "trespass" in S 297, I P C does not have the same meaning as is attached to "criminal trespass" in S 441 I P C. The term appears to mean any violent or injurious act committed in such place and with such knowledge as is specified in S 297 40 C 548, R Ref. The mere uttering of abuse and threats does not amount to the commission of a trespass within S 297, I P C. (*May Oung, J*) **MUSTAN v EMPEROR** 1 Rang 690

—S. 297—*Trespass—Entry on property*

In S 297 I P C the word "trespass" means any injury or offence done and it should not be coupled with entry upon property 18 A 395 followed. (*Ryves, J*) **MAQSUD HUSAIN v EMPEROR**, 45 A 529 21 A L J 455 L R 4 A 79 (Cr) 73 I C 935 24 Cr L J 911 1924 A 9.

—Ss 299, 300—*Reckless administration of dhatura—Death—Offence committed*

## PENAL CODE, S. 300.

Where death ensues as the result of a reckless administration of *dhatura*, the offence is one of murder and not anything smaller (*Walsh and Ryves, JJ.*) *EMPEROR v NANHU*. 45 All 557 1923 A 608

## —Ss 300 and 299—Culpable homicide when murder

Culpable homicide is not murder unless the act by which the death is caused is done with the intention stated, in one or more of the four clauses to be interpreted in the light of the four illustrations appended to it one for each clause. If the question is whether the injuries caused in a case are sufficient in the ordinary course of nature to cause death, the court has to take it into consideration the nature of the weapon used and the injuries caused. If it was so light that even if used with sufficient violence no lethal blow could be inflicted with it, it would follow that it was used to give a thrashing and not to inflict fatal or dangerous injuries. If the number of blows given were not less than fifty, but now blow was inflicted on any vital part with sufficient violence to cause serious damage such as fracture of the skull it cannot be said that the injuries which the appellant intended to inflict were sufficient in the ordinary course of nature to cause death. All that can be inferred from his act of prolonged beating is that he knew that the injuries that he was inflicting might cause death (*Scott Smith, and Zafar Ali, JJ.*) *DARAZ v, EMPEROR* 75 I. C 689 1923 Lah 317

## —Ss 300 and 304—Death—Grave and sudden provocation—Deceased taking liberties with sister of accused

The accused saw the deceased in his house at midnight taking liberties with his sister where upon he beat him to death. *Held* that the accused had grave and sudden provocation and that he was guilty of culpable homicide not amounting to murder, (*Shadi Lal C. J. and Campbell, J.*) *MAHOMED YAR v EMPEROR*, 5 L. L. J 40 1924 Lah. 62.

## —S 300—Dhatura poisoning.

The accused made friends with three young men who were returning to service, and got into conversation with them, and in the evening they proposed to cook *dal* and *roti* for them and did so. Shortly after partaking of this food all three became more or less insensible, one died eventually. The others were taken to hospital and ultimately recovered after treatment. The cause of death was *dhatura* poisoning. The property which these persons had, had been removed by the accused which was subsequently recovered from their possession. *Held* the accused were guilty under section 302 and not section 304. (*Walsh and Ryves, JJ.*) *NANHU v EMPEROR* 45 A 557 75 I C 361 24 Cr L J 937 1923 A 608

## —S. 300—Grave provocation

It appeared from the evidence of some of the witnesses for the prosecution that the accused was enraged when the deceased abused him, but considering that after attacking the victim with a fork the offender fetched a *Shikari* in order to strike the deceased again it is not possible to

## PENAL CODE, S. 300

hold that the provocation that he received can be regarded as sudden within the meaning of the first exception to S 300 Indian Penal Code nor that the abuse uttered by the deceased can be received as a grave provocation in order to reduce the offence to one of culpable homicide (*Shadi Lal, C. J. and Zafar Ali, J.*) *PARTABA v. EMPEROR* 1923 Lah 408

## —Ss 300 302 and 304—Grave and sudden provocation—Death of wife caused by her husband

The accused's wife was in the habit of going away from her husband's house though she was not ill-treated there. One day the accused heard that this wife was again running away and followed her to a grove. He happened to carry a chopper at the time but not with the intention of hitting his wife, he having been working in his field with the chopper. He tried to persuade his wife to accompany him back home but she refused and gave him foul abuse whereupon the accused struck her with the chopper and caused her death. *Held*, having regard to the unfortunate habit of the woman of running away from home, the foul abuse given by her to her husband who tried to take her back home, and having regard to the circumstances of an Indian household where the wife is expected to obey and respect her husband, there was grave and sudden provocation. The conviction of the accused was altered into one under S 304 I P C and the accused was sentenced to eight years rigorous imprisonment (*Dalai, A. J. C.*) *MAHADEO v EMPEROR* 90 L. J 597 90 & A. L. R 60 74 I C 712 24 Cr L J 808 1923 Oudh 112.

## —S 300—Grave and sudden provocation—wife's intrigue with stranger—Husband asking her to desist—Refusal

The accused's wife was carrying an intrigue with another and in spite of the advice of a Panchayat refused to mend her ways. On the day of the offence, the husband advised her to give up her bad ways, to which she asked him to go his own way, whereupon he killed her. *Held*, there was grave and sudden provocation within the meaning of the section (*Dalai, J. C.*) *GURID v EMPEROR* 90. & A. L. R 556.

## —S 300—Intention—Motive for the crime

Where the accused had engaged the deceased to carry on negotiations for the divorce of a woman whom accused had abducted from her husband but the deceased had failed to settle the matter to the satisfaction of the accused and the deceased gave evidence against accused in an enquiry under S 202, Criminal Procedure Code. *Held* there was sufficient motive for the crime. (*Shadi Lal, C. J. and Campbell, J.*) *MAULU v EMPEROR* 1923 Lah. 619.

## —Ss 300 and 302—Murder—Grave and sudden provocation—Wife guilty of adultery

Where a person finds his wife in *flagrante delicto* with another man he is deprived of the power of self control by grave and sudden provocation and if he kills wife acting under that impulse he comes within S 300, I. P. C. Exception I. (*Pipon, J. C.*) *SHARIF v. EMPEROR*, 71 I. C. 998: 24 Cr L J. 373.

## PENAL CODE, S 300

—Ss 300 and 326—*Murder—Intention to cause death or bodily injury sufficient to cause death—Knowledge—Presumption*

In the absence of any evidence to indicate that a blow on a more vital part it must be held that the offender inflicted the blow where he intended. The fourth para of S, 300, I P C, can never be invoked in a case where there was intention of causing specific bodily injury to a particular person. *Illn (d)* shows that it only applies to a case of dangerous action without an intention to cause specific bodily injury to a person. Wounds which actually cause death must be held to be grievous hurt within S 326, I P C 42 A 302 dist (*Ashworth, J C and Simpson, A J. C*)  
 RAM ASRE v EMPEROR 26 O C 18  
 73 I C 49 24 Cr L J 513 1923 Oudh 97

—S 300 Exception I—*Absence of premeditation—Effect*

On the occasion of the marriage ceremonies of a man the deceased came and took away the bride and when he remonstrated was soundly abused. He took a pen knife and inflicted a wound which however resulted in death. Held exception 1 to S 300 I.P.C applied, also he must be deemed to have acted without pre-meditation and as he caused only one wound, cannot be deemed to have intended to cause death (*Scott Smith and Moti Sagar, JJ*) ALLAH DIN v EMPEROR,  
 73 I C 695 24 Cr. L J. 663

—S. 302—*Absence of premeditation—No intention to kill—Sex of accused—If reasons for passing lesser sentence*

Mere absence of premeditation or deliberate intention to kill is no reason for not passing the sentence of death. Nor is the fact that only one blow was struck a ground. So also the fact the accused is a woman is not a conclusive reason for not passing the sentence of death (*Young, O C J. and May Oung, J.*) MI SHWE YI v EMPEROR  
 2 Bur L J 277

—S 302—*Appellant going with a weapon on the day of murder.*

The mere fact that the appellant left the house with a *toka* in his hand after the deceased had left it on the night of the murder is not a very material point. Many *zamindars* carry *tokas* which are used for their ordinary work as agriculturists and there is nothing significant in the fact that the appellant had a *toka* in his hand when he left the house. (*Scott Smith and Fforde, JJ*) BARHATI v EMPEROR  
 1923 Lah. 539

—S. 302—*Benefit of doubt*

Where the prosecution theory in a murder case was presumably built on the opinion first expressed by an expert witness (civil surgeon) whom the accused had no proper opportunity to cross-examine but who subsequently modified his opinion, the benefit of doubt was given to the accused (*Scott-Smith and Campbell, JJ.*) JAMMAN RAM v. EMPEROR  
 1923 Lah. 189

—Ss 302, 304, 320, and 323—*Causing death of wife—Kicking—Murder—Hurt*

The deceased, a young woman, was on bad terms with her husband, the accused and had on

## PENAL CODE, S 302

several occasions returned to her parent's house complaining of his ill-treatment. The accused had a quarrel with her and gave her a slap on the cheek which knocked her down. The accused thereupon gave her some kicks which instantaneously caused her death. Held that the accused must have kicked her with tremendous force to produce such an effect and that a man who so kicks a prostrate woman on the side must be credited with the knowledge that he is likely thereby to cause her death even if he be exonerated from the more definite intention or knowledge required by S. 302 I P C (*Ayling and Odgers, JJ*)  
 MARIMUTHU IN RE 18 L W 188  
 (1923) M W N. 796 73 I C 961  
 24 Cr L J 721 1924 Mad 41

—S 302—*Common intention—Attack with deadly weapon*

Where a number of persons armed with deadly weapons set upon a man and kill him, their common intention can be presumed to be to cause death or such bodily injury as would make them guilty of murder (*Scott-Smith and Harrison, JJ.*) BHAG SINGH v EMPEROR  
 69 I. C 449 23 Cr L. J. 721.

—S. 302—*Confession*

Where the body though decomposed was identified by the help of clothes, height and age of the deceased and the accused made confession before witnesses and the Tahsildar before whom she was produced for remand and who though had not recorded the confession under S 164 Cr. P C deposed to it, held, that the appellant was guilty of the offence under S 302, that there was no reason to doubt the testimony of the disinterested witnesses and the unanimous verdict of the assessors (*Broadway and Martineau, JJ*) MT IHSANAN v EMPEROR.  
 1923 Lah 40

—Ss. 302 and 304—*Death due to septic poisoning—Long interval after injuries were inflicted*

The deceased died of septic poisoning in respect of wounds inflicted by the accused some two months previously. The wounds were not inflicted on any vital part. Held the case was one on the border line and though the accused must be held to have intended to cause bodily injury which was likely to cause death, the degree of probability was not high enough to justify a conviction under S 302 I P C but it was an offence under the first part of S. 304 (*May Oung and Beasley, JJ.*)  
 NGA PO CHET v EMPEROR  
 2 Bur. L J. 239.

—S. 302—*Doubt as to the guilt of appellant.*

Where it was doubtful whether appellant poisoned her husband and from the circumstances it was equally possible that some body else had done the foul deed, the benefit of doubt was given to the accused. The mere recovery of utensils with particles of arsenic adhering do not necessarily fix the guilt upon appellant in the absence of clear proof (*Scott Smith and Fforde, JJ.*) MT DAULAT RAI v. EMPEROR,  
 1923 Lah. 537.

## PENAL CODE, S 302

—S 302—*Identification not clear—Benefit of doubt*

Where the body of a dead person is not clearly identified to be that of the particular deceased, a conviction cannot be based on the remaining evidence (*Broadway and Lumsdon, JJ*) JAGTU v EMPEROR, 5 Lah L J 417.

—S 302—*Information of eye witness—Want of*

When a person sees a murder committed and gives no information thereof, his evidence is little better than that of an accomplice (*Scott Smith and Moti Sagar, JJ*) NAWAB v EMPEROR 5 Lah L J 322 1923 Lah 391

—S 302—*Insufficient evidence*

When the Civil Surgeon and the sub-assistant Surgeon were unable to say what poison was actually administered and there was no evidence on the record to show what poison had been administered *Held* the evidence on the record was quite insufficient to establish the charge (*Scott Smith and Zafar Ali, JJ*) MT GURDEVI v EMPEROR 1923 Lah 325

—S 302—*Intent to cause death*

Where two persons armed with dangerous weapons attacked the deceased on the head, they must be deemed to have intended to cause death (*Shadi Lal, C, J and Le Rossignol, J*) WARYAN SINGH v EMPEROR 75 I C 359 24 Cr L J 935 1923 Lah 598

—S 302—*Knowledge of certain effect*

A man who aims a blow at the head of another with a deadly weapon, while that other is held in position so that no mistake could possibly occur, must necessarily know that his act is so imminently dangerous that it must in all probability cause death. (*Scott-Smith and Harrison, JJ*) BANTU v EMPEROR 69 I C 439 23 Cr L J 711 1923 Lah 68.

—S. 302—*Knowledge of where body is buried.*

Even if it be held satisfactorily proved that accused did give the information which led to the recovery of the dead body, that fact alone would not be sufficient to connect him with the murder, because a person may very well know where the body of a murdered man has been buried without himself having joined in committing the murder (*Scott-Smith and Zafar Ali, JJ*) GULAB v. EMPEROR 75 I C 693 1923 Lah 315.

—S 302—Murder—Absence of motive—Evidence of being habitual ganja smoker—Plea of unsoundness of mind not raised—Sentence See PENAL CODE Ss 84 ETC 27 C W N 290

## —S 302—Murder—Attack with lathis—Concerted attack—Intention to kill

Where a number of men armed with lathis make a concerted attack upon another man and practically kill him on the spot inflicting injuries to the head the result of blows which must have been struck either with the intention to kill or at any rate with the intention to cause hurt such of the strikers must have known to be imminently likely

## PENAL CODE, S. 302

to result in the death of the person struck in the case at least of the ringleaders the penalty prescribed by the law as the proper penalty in cases of murder will be inflicted (*Mears, C J and Piggoit, J*) SIPAHI SINGH v EMPEROR

45 A 130 71 I C 234  
24 Cr L J 106 1923 A 88 (2)

## —S 302—Murder—Beating a sickly and invalid wife—Throwing body into a well—Offence

The accused had a young wife of 14 years. She was an epileptic. She was physically weak, mentally deficient and excitable, certain to meet a premature death, and in a condition of mind and body which rendered her unable to sustain a severe shock.

For some cause which was not clearly stated, except that it appeared to have been due to her defective health, she irritated him into a savage beating which inflicted upon her frail body injuries which in the ordinary course of events would not cause death to a healthy person, but had caused her death. The accused instead of going to his friends or her friends or anybody in authority to explain this accident which he had brought about, if it was an accident—though in the opinion of the court he must be taken within the meaning of the Code to have known quite well that what he was doing was likely to cause her death—he surreptitiously by night carried what he thought was her dead body and threw it down a well leaving it there presumably in the hope of covering up the traces of enquiry. *Held*, that one common intention of inflicting such injuries upon her as he must have known to likely cause her death was present throughout the case from the beginning to the end (*Walsh and Ryves, JJ*) EMPEROR v KHUBI L R 4 A 131 (Cr) 1923 A 545.

## —S 302—Murder—Deceased beaten by accused with lathis—Death caused by injury—Offence—Question as to who struck 1st blow or fatal blow, if material.

Where the accused joined in beating the deceased when he was on the ground with lathis and inflicted such serious injury to him that he died two days afterwards.

*Held*, that the accused must be deemed to have known that they were causing injury likely to cause death and death having resulted they were all guilty of murder.

That it was immaterial who struck the 1st blow or whose lathi inflicted the fatal injury 29 A 282 not toll 35 A 506, 35 A 560, 20 A L J 900 foll (*Ryves and Daniels, JJ*) UMED v EMPEROR.

45 A. 727 21 A L J 623 L R 4 A 205 (Cr)  
74 I C. 858 24 Cr L J 826

## —S 302—Murder—Exceptions to the section—Intention and motive—Absence of—Sentence

A man who cuts another, even on the leg with such a ferocity and with such a weapon as to cause such an injury as that which the deceased received must be presumed to intend to cause injury sufficient in the ordinary course of nature to cause death, and if death results, is guilty of murder unless the case is shown to fall within

## PENAL CODE, S. 302

the exceptions provided in the Code Under the circumstances the Court passed the minor sentence of transportation for life (*Heald and May Oung, JJ*) KRA CHAN *v* EMPEROR  
2 Bur L J 103 1923 Rang 247

—S 302—*Nature of act necessary*

An injury that is merely likely to cause death does not of necessity amount to murder The act must be done with the intention mentioned in S 302 Where the degree of likelihood is not sufficiently high the intention does not extend the intention of causing such bodily injury as is likely to cause death the offence is only the culpable homicide not amounting to murder (*Robinson, C J and May Oung, J*) APALU *v* EMPEROR  
1 Rang 285 2 Bur L J 94 1923 Rang 174  
75 I C 295 24 Cr L J 919

—Ss 302, 304, 326—*Scope*

*Held* on the facts taking all the circumstances into consideration that it has not been shown that any of the appellants intended to kill deceased or to cause such injury as they knew to be likely to cause his death But where they all knew that grievous hurt was likely to result from an assault of so serious a nature, and as dangerous weapons were employed they could rightly be convicted of an offence under section 326 Indian Penal Code read with S 149, (*Martineau and Moti Sagar, JJ*) ALLAH DITTA *v* EMPEROR  
1923 Lah 441

—S 302—*Scope*.

Accused had enticed away the sister of the deceased The deceased and the accused with his brother who were armed with a spear met at first before the house of the deceased near a mosque where abuse was exchanged and demand was made by the deceased to the accused to return his sister. At the persuasion of a relation the accused retreated being followed by the deceased and between the two Mohallas where each lived at a spot at a considerable distance from the houses of each the accused struck a blow with the spear at the deceased who in no time succumbed to the fatal wound *Held*, the accused did cause the death of the deceased intentionally and he is not entitled to the benefits of any exception to section 300 I P C (*Scott Smith and Harrison JJ*) MUHAMMAD *v* EMPEROR 1923 Lah 195

—Ss 302 and 300, Cls 3 & 4—*Scope of*

Where so far as the external marks of violence afford an indication there can be no doubt that the assailants desisted from striking on any vital part of the body, and the only serious injuries above the waist were those inflicted on the two cheeks, but the medical witness, however, found the soft tissues of the head and the lining of the brain congested but he does not disclose the exact cause of this congestion *Held* having regard to the nature of the injuries and in view of the fact that the assailants scrupulously avoided the vital parts of the body they did not intend either to cause death or to cause such bodily injury as they knew was likely to cause death nor does the case come within the purview of clauses "thirdly" and "fourthly" of S. 300 Indian Penal Code. (*Shadi Lal, C.J and Harrison, J*) RAJMA *v* EMPEROR  
1923 Lah. 319.

## PENAL CODE, S. 304

—S 302—*Stab in the abdomen—Murder*

A stab in the abdomen with sufficient force to pierce the abdominal walls is sufficient in the ordinary course of nature to cause death and it death ensues is punishable under S 302 I P C (*May Oung and Duckworth, JJ*) ON SHWE *v* KING EMPEROR  
1 Rang. 436

—S 302—*Sudden and grave provocation*

Where the crime was not a pre-meditated one and it was quite clear that the accused must have acted on sudden impulse as death took place by strangulation effected by twisting deceased's hair round her throat

*Held*, some sudden provocation must have arisen to impel the accused to do this deed and in the absence of any evidence on this point the accused is entitled to the benefit of the doubt as to whether sudden and grave provocation did not arise which temporarily deprived him of self control (*Broadway and Fforde, JJ*) MALLA *v* EMPEROR  
1923 Lah 691

—Ss 304 and 323—*Attack by several accused—Common intention—Simple hurt—Injuries likely to cause death—Offence*

Where the accused and his two sons were convicted under Ss 34 and 304 I P C it was found that the accused and the wife of the deceased quarrelled as regards the alleged theft of fodder by the sons and the deceased intervened whereupon the accused brought out a dang and attacked the deceased The deceased was struck twice on the head during the course of the struggle and fell down after which he was beaten by the sons *Held* that it had not been proved that the accused and his sons had a common intention to inflict anything more than simple hurt on the deceased or they had a common intention to inflict on the deceased such injuries as were likely to cause death The conviction of the accused was changed to one under S 323 I, P C (*Campbell, J*) MALA SINGH *v* EMPEROR.  
5 Lah L J 121  
1924 Lah 61

—Ss 304 and 325—*Blow aimed at one—Causing death of another—Offence*

Where the accused broke open and entered the door of the house of the complainant with a view to give him a thrashing and the wife of the complainant who had a child in her arms intervened with the result that the blow which was aimed at the complainant fell upon the child which was invisible in the dark and caused the death of the child *Held*, that the accused was guilty of the offence of causing grievous hurt to the woman. (*Harrison, J*) DYAL SINGH *v* EMPEROR.

5 Lah. L J 228 71 I C 52. 24 Cr L J. 4  
1924 Lah. 47

—S. 304—*Common intention—Absence of evidence as to who caused death—Effect*

If two or more people are found to have had a common intention of causing such bodily injury as is likely to cause death and that result ensues, all are guilty of the offence of culpable homicide not amounting to murder, quite irrespective of who caused the particular injury leading to death (*Wazir Hasan, A.J.C.*) KEDAR *v* EMPEROR

90 & A. L R 1024.



## PENAL CODE, S. 304.

## —S 304—Common intention—Sudden fight with deadly weapons

Because a fight is a sudden one it cannot be said that each accused must be held responsible only for the part played by him individually 40 All 686 Foll 24 P R 1919 Foll Where it is proved that each of the two accused used a *Kulhar* or etc and their intention when they attacked the deceased, was a common one Held that intention must be presumed to have been to inflict injuries likely to cause death It is not necessary to make out premeditation in order to establish a common intention at the moment of action (*Campbell, J*) MAHOMED HUSSAIN v. EMPEROR

1923 Lah 336

## —S 304—Conviction under

Where the court finds that the accused must have known he was likely to cause death and concluded from that an offence under S 300 (4) I P C the conviction must be changed into one under S 304, I. P. C (*May Oung, J*) NGU PO SAW v EMPEROR

2 Bur L J 99

## —S 304—Difference in the two parts

The difference between the two parts of S 304 I P C is that under the first part the crime of murder is first established and the accused is then given the benefit of one of the exceptions, while under the second part of the same section, the crime of murder is never established at all, (*Pipon, J. C*) MIR ALAM v EMPEROR

69 I. C. 454 23 Cr L J 726

## —S 304—Extenuating circumstance

Even when there is no evidence as to previous existence of any serious enmity and the affairs arose out of a petty quarrel of the moment, this is hardly an extenuating circumstance in favour of accused using a weapon like a *chhava* on slight provocation which shows a callous disregard of human life for which he must suffer the consequences. (*Campbell, J.*) INDAR SINGH v EMPEROR

73 I C 932 24 Cr L J 708  
1923 Lah 326

## —S 304—Grave and sudden provocation

## —What is,

In order to remove a culpable homicide from the category of murder the provocation must not only be grave but also sudden, and must have by its gravity and suddenness deprived the accused of the power of self control Where a provocation ripens into resentment and malice, and the person aggrieved deliberately determines to take the lives of the persons who offend him, breaks into their houses in the night time, surprises them in their sleep and attacks them with a deadly weapon with intent to kill them and does cause the death of two of them and inflicts grievous injuries to the third, he is clearly guilty of murder and of an attempt to murder. (*Rossignol and Jafar Ali, JJ*) RUP SINGH v THE CROWN

1923 Lah 493

## —Ss 304 and 323—Hurt—Murder—Diseased spleen—Absence of knowledge

Where it was shown that accused person had no knowledge that the deceased's spleen was diseased, he could only be convicted of causing

## PENAL CODE, S. 304

simple hurt for causing simple injuries (*Scott Smith, J*) BHAIAN DAS v EMPEROR

72 I C 533. 24 Cr. L J 421

## —S 304—Joint attack by several—All guilty

If several persons jointly attacked the deceased, they are all equally guilty even though it may not be possible to prove which of them actually inflicted the fatal blow (*Daniels, J*) GHULAM HUSSAIN v EMPEROR

73 I C 769

24 Cr L, J 673 1924 A 78

## —Ss 304, 114 and 323—Scope sudden provocation reduction of sentence

In a scuffle deceased received one injury on the chin and two on the head, one of which resulted in an extensive fracture of the skull as a result of which he died All that can be said to be proved was that G inflicted one of the injuries on deceased's head and that M inflicted the one on the jaw

Held G had been rightly convicted of an offence under S 304 but as he was not shown to have struck more than one blow and as it was struck without any premeditation on a sudden, quarrel the sentence of seven years' imprisonment which has been passed on him is excessive It is not shown that M joined the attack on deceased with the same intention or knowledge as G. S.114, I P C is not applicable to him and he can be held liable only for the injury that he caused (*Martineau, J.*) GANDU v EMPEROR

5 Lah. L J 414 1923 Lah. 170

## —S 304—Severity of sentence

When it is found that two opposite parties were fighting out their differences and there were no independent witnesses, and one party was given the credit of being exercising the right of self-defence, held that it should be taken into consideration that the accused have themselves received more or less serious injuries, that one of their party has been killed, that the complete story has not been told by the prosecution and that, therefore there is a possibility (which) nevertheless amounts to nothing more, that they may have been acting in self defence and therefore too severe a sentence is not justified (*Campbell, J*) MEHR ALI v EMPEROR,

1923 Lah 313.

## —S. 304—Sudden provocation—Absence of premeditation

Where the accused killed another whom he saw occupying the same bed with the wife of his cousin and there was no motive for the crime, he must have acted under sudden and grave provocation and the conviction can be only under S 304, I P C (*Shadi Lal C J and Fford, J*) CHANDAN v EMPEROR

1923 Lah 312

## —S 304—Trial—Magistrate empowered under S 30, Cr Procedure Code

In every case under the first Part of S 304, it is almost invariably proper for the case to be committed to the Sessions, if the evidence is sufficient to establish the charge

Where the charge is one of murder under S 302 and there is no question of the first exception to S 300 being admitted by the prosecution

## PENAL CODE, S. 304-A.

and a magistrate specially empowered under S 30 Cr P Code heard the case and convicted under S 304 I, P C the proceedings were quashed and the accused committed to the Sessions 69 I C 454 Explained (*Pison, J C*) *EMPEROR v SARDAR* 69 I C 459 23 Cr L J 731

## ——— S 304-A—Assault on an old man

Where the accused knew that the object of his assault was a weak old man and in spite of that he attacked him most violently with a *lathi* causing no less than five fractures *Held*, this act of his leads to the inference that he knew that the injuries would likely result in death (*Zafar Ali, J*) *RAJINDAR SINGH v EMPEROR*

1923 Lah. 516

## ——— S 304 (2)—Death caused by single blow Sentence

Where the cause of death was single *lathi* blow a sentence of 7 years' rigorous imprisonment and a fine of Rs 400 is unduly severe In such a case the sentence of fine is unnecessary. (*Braher, J*) *LAL SINGH v EMPEROR*

5 L L J 180.

## ——— S 304 (2)—Scope—Alibi

Being enraged at the deceased's report to the headman that the accused had stolen gram from his threshing ground the accused attacked the deceased and dealt him several blows on the body and he died on account of the only blow received on the head *held* the accused who dealt that blow was guilty under 304 (2) and 325 (*Ffoide, J*) *JAWAHARA v. EMPEROR*.

1923 Lah 416.

## ——— S 307—Act necessary to constitute offence

The Act which is punishable under S 307 I P C must be an act which is itself capable of causing death. Where a person pulled the trigger twice and aimed the gun at a certain person but with no result in the absence of proof that the gun was loaded, a conviction under S 307 I, P C, cannot be had. (*May Oung, J*) *NGA NWAIK v EMPEROR* 2 Bur L J 76 1923 Rang 251

## ——— S 307—Evidence to support conviction—Severity of sentence

Where a prosecution witness who was not interested in the accused Nos 1 and 2, and who came up after the occurrence, deposed that he was told by Manja Bakhsh and Khair Din eye witnesses that Abdul Hamid accused No. 3 had killed Nizam Din, and they did not immediately after the occurrence name the accused Nos. 1 and 2. *Held* that it was highly probable that accused Nos. 1 and 2 did not take any part in the actual attack, and as Abdul Hamid alone could easily have caused all the injuries found on Nizam Din's person, it would be unsafe to convert accused Nos. 1 and 2 *Held* further that as accused No 3 made a violent and unprovoked attack upon Nizam Din and cut off his hand with a single blow thus maiming him for life, a sentence of 5 years rigorous imprisonment was not too severe, (*Scott Smith, J*) *UMER BAKHSH IBRAHIM v EMPEROR*, 1923 Lah. 236 (2)

## PENAL CODE, S 323

## ——— S. 307—Scope

Where appellant, a sower pursued deceased whom he thought to be the person wanted at the police station and fired three shots and the deceased who was standing in the river at the time of the third shot never appeared again *Held*, there is no sufficient evidence to support the conviction It was necessary to prove that the appellant did an act with such intention or knowledge that if he had caused death by that act he would have been guilty of murder The only act which he is clearly proved to have committed is to pull the trigger of a loaded rifle three times It was just likely on the facts disclosed that he would have fired into the air in order to frighten and step deceased as that he would fire at deceased (*Campbell, J*) *PIR MUHAMMAD v EMPEROR*

1923 Lah 415.

## ——— S 307—Nature of offence — Putting trigger of an unloaded gun

The act which is punishable under S 307 I P C must be an act which is itself capable of causing death pulling the trigger of an unloaded gun will not fall under the section (*May Oung, J*) *NGA WAIK v EMPEROR* 1 Rang 209

74 I C. 1042 24 Cr L J 850.

## ——— S 311—false complaint — Failure to prove a case—Effect of

Omission to prove a case is not the same thing as the institution of a maliciously false case The Police reported a case as not true but the Magistrate gave the complainant a chance of showing that the Report of the Police was incorrect and made over the case to the Sub-Deputy Magistrate who allowed the cross-examination of the prosecution witnesses and examined the witnesses and then sanctioned the prosecution of the complainant for an offence under S 211 I P C. *Held* that the procedure before the Sub-Deputy Magistrate was illegal and he erred in holding a trial The question before him was whether the complainant had *prima facie* made out a case which would justify the summoning of the accused (*Bucknill, J*) *RAHIM v EMPEROR* 1 Pat L R (Cr) 45

72 I C. 894 24 Cr L J, 478

## ——— S 319—Poisonous drug administered as a love philtre—Offence

Where an infatuated young man administered *dhatura* under the impression it was a love philtre, there is no intention to cause hurt. The offence falls under S. 319 and not under S 328, I P C (*Sulaiman, J*) *ANIS BEG v EMPEROR*

21 A L J 844 .  
L R, 4 A 229 (Cr.).

## ——— Ss 323 and 325—Conviction under S. 325—Alteration of conviction into 323—Power of appellate Court—Prejudice

Where the accused were tried for an offence under S 325 for inflicting an injury to the incapacity of the complainant and for no other offence an appellate Court is not justified in altering the conviction under S 325 to one under S 323, I P C inasmuch as the accused had not been given an opportunity of answering the charge in the first instance of inflicting injuries other than the

## PENAL CODE, S 323

injury to the knee-cap (C C Ghose and Cuming, JJ) PATAL GHOSE v EMPEROR  
72 I C 72 24 Cr L J 312

—S 323—Self defence See (1922) DIG  
COL 898 KHANUN v EMPEROR  
71 I C 665 24 Cr L J 201

—S 323—Wrongful confinement—Assault  
Private defence, right of

Where a police constable is guilty of the offence of wrongful confinement the accused person is entitled to exercise against him his right of private defence. He cannot therefore be convicted under S 323 for assaulting the constable (Lindsay, J) RAM SINGH v. EMPEROR  
1923 A 34

—S 325—Absence of evidence as to who gave blow—Common intention

If it is not shown which of the two appellants dealt the blow which caused grievous hurt, both the accused cannot be convicted of an offence under S 325, unless they had a common intention of causing grievous hurt (Marineau, J) NUR SHAH v EMPEROR 1923 Lah. 35 (1)

—S 326—Acquittal on separate charge under S 326 read with S 119—Effect

The accused were charged with offences under S 326 read along with S 119. They were acquitted on the latter charge as the alleged motive was not convincing and the common object was not made out. Held, this does not prevent a conviction being bad under S 326 I P C if grievous hurt was caused (Macpherson, J) RITLAL SINGH v EMPEROR 74 I C 717 24 Cr L J 813

—S, 326, 147—Scope of

Where the Court had been able to make up its mind definitely about the actual persons who caused the injuries sustained by the complainants and there was delay in making their complaint a conviction cannot be sustained (Cambell, J) ISHAR v EMPEROR. 1923 Lah. 447

—S 331 "Demand"—Meaning of.

Under S 331, I P C the "demand" must be with respect to property. Consequently the extortion of a promise to restore an abducted woman is not an offence under the section (Zafar Ali, J) MAULA BAKHSH v EMPEROR 5 Lah. L. J 375 73 I C 272 24 Cr L J 576

—Ss 342 and 114—Wrongful arrest of debtor—Protection order—Effect

Where a decree holder gets his judgment debtor arrested during the subsistence of a protection order, is guilty of an offence under Ss 342 and 114, I P C, irrespective of actual presence at the time of arrest (Spencer, J) THIRUVENGADACHARIAR v CHOCKALINGAM CHETTY 18 L W 167 1924 Mad 31

—Ss. 343 and 366—Wrongful confinement—Elopement—Conviction

The accused took away a married woman of 16 years of age to force her to illicit intercourse and kept her in wrongful confinement for 6 days but it was probable that the girl had not been

## PENAL CODE, S 350

abducted but had eloped. Held that the accused were not guilty under Ss 366 and 343 I P C. (Zafar, Ali, J) MOHABAT SINGH v EMPEROR, 5 L L J 38 1923 Lah. 274

—Ss 349, 350—Criminal force

Where it was proved that the complainant was obliged to run away by reason of the accused's rushing at him with sticks and lathis and using threats towards him. Held that was a resort to criminal force as defined in S 349 and 350 of the Indian Penal Code. Where the complainant came up while the acts of criminal trespass were still in progress and he had not already been effectively dispossessed and that only took place when the complainant was actually driven off his lands by the accused rushing towards him with sticks and lathis and using threats, Held the possession was not obtained peacefully (Lindsay, J) ASHIQ HUSSAIN KHAN v EMPEROR 74 I C 1049 24 Cr L J. 857 1923 A 333

—S 352—Search by Police-officer outside his jurisdiction—Assault—Offence

Where a Police Sub-Inspector attempts to search a house outside the circle and if the inmates of the house assault so as to prevent the search they are not guilty of an offence under S 352, I P C (Rafique, J) PITAM LAL v. EMPEROR 71 I C 996 24 Cr L J 276 1923 A. 433 (1)

—S 353—Assaulting constable in charge of lock up. Trying to prevent communication with prisoner. See PRISONS ACT, S 42 4 Lah. 448

—S 353—Attachment of property under time expired warrant—Resistance—Offence

Where under a time-expired warrant a public servant attaches property, resistance to the attachment is no offence under S 353, I P C 10 C. 18, 31 C. 424 followed. (Bager, O J. C) NANDLAL v EMPEROR 19 N L B 183

—S 353—Offence under—Issue of distress warrant by Collector for arrears of Income-tax—Resistance to Police Officer executing such warrant—Effect of See INCOME-TAX ACT, S 46 CL 3 AND 4 4 Pat L T 171

—S 353—Warrant—Execution by Amin—Resistance—Expiry of time for return of warrant—Effect

A warrant was executed by the Amin of a Civil Court after the expiry of the time fixed by the Amin and before the expiry of the time fixed by the Court for its return and the Amin was obstructed in the course of the execution by the accused. Held that the accused was guilty of an offence under S 353 I P C (Krishnan, J) GARAPATHY KOTTAYYA In re 45 M. L. J 74 (1923) M W N 444 32 M L T 248 (H C) (1923) Mad. 687

—S 359—Procedure—Charge to be explained

When a question whether there was kidnapping either with or without persuasion, and a question as to how long the kidnapping has

## PENAL CODE, S 361

continued, and as to whether at some stage a fresh kidnapping has been carried out, and whether there was a previous conspiracy or conduct amounting to abetment, or whether there was no kidnapping or share in the kidnapping at all but merely a confidence trick undertaken to cheat a person, arises for decision it is more than ever the duty of the Judge, even though counsel may be engaged, to clear the ground, and to be quite sure that each accused or his counsel clearly understands what case they have to meet (*Walsh, J*)  
**JODHA SINGH v EMPEROR** L R 4 A 83 (Or)  
 1923 All 285

## S 361—Scope

If a minor girl leaves her husband's house without any persuasion, inducement or blandishment held out to her by a man so that she has got fairly away from home, and then goes to him he cannot be deemed to have infringed the law even if he does not restore her lawful guardian (*Shade Lal, C J*) **LACHHI RAM v EMPEROR**  
 73 I C 260 24 Cr L J 564  
 1923 Lah 330,

## S 362—Abduction, what amounts to

When the appellant met the girl, she had ceased to be a kidnapped woman in the strict sense. She was then a free agent but she would not have gone with the appellant but for his false representations to her as to his being a police constable and the inducement held out by him that he would take her to the police station. Held, his action therefore amounted to abduction as defined in S 362, I P C (*Broadway J*)  
**BAHADUR ALI v THE CROWN** 73 I C 510  
 24 Cr L J 622 1923 Lah 158

## S 363—Intention—Giving refuge—If amounts to offence

To constitute the offence of kidnapping the intention to prevent the kidnapped person from returning to his guardian is not necessary.

Where a minor runs away from lawful guardianship the person with whom he takes refuge is not "taking him" within the meaning of the law. But inducing a minor to run away or giving him encouragement would constitute the offence, and any question of intention would be relevant only as regards the sentence (*Pipon, J C*)  
**JAFAH SHAH v EMPEROR** 69 I C 444  
 23 Cr L J 716.

## S 363—Kidnapping—Mahomedan—Minor—Guardianship of girl—Custody of husband,

In the absence of the mother, the mother's mother is the guardian of the person of a Mahomedan minor girl who has not attained puberty. The husband is not the lawful guardian of her person unless entrusted with such costs by the lawful guardian and where the girl's maternal uncle takes her away from her husband's custody he cannot be convicted of the offence under S 363 I P C (*Newbould and Suhrawardy, JJ*)  
**DARAJUDDIN AKANDA v EMPEROR.**

37 C L J 329; 27 C W N 531  
 73 I C 936 24 Cr L J 712 1923 Cal. 672.

Y. D.—68

## PENAL CODE, S 376

## S 365—Scope

Where the appellant intended to and actually did confine a girl wrongfully while he negotiated with her relatives for the payment of a sum of Rs 600 which was practically her ransom. Held his act therefore fell under S 365, I P C 6 L B R foll (*Broadway, J*) **BAHADUR ALI v THE CROWN,**  
 73 I C 510 24 Cr L J 622  
 1923 Lah 158

## S 366—Essentials of—Guardianship—Knowledge

It is not necessary for a conviction under S 366 I, P C that the accused should know definitely who the guardian of the minor girl is when he finds wandering about (*Dalai, J C*) **IDU v EMPEROR**  
 90 & A L R 1102

S 373—Girl under 16. See (1922) DIG COL 899 **ABDUL GAFUR SIKDAR v EMPEROR**  
 71 I C 124 24 Cr L J 76.

## S 366—Kidnapping—Guardian not taking serious view—Object for lawful marriage—Sentence

In a prosecution under S 366 I, P C when a girl is kidnapped from the custody of the mother by her paternal relations not for any immoral or illegal object but to marry her lawfully to a relation of hers, technically the offence of kidnapping is committed. Where the mother herself did not take a serious view of the offence, a nominal sentence is enough (*Moti Sagar, J.*)  
**SHER v EMPEROR** 5 Lah. L J 377

S 366—Kidnapping—Minor—Minor leaving home for purpose of illicit intercourse, See (1922) DIG COL 898 **EMPEROR v, SAJDAR REZA**  
 72 I C 379 24 Cr L J 379

## S 366—Offence under—Essentials of.

S 366, I. P. C requires that abduction must be (a) with the intent that the woman may be compelled or knowing it to be likely that she will be compelled, to marry any person against her will, or (b) in order that she may be forced or reduced to illicit intercourse (*Scott Smith, J*) **BHAJAN DAS v EMPEROR** 72 I C, 533 24 Cr L J 421

S 373—Offence under—Proof of intention or knowledge—Onus. See (1922) DIG COL 899 **KHETRAMANI DASI v EMPEROR**  
 71 I C 232 24 Cr L J 104

## S 376—Attempt to commit rape

The fact that the vernacular record showed that the accused put his finger in the private part of the complainant coupled with the absence of semen on the pyjama of the girl and the absence of marks on the male organ of the accused were held to be sufficient circumstances for conviction for an offence of attempt to commit rape and not for rape (*Abdul Qadir, J*) **SADHU SINGH v THE CROWN** 73 I C 513  
 24 Cr L J 625 1923 Lah 167

## S 376—Evidence

It is hardly possible that any self respecting woman would come forward in a court of justice to make a humiliating statement against her honour of having been raped unless it was absolutely true (*Moti Sagar, J*) **LABH SINGH v EMPEROR** 75 I C, 77  
 24 Cr L J 877 1923 Lah 291.

## PENAL CODE, S 376

—S 376—*Presumption*

The fact that the charge of rape was brought against the accused immediately after the occurrence, coupled with the medical evidence and the fact that he was assaulted by Lambardar and arraigned before the Panchayat then and there lead strongly to the conclusion that the rape story was notification, though the friends of the girl being ignorant rustics were not wise enough to look for blood or to preserve it as evidence in support of the charge 38 All 49 Foll (Zafar Ali, J) HUSSAIN KHAN v EMPEROR

1923 Lah 332

—S 376—*Rape—Quantum of proof, conviction*

Where there was no physical proof of the rape the inference from the medical evidence was that at the time of the alleged offence, the girl was not a virgin no trace of semen was found on her clothes and the girl of 17 was said to have been forced through a low arch only 3 feet high.

Held the evidence was not sufficient to support conviction for rape (Le Rossignol, J) AMIR-UD-DIN v. EMPEROR

1923 Lah. 238 (1)

—S 376—*Vulval penetration sufficient*

Vulval penetration is sufficient for conviction under S 376 I P C (Zafar Ali, J) NATHA v EMPEROR

1923 Lah. 536

—S 378—*Theft—Essentials—Dishonest taking—Meaning—Bona fide claim of right—Taking under—Proof—Effect*

If there is a taking under a colour of right, or in other words, under a *bona fide* claim, the taking cannot be dishonest or felonious, that is to say, it is not theft under the Indian Penal Code. It is immaterial whether the claim is good or bad, though, in deciding as a question of fact whether the claim was a *bona fide* claim, it may be material to consider whether or not there was any right at all.

The first accused bought some land from P W. 2 and *bona fide* claimed the right to the share of the grass grown in a tank in the same village alleging that the said right went with the land purchased by him P W 2, on the other hand, contended that the right in question was severable from the said land and that he continued to be entitled to the said right, notwithstanding the sale by him. After the reaping of the grass in question had gone on for some time, the accused went himself or sent the 2nd accused with instructions to remove a quantity of the grass that had already been cut and stacked. The Magistrate convicted both of them of theft, being of opinion that no question of *bona fides* could arise because the matter affected third parties. Held that the conviction was illegal (Schwabe, C J.) SRINIVASALU REDDIAR v GOVINDA GOUDAN

44 M L J 138 17 L W 104

(1923) M. W. N 132 32 M L T (H C) 153

71 I C 798 24 Cr L J 204 1923 Mad 239

—S. 379. *Legal possession—Dishonest intention—Omission to direct jury—Effect.*

In a charge for theft, where there was no question as to whether there was legal possession or whether dishonest intention was established and, the address to the jury, simply, consisted of ex-

## PENAL CODE, S 380

plaining that "theft is committed as soon as the property which the thief intends to steal has been moved with that object" Held, the direction to the jury was sufficient (Oldfield and Ramesam, JJ) RANGARE RAMUDU In re

17 L W, 236, 1923 Mad 329

—S 379—*Pointing out stolen articles in a place not of accused*

Where articles lay buried under ground at a place pointed out by the accused but not in his possession the only conclusion that could be drawn from his having shown the place is that he knew that the ornaments were there and not that he had stolen the same or had actually participated in the act of concealing them there (Shadi Lal, C J and Zafar Ali, J) RULLIA RAM v EMPEROR

5 L. L J 325 1923 Lah 438 (2)

—S 379—*Theft—Bonafide claim of right—Offence.*

There is a distinction between the lands and the crops grown thereon and although the lands on which the crops are alleged to have been grown by the complainant had been awarded to him, the accused might have been under the belief that he was entitled to the crops.

The conviction in this case had rested merely on the facts that a demarcation had taken place and that the land on which the crop was grown had been awarded to the complainant. But it was not clear how on these facts the accused was guilty of theft in removing the crops if he removed them under the impression that the crops were sown by him and that he was entitled to them. Held that the conviction for theft was unsustainable (Ross, J) BODH KISHAN GOALA v, EMPEROR

4 Pat L T 608 72 I C 614 24 Cr. L J. 454

—S 379—*Theft—Running water—Water in the possession of Cantonment authorities*

The accused put a water connection from the main water pipe into their house and this was done contrary to law without the permission of, and indeed, without the knowledge of, the Cantonment authority and the Municipal Board who had the control of the supply and distribution of the water within municipal limits. Held that water when conveyed in pipes and so reduced into possession can be the subject of theft and that the accused were guilty of theft (Daniels, J) MAHADEO PRASAD v EMPEROR

45 A 680 21 A L J 654

L R. 4 A 134 Cr 75 I C 159 24 Cr L J 911

—S 379—*Trespass—Preparation for theft*

It was found that the accused was caught at night time in the vicinity of some cattle which has been tethered on the complainants square and near which complainant and his brother were sleeping. Held that the accused might have intended to commit theft but that they could be convicted of the offence of criminal trespass only. 15 P R 1907 followed (Brasher, J) NAURANGA v EMPEROR

71 I C 792 (1) 24 Cr. L J 248 (1).

—S. 380—*Removal of goods—Dishonesty.*

There was an agreement between the accused and the complainant that the latter should advance money to him on the security of goods deposited

## PENAL CODE, S 380.

by the former. The accused afterwards removed the goods placed as security from the godown—*Held*, the removal was dishonest and amounted to an offence under S 380 I P C (*Newbould and Suhrawardy, JJ*) *KARTIKESWAR ROY v BANSID HAR BYAS* 1923 Cal 594

—S 380—Theft—Essentials of—Property left as security with complainant—Property secured in shop of accused—Opening of shop and taking possession of property—Offence *See* (1922) DIG COL 900 *LAKSHMINARAYANA CHETTIAR In re* 72 I C 526 24 Cr L J 414

—Ss 381 and 379—Charge under S 379—Conviction under Ss 109 and 381—Legality of—Standing by a thief, if abettment—Cr P Code, Ss 236 and 237

Mere standing by the side of a man who ultimately turned out to be a thief without any further evidence to show that the person was engaged in any conspiracy with the principal offender for the doing of the theft does not lead to the conclusion that he is guilty of abetting the theft

When an accused person is charged with having committed an offence under S 379, I P C, he should not be convicted of an offence under S 381 read with S 109 I P C when he is not charged with having committed that offence S, 226, Cr P Code which must control S 237, Cr P Code, only applies when from the evidence led by the prosecution, it is not doubtful which of the offences has been committed by the petitioner 54 I C 262 Ref (*Das, J*) *GOVIND MAHTON v. EMPEROR*. 1923 P 121.

—S 381—Offence if triable by 3rd class Magistrate

An offence under S 381, I P C is not triable by a third class magistrate and S 562 Cr P Code does not apply (*Man Oung, J*) *EMPEROR v NGA THAUNG PE*. 2 Bur L J 75 1924 Rang. 12

—S 382—Scope.

Even though there is every reason to surmise that the accused were in a certain place for the purpose of committing theft, S 382 I P C, requires that actual theft shall be committed (*Campbell, J*) *LAL SINGH v EMPEROR* 1923 Lah 512

—S 383—Extortion—*Nikah Khawan*—Refusal to perform marriage in the absence of fee.

A *Nikah Khawan* is not bound to read a *Nikah* for a person unless he chooses to do so and it is certainly no offence for him to demand any fee he likes for doing so. (*Scott Smith, J*) *NIZAM DIN v. EMPEROR*. 4 Lah 179 75 I C 542 24 Cr. L J 958

—Ss 383 and 44—Injury—What is—Extortion.

If a person promises to speak favourably to a person in authority and to do his best to induce him to do something and in consideration of the promise receives money, he has not threatened to cause injury to that person and thereby committed extortion. Before a person can be said to put

## PENAL CODE, S 395.

any person into fear of any injury of that person, it must appear he has held out some threat to do or omit to do what he is legally bound to do in the future (*Sulaiman, J*) *HABIBUL RAZZAK v EMPEROR*. 21 A L J 850 L R 4 A 253 (C)

—Ss 384 and 385—Extortion levied by picketing—Boycott of foreign cloth *See* (1923) DIG COL 901 *CHATURBHUI v EMPEROR* 45 A 137 71 I C 110 24 Cr L J 62

—S 384—Scope—Identification

Accused robbed three passengers in the female compartment of a running train causing them injuries, one of whom received a grievous hurt and then jumped out of the train and was found lying by the roadside as he broke his leg while jumping, having in possession some of the ornaments robbed while more valuable things were taken away by his companion *Held* the accused was guilty. The offence was committed in the morning and the offenders were in the compartment for some time taking off ornaments from the person of the victims and causing them injuries, and there is nothing unlikely in their having been able to identify him (*Abdul Qadir, J*) *SAUDAGAR v EMPEROR* 1923 Lah 169

—S 395—Conviction based on identification—Propriety of

A Conviction in a dacoity case based solely on identification evidence is dangerous especially when full enquiry is not made as to the genuineness of the identification (*Dalai, J C*) *BHAJUA v EMPEROR* 90 & A L R 561

—Ss 395 and 397—Corroboration of approver—Things not mentioned in first information

Where some common things were found in the search and some other things found claimed by the accused to be their own were not mentioned in the first report and a gun and a sword were found which were proved to belong to complainant which were concealed because the accused did not hold a license *held* there was no sufficient corroboration of the approver's story to justify conviction (*Broadway, J*) *SULEMAN v EMPEROR* 1923 Lah, 385

—S 395—Dacoity—Essentials of offence—Evidence necessary for *See* (1922) DIG COL 901. *NARAMBAN In re* 71 I C 877 24 Cr. L J 269

—Ss 395 and 447—Dacoity—Evidence of—House breaking implement—Pointing out chhavis—Identification of accused

Where there is no evidence that robbery was either committed or attempted or a particular harm was done to any one and the place where the appellants are alleged to have come was an open yard not surrounded by a wall and not entered through a door or gate, the mere fact that one of the accused after arrest pointed out a place to the police at a distance of about two miles from the village where three *Chhavis* a house breaking implement and a bunch of keys were buried cannot connect him with an offence of dacoity in that village. (*Campbell, J*) *HAZURA v. EMPEROR* 5 Lah L J 82 1923 Lah 161.

## PENAL CODE, § 395

—§ 395—*Identification evidence—Value of*

Identification evidence by itself is a very insufficient basis for identification but when it is found that the identification witnesses have been familiar with the face of the person identified there can be no certainty that the witnesses really saw the accused (*Dalal, J C*) *DIN DAYAL v KING EMPEROR* 90 & A L R 558 100 L J 347

—§§ 395, and 397—*Mode of judgment*

In a dacoity trial involving several accused, the court should first give a general outline of the case the course of investigation and the arrest and then the case of each should be dealt with in detail, (*May Oung, J*) *NGA MU v EMPEROR* 2 Bur L J 199

—§ 396—*Scope*

The fact that murder was committed in the compound of the house raised at a time when the dacoits were making good their escape is not sufficient to take the case out of S 396 (*Scott-Smith and Moti Sagar, JJ*) *KARIM BAKHSH v EMPEROR* 1923 Lah 329 (1)

—§ 397—*Interpretation of—Such offender*—*Meaning of*

The words 'such offender' in S 397 I P C clearly refer to the offender who uses a deadly weapon or causes grievous hurt, to any person and not to those who jointly commit robbery or dacoity with him (*Scott-Smith J.*) *ILAHIA v EMPEROR*, 72 I C 517 24 Cr L J 405

—§§ 397 and 395—*Scope of*

S. 397, Indian Penal Code does not constitute a separate offence. When five or more persons conjointly commit robbery they are said to have committed dacoity, an offence which is punishable under S 395 Indian Penal Code. Where a confession was made and articles were found which were identified as taken in dacoity held their was sufficient corroboration of approver's story. (*Broadway, J*) *WADHAWA SINGH v EMPEROR* 1923 Lah 389 (2)

—§ 398—*Scope of*

S. 398 I P C. does not create a substantive offence. It merely provides that if any member of a gang of dacoits is armed with lethal weapon during the commission of a dacoity such member is to suffer a minimum punishment of 7 years (*Broadway, J.*) *BAKHTAWAR SINGH v EMPEROR* 1923 Lah. 66

—§ 399—*Essentials of offence under—Preparation—Dacoity—Robbery*

To establish an offence under S 399 I, P C it is not necessary that the persons shown to be making the preparation should be five or more in number. But it is necessary to prove that the raid for which they were making preparation was to be committed by five or more persons. Otherwise it would not be dacoity but merely robbery and mere preparation for committing robbery unless it ends in an actual attempt is not punishable by law (*Poon, J C*) *KHWAJA HASSAN v EMPEROR* 71 I. C 360 24 Cr L J 136

## PENAL CODE, § 403

—§ 401—*Essentials*

It is not necessary to prove that each individual member of the gang has habitually committed theft or any particular act of theft. Once it is proved that a gang was formed for the purpose of habitually committing theft, all persons who hereafter join the gang in committing one or more thefts come within the purview of S 401 of the Penal Code (*Lumsden, J*) *EMPEROR v DARYA SINGH* 1923 Lah 666

—§ 401—*Essential and evidence*

The sustain a conviction in a charge under S 431 Indian Penal Code it is necessary to prove —

- (1) that there existed a gang of persons,
- (2) that those persons were associated for the purpose of committing theft or robbery,
- (3) that theft or robbery was to be committed habitually
- (4) that the accused was a member of such gang. In the absence of direct evidence the associating and the purpose of the association may be established by proof of acts from which these may be reasonably inferred (*Moti Sagar, J*) *PIR BAKSH v EMPEROR*. 73 I C 815 24 Cr L J 703 1923 Lah 327

—§§ 403 and 405—*Criminal breach of trust—Essentials of offence—Temporary misappropriation*

Criminal breach of trust is a series of criminal misappropriation by a person entrusted with the property misappropriated and a dishonest appropriation even for a short time is none the less an offence. Consequently the offence of criminal breach of trust is committed even where the act of the accused caused wrongful loss for a time only 8 Bom L R 951 Ref (*Batten, J C.*) *LOCAL GOVERNMENT v. MADHO PATWARI* 1923 Nag. 146

—§ 403—*Criminal misappropriation—Dishonest intention—Taking and retaining under bona fide belief that the property belongs to accused—Test*

To a charge of criminal misappropriation of the complainant's buffalo, the accused pleaded that he was not guilty because he acted *bona fide* in keeping the buffalo. It was found that the accused himself had a month previously lost a buffalo, that the buffalo alleged to have been misappropriated strayed into the accused's house, that, believing it to be his own, the accused took it home and kept it tied up in the verandah of his house which was open to the gaze of the public, and that when the complainant went to the accused's house and claimed the buffalo as his. Held that there was no dishonest intention proved and that a conviction under S 403 was unsustainable (*Krishnan, J*) *DWARAKA DOSS v NARASIMHALU NAIDU*. 44 M L J 128 17 L W 157 1923 Mad 364 (1)

—§ 403—*Criminal misappropriation—Marriage presents* See (1922) Dig Col 901 *NASIR KHAN NISTRI v FYAZ HOSSAIN* 72 I. C 348, 24 Cr L J 348.

## PENAL CODE, S 405.

—S. 405—*Criminal breach of trust—Retention of money by pleader*

It is not a criminal offence in every case for a Pleader to retain fees the legal recovery of which may be timebarred. It must be remembered that a pleader will not be willing to continue to act for a party unless he is paid all his fees. (*Batten, J C*) *EMPEROR v KRISHNA RAO* 6 N. L. J 119, 73 I C 335 24 Cr L. J 591.

—S 405—*Trust essential*

The accused as booking clerk recovered in excess of the legal charge but did not credit it to the Railway. Held he could not be convicted of the offence under S 405 as he was in no sense a trustee. (*Moti Sagar, J.*) *KUDRAT NATH v THE CROWN* 75 I C 79 24 Cr L. J 879 1923 Lah 295 (1)

—S 406—*Breach of trust—Contract for sale of goods—Delivery—Denial—Offence*

Where goods have been delivered to a person in pursuance of a contract of sale and accepted, all that remains is to ascertain the money due to the vendor, the rate being already fixed by the contract. There is no question of any entrustment or of a trust. Consequently the mere fact that the purchaser subsequently denies receipt of the goods does not make him guilty of the offence of criminal breach of trust or misappropriation. (*Krishnan, J*) *VELAYUTHA CHETTY In re* 72 I C 172 24 Cr L J 332.

—S 406—*Burden of proof*

In a prosecution under S 406 I, P, C. the prosecution must prove that a trust had been created in respect of the property and that the accused had violated that trust. (*Moti Sagar, J*) *PIRAN v EMPEROR* 1923 Lah 321

—Ss. 406 and 420—*Pledge of promissory notes—Pledgor dishonestly inducing pledgee to return the articles—Offence—Cheating*

Where the accused dishonestly induced the complainant to hand over certain promissory notes which he had pledged with the complainant as security for a loan of Rs 2,500 by pretending that he required them to collect the money from his debtors with the aid of which he promised to pay to the complainant, held, that the act of the accused constituted the offence of cheating as instead of collecting the money and paying the complainant he disposed of the promissory notes otherwise. It cannot be said that it would be impossible under any circumstances for a person to commit criminal breach of trust in respect of his own property. (*Spencer, J.*) *VENKATAGURU-NATHA SASTRI In re* 45 M L J 133 17 L W 580 32 M L T (H. C) 234 (1923) M. W N 313 72 I C 612. 24 Cr L J 452 1923 Mad 597

—S 406—*Pledge—Subpledge by pledgee in an offence* See (1922) DIG COL 902 *SARJU PRASAD v EMPEROR*

26 O C 4 71 I. C 58. 24 Cr L. J 10

—Ss 409 and 420—*Breach of trust—Municipal servant—Sale of rubbish and night soil—Appropriation of proceeds—Offence* See U P, Dt. MUN. ACT, S 116

21 A. L. J 149

## PENAL CODE, S 411

—S 409—*Breach of trust by agent—Disposal of property entrusted for sale—Recovery off*

Where the owner of a sewing machine gives it to an agent to be sold for money and the latter pledges it, it is not open to a Criminal Court to order the pledgee to deliver possession of the machine to the owner on the ground that the agent had exceeded his authority. (*Macgregor, J*) *SINGER SEWING MACHINE CO v YEN KUN* 1923 Rang 68, (1)

—S 409—*Conversion to one's own use*

It was proved by as good evidence as could have been produced that accused received the three sums in question and, as up to the time of his prosecution more than a year later, he had not paid them over to the persons authorised to receive them, he must be presumed to have converted them to his own use. (*Scott-Smith and Ffoido, JJ*) *EMPEROR v AHMED SHAH* 1923 Lah 566.

—S 411—*Applicability of S 562 Cr P Code* See CR P CODE S 562

(1923) Pat 297 (2)

—Ss 411 and 448—*Criminal trespass—Desire to cause annoyance* See (1922) DIG COL 1098 *LAKSHMI DAS v EMPEROR* 73 I C 527 24 Cr L J 639.—S 411—*Essentials for conviction*

A conviction cannot be had under S, 411 I P C until it is clearly proved that the properties were stolen property. (*Prideaux A J C*) *YASIN-KHAN v EMPEROR* 19 N L B 176 75 I C 544 24 Cr L J, 960

—S 411—*Essentials for conviction*

An accused Person cannot be convicted under S 411 I P, C merely on showing he was in possession of certain property and failed to account for its possession. The prosecution must prove both that the property was stolen and that the accused received it or retained it dishonestly. (*Salasman, J*) *BHAROS v EMPEROR* 21 A L J 836 I R, 4 A 245 (Cr)

—S 411—*Joint property of brothers—Servant in charge—Possession*

Where stolen property is found in a shed belonging jointly to three brothers and which was in the charge of a servant and the evidence showed the accused was living some miles away and used to visit it only occasionally a conviction under S, 411 I P C. is bad. (*Shadr Lal, C J*) *GANESHI LAL v EMPEROR* 74 I C 271 24 Cr L J 767

—S 411—*Proof*

Where the fact of burglary was not reported until four months had elapsed and goods of common pattern were found in the house of the accused which the accused and the complainant each claimed as his own, Held there was no satisfactory evidence to prove that the article belonged to the complainant and the accused must be acquitted. (*Harrison, J*) *MD, BAKSH v EMPEROR* 1923 Lah 36 (1)

—S 411—*Two properties recovered on the same date—If can be convicted separately,*



## PENAL CODE, S 411

Where there is no proof of separate receipt of two properties toud with the accused at one and the same time, he cannot be convicted separately for each, unless there was distinct evidence of receipt of articles under different circumstances and times (*Datal, J C*) *MUNWA v EMPEROR.*  
90 & A L R 779

— Ss 411 and 457—*Receiving stolen property—Circumstantial evidence*

The mere pointing out by an accused person of the place where stolen property is concealed which place is not in his possession, is not of itself sufficient evidence to maintain a conviction for theft or for dishonestly receiving stolen property. Track evidence is not of much value when the foot prints are not those of bare feet but of shoes and the accused is a resident of the same village (*Scott Smith, J*) *INDAR SINGH v EMPEROR.*  
5 Lah L J 87  
73 I C. 331 24 Cr L J 587

— S 411—*Receiving stolen property—Evidence of—Guilty knowledge—Presumption—Evidence—Statement by co accused—Admissibility*

It is of the essence of an offence under S 411, I P. C. to show that the person who was in possession of the stolen property knew or had reason to believe that it was stolen property. Where the stolen property was traced to the accused's possession two months after the theft there is no presumption against him under S 144 of the Evidence Act

Where two persons were originally charged together but were later on tried separately, a statement made by one of them incriminating the other when they were both co-accused, ought not to be used against the other accused at his trial (*Krishnan, J*) *RAMUDU AIYER In re*  
44 M L J 243 17 L W. 370  
32 M L T. (H. C) 318 72 I C 538  
24 Cr L J 426 1923 Mad 365

— S 411—*Receiving stolen property—Possession when to be accounted for.*

There must be reason to believe that the property found in the accused's possession was stolen as a preliminary condition before the accused can be called on to account for that possession. (*Newbould and Suhmawardy, JJ*) *TULSI TOLINI v EMPEROR*  
50 Cal 564 72 I C. 372  
24 Cr L J 372 1923 Cal 596.

— S 411—*Reformatory Schools Act S. 31,*

A boy of 14½ years convicted under S 411 I P C cannot be let off after mere admonition but 6 month's rigorous imprisonment is not proper on a youthful first offender

A security, for good behaviour for 1 year was thought to be sufficient in the circumstances of the case (*Ross, J*) *JAGARNATH CHAUBI v EMPEROR*  
1 Pat L R 177 (Cr.) (1923) P 297 (1)

— Ss 411—*Scope of.*

The mere finding of stolen property with the accused three years after the theft does not indicate dishonest intention within the meaning of S 411 I P C. (*Harrison, J*) *SANT SINGH v THE CROWN*  
1923 Lah. 460

## PENAL CODE, S 415

— S 414—*Essentials for conviction*

To convict the accused under S 414, I P C, it is necessary that the property which is the subject of the charge should be stolen property and further that the accused should have known or had reason to believe that it was stolen property, which they were trying to conceal or make away with. Hence a finding that it is stolen property is essential. It is not actually necessary to prove in what theft the property was stolen or in what manner it was stolen. If an accused person thinking a certain property in his possession is stolen property tries to conceal it when as a matter of fact it is not, no offence under S 414 is committed (*Krishnan, J*) *Ime SAMACHARI*  
45 M L J 728  
33 M. L T 182 (H C) 18 L W 743

— Ss 415 and 420—*Applicability of—Dis-solution of marriage—Return or ornaments*

Owing to the disparity of age between a husband and a wife, the father of the husband called a Panchayat of leading men who determined that the marriage should be put an end to on return of certain ornaments by the father of the girl. In accordance with the advice of the Panchayat the ornaments were made over and a formal receipt was written and signed by the parties. Subsequently the father of the bride charged the bridegroom's parents for cheating. Held that in the absence of dishonest inducement the charge could not be entertained (*Ryves, J*) *JUNMAN v EMPEROR.*  
21 A L J 321  
L R 4 A 81 (Cr) 1923 A 431

— S 415—*Cheating—Paying cheques knowing that there was no balance of drawer with his banker—Horse racing—Bets*

The petitioner was a licensed book-maker of the Royal Calcutta Turf Club and had a permanent book for the season 1922—1923 within the first enclosure of the Calcutta Race Course. On the assurance of the opposite party, who was a Deputy Director of Commercial Intelligence, employed under the Government of India, that he would pay up his losses, if any, punctually on the settling day, the petitioner allowed the Opposite Party to take bets on credit on the 9th of December 1922. The debts due to the petitioner by and from the Opposite Party in respect of debts on credit amounted to a sum of Rs. 1,591. The Opposite Party failed to pay the said sum of Rs 1,591 on the following settling day and accordingly the Petitioner decided not to allow to the Opposite Party any more credit until the said sum was paid off in full. Thereupon the Opposite Party sent to the Petitioner, on the 15th December 1922, a crossed cheque for Rs 1,591 on the Indian Industrial Bank. The said cheque was sent in the evening after banking hours. The Opposite Party assured the Petitioner that the said cheque would be paid on presentation and on such assurance the Petitioner allowed the Opposite Party to take bets with him on credit on the 16th December 1922, and in respect of such bets taken on credit on the 16th December 1922, the Opposite Party became indebted to the Petitioner to the extent of Rs 3 450. The Cheque referred to above was presented for payment on

## PENAL CODE, S. 415

the 18th December 1922, when it was dishonoured. The Opposite party was thereupon communicated to and he gave a fresh cheque for Rs 5,041 to cover his losses on the 9th and 16th of December and assured the Petitioner that there would be no difficulty whatsoever in getting the said cheque cashed. The Petitioner relied on the assurance of the Opposite Party and allowed him to take further bets on credit on the 23rd and 26th of December 1922. The opposite Party became indebted to the Petitioner in a further sum of Rs 752. Meanwhile the said cheque for Rs 5,041 was presented for payment on the 28th December 1922 when it was dishonoured. The petitioner thereafter made various efforts to obtain payment of the two sums of Rs. 5,041 and 752, but without success. On a complaint of cheating against the opposite party *Held*, that although it was quite clear that the Petitioner was deceived and thereby induced to take bets on credit from the Opposite Party, it was not possible to say that the act which the Petitioner was induced to do by reason of such deception caused or was likely to cause damage or harm to him in body, mind, reputation or property. Nor was it certain that if the petitioner had refused to take bets on credit the opposite party would or certainly have had to offer bets by paying cash (*Ghose and Cumming, JJ*) H K BHEDWAR v RAO SHAHAB C S R RAO 27 C W. N 919 74 I C 76 24 Cr L J 748

—S 415—Insured cover not containing notes—If amounts to cheating

Where an insured postal cover which purports to contain currency notes is found on opening to contain only bits of waste paper, the act does not amount to cheating under S 415 I, P C (*C C Ghose and Cumming JJ*) RAMAN BEHARI ROY v EMPEROR 50 Cal 849 28 C W N 252 73 I C 780 24 Cr L J 684

—S 415—Proximate conviction—Proof of

To convict a person for cheating, it is necessary to show that there is a proximate connection between deception practised on the complainant and his being induced to part with some property—If the connection is too remote or very indirect the offence of cheating would not be complete (*Sulaiman, J*) SARDA SARAN v EMPEROR 21 A L J 873 90 & A L R 968

—S 415—Sending an insured letter containing Khilafat Bonds—If amounts to cheating

A debtor on being pressed by his creditor promised to send him money insured and an insured cover when opened by the creditor contained Khilafat notes instead of Government currency notes *Held*, whatever other offence it might be it does not amount to cheating or attempting to cheat (*Sulaiman, J*) TULA RAM v EMPEROR 21 A L J. 865 90 & A L R 973.

—S 415—Supplying wagons to colliery siding—If amounts to delivery—Causing damage—What is

By means of wrong entries more wagons were sent to a colliery siding than it was entitled to *Held*, this does not amount to "a delivery of property" so as to constitute the offence of cheating

## PENAL CODE, S. 426

Where cheating by causing damage is the charge, the offence does not necessarily involve fraud or dishonesty. The resulting damage need not have been in the actual contemplation of the accused when deceit was practised, but the person deceived must have acted under the influence of the deceit, the facts must establish damage or likelihood of the same and such damage ought not to be too remote. (*Richardson and Suhrwardy, JJ*) SUPERINTENDENT AND REMEMBRANCE OF BEGAL AFFAIRS, BENGAL v MANMATHANATH BHUSAN CHATTERJEA 28 C W N 160

—S 420—Cheating—Broker—Advance secured by promote—Supply of paddy

Where there was a long series of mutual transactions between a milling firm and one of its own brokers, and there was no question of his absconding and he did supply some paddy and the evidence of the clerks showed that the broker had given at least one person an advance (which means earnest money) for the purchase of paddy *Held* there was no irresistible inference that the accused broker wanted to cause wrongful loss and there was no evidence that he had deliberately made a false representation, knowing or having reason to believe it to be false (*May Aug, J*) MAUNG PO LU v EMPEROR 1 Rang 397 2 Bur L J 139 1924 Rang 81

—S 420—Cheating—False representation—Elements of the offence

In a criminal Court it has to be shown that the man who plays the part of the confidence man is putting forward what he knows to be untrue and is in many cases, share in the proceeds (*Walsh, J*) JODHA SINGH v EMPEROR L R 4 A 83 (Cr) 1923 A 285

—S 420—Hire purchase arrangement—Sale before whole purchase money is paid.

A person who takes property under a hire purchase arrangement, but sells it before the instalments are paid commits criminal breach of trust (*Walsh, J*) CADD v EMPEROR 45 A 588 21 A L J 510 L R 4 A. 118 (Cr) 73 I C 508 24 Cr L J 620 1923 A 598

—S 420—Intention—Payment denied—Recovery of sum not due

Petitioner was convicted of cheating on the ground that in spite of receiving from his debtor cash and cattle in payment of what he owed him, he gave him notice later on for payment of the debt originally due, and denied what he had already received *Held* there was nothing to show that the petitioner received payment with the preconceived intention of denying it later on. If he subsequently denied it he cannot be said to have cheated the debtor though this conduct of him was highly reprehensible (*Zafar Ali, J*) RAM SARAN v. EMPEROR 1923 Lah. 621

—S 420—Offence under—If compoundable in revision before the High Court See Cr P Code S 345 (5 A) 21 A. L J. 838

—Ss. 426 and 447—Mischief—Criminal trespass—Criminal intention—Absence of

## PENAL CODE, S. 426.

To sustain a conviction under Ss 426 and 447 I P C the presence of a criminal intention is necessary (*Abdul Quadir, J*) BANARSI DAS v EMPEROR 1923 Lah. 92

—S. 426—Tenant removing earth—Bona fide exercise of right—If an offence

Where a tenant removed earth in the bona fide exercise of his right and the landlord complained the dispute is one of a civil nature between landlord and tenant and is not an offence under S 426 I P C (*Ryvese, J*) HUKUM CHAND v EMPEROR 73 I C 805 (1) 24 Cr L J 693 (1) 1923 A 544 (2)

—S. 430—Mischief—No finding as to ownership of property

No person can commit mischief in respect of property which belongs exclusively to himself *Held*, that in the present case the conviction was bad because there was no finding, and indeed it appeared to be contrary to the evidence that the property, that is, the channel to which charge was caused, was at the point where it was blocked up, the property of any other man than the accused, (*Ashworth, A J C*) KESHO SINGH v EMPEROR 90 & A L R 10 72 I C 883 (1) 24 Cr L J 467 (1)

—S. 430—Obstructing supply channel Offence

If a supply channel is obstructed by means of a dam with the intention to cause or with knowledge that it was likely to cause wrongful loss to any person, it constitutes mischief. If the act causes a diminution of water, the offence falls under S 430 I P C (*Krishnan, J*) DEENABANDU RAJAGARU v VISVASARAYI LACHANNA DORA (1923) M. W. N 634 74 I C 862 24 Cr L J 830

—S. 430—Offence under — Mischief—Erecting a bund across a channel

Where the accused was charged under S 430 I P C for having erected a bund across a channel flowing through his land with the result that the supply of water to the complainant's land was reduced, *held* that in the absence of a claim of easement or contract for the supply of water by the complainant, the accused could not be convicted, (*Krishnan, J*) BUDDA REDDI *In re* 44 M L J 234 1923 Mad. 141

—Ss 441, 447—Servant of landlord taking possession of tenant's land—If offence.

Where the servant of a landlord illegally takes possession of the tenant's land with the main object of illegally ejecting the tenant, an intention to annoy cannot be presumed, unless there are other circumstances from which such an inference can be drawn (*Dalal, J C*) ABDUL SHAKUR v EMPEROR. 90 & A. I. R. 638

—S. 442—Entry, meaning of

The mere putting of a hand into a hole in the wall without putting it through the hole is not an entry into the house within the meaning of S 442, I P C. (*Scott-Smith, J*) GHULAM v EMPEROR 4 Lah. 399 1923 Lah. 509

## PENAL CODE, S. 448

—Ss 445 and 457—Offence under S 457—Elements of—"Fastened" meaning of *See* (1921) DIG COL 904, LEDGA v EMPEROR 6 N L J 37

—S. 447—Criminal trespass—Act of servant under authority of master

Where a servant acting under the instructions of his master and in the course of his employment trespasses on the property of another S 447 I P C does not apply (*Macgregor, J*) MG SHWE KYI v EMPEROR 1 Bur L J 276 1923 Rang. 135 (1)

—S. 447—Criminal trespass—Complainant not in possession of property—Trespass

A magistrate held certain arrack sales in his Court and the accused was alleged to have entered into the Court premises and intimidated the complainant a prospective bidder *Held* that the complainant not being in possession of the court house a complaint by him for criminal trespass was not maintainable (*Spencer J*) AVUDAYAPPA MUDALIAR *In re* 18 L W. 181 (1923) M. W. N 451 33 M. L. T. 184 (H C) 74 I C 856 24 Cr L J 824 1924 Mad. 40

—S. 447—Criminal trespass—Tenant—holding over—Forcible entry—Offence

Where a tenant is holding over it is not open to the landlord to re enter the land without determining the tenancy in accordance with law and if he does so with force he will be guilty of an offence under S 447 of the I P C. (*May Oung, J*) MAUNG SAN MYIN v EMPEROR 2 Bur. L J 37 1923 Rang. 245

—S. 447—Essentials for conviction

To amount to an offence under S 447, I P C, the property trespassed upon must be proved to belong to the complainant and there must be an intention to commit an offence or to intimidate, insult or annoy any person (*Moti Sagar, J*) BISHEN SINGH v EMPEROR 74 I C 534 24 Cr L J 790

—S. 447—Essentials of offence—Annoyance or insult.

The main ingredients of S 447, I P C is that the trespass must be with the intention of annoyance or insulting some one, or must be with the intention of committing an offence. Where there is nothing on the record to show any such intention the conviction of a criminal trespass is impossible (*Sultan Ahmed, J*) DAMODAR DAS v EMPEROR 1923 P 56

—S. 447—Landlord if can complain—Land in possession of tenant

Where the accused entered upon property in the possession of a tenant with intent to commit an offence or to intimidate, insult or annoy that tenant he is guilty of criminal trespass. A complaint by the landlord is sufficient to set the law in motion just as much as a complaint by the tenant (*Chevis, J*) FAKIR CHAND v FAKIR 69 I C 379 23 Cr L J. 699

—S. 448—Criminal Trespass—Thandika property—Entry by member of the public

## PENAL CODE, S 448

Where the rayat in question is admitted to be Thandika property, a member of the public has *prima facie* a right to enter it for religious purposes. The onus lies on the complainant to show that he has a right to exclude the accused. In any event the question is one of great complexity and ought not to be litigated in a summary criminal trial. Consequently the accused a member of the public ought not to be convicted for criminal trespass for having *bona fide* entered on the property (*Lentaigne, J*) MAUNG SHWE KU v EMPEROR  
2 Bur L J 55 75 I C 353 (2)  
24 Cr. L J 929 (2) 1923 Rang 157

—Ss 448 and 452—Elements of offence—House trespass

Where house trespass was committed, but no further fact was found from which it can be held that the accused committed house trespass having made preparation for causing hurt to any person or for assaulting any person, his conviction under S 452 I P C is bad (*Newbould and Sulua waiay, JJ*) FAKIR CHANDRA DE v EMPEROR  
38 C L J 161

—S 448—Trespass—Head man holding court in private building

A headman was holding Court in his private building and the appellant a relation of the accused went in to watch the proceedings. The appellant was ordered to withdraw but remained to witness the trial. The appellant was then charged under S 448 I P C. Held that the appellant not having said or done anything from which an intent to intimidate, insult or annoy might be inferred, he was not guilty of any offence (*May Oung, J.*) NGA PO YA v EMPEROR.  
2 Bur L J 17 1923 Rang 145

—S 457—Charge of house trespass for committing theft—Conviction for trespass with another object—Legality of

Though it cannot be laid down as a general rule that in all cases a prosecution for house trespass with the alleged object of theft must fail if that object is not proved, yet when a charge has been definitely framed in which theft is alleged the accused cannot be convicted of house trespass with some other object without an amendment of the original charge unless the court is satisfied that he has not been in any way prejudiced in his defence by the omission to amend the charge. 16 W N 696, 41 C 743 (*Newbould and Ghose, JJ*) HAJARI SONAR v EMPEROR  
71 I C 247 24 Cr. L J 119

—S. 458—Scope of,

S 458, I P C. only applies to the house breaker who actually has himself made preparation for causing hurt to any person or for assaulting any person or for wrongfully restraining any person and so on, and not to his companions as well who themselves have not made such preparation (*Scott-Smith, J*) GHULAM v, EMPEROR  
4 Lah. 399 1923 Lah 509

—S. 464—Expert evidence—Not corroborated—Expert not called as witness,

Conviction under S 465 based only upon the uncorroborated statement of a finger print expert is bad, especially when he has not been called as

Y. D.—69

## PENAL CODE, S 498

a witness and cross examined by the accused 1922 Pat 73, Rej (*Moti Sagar, J*) JASSU RAM v EMPEROR  
4 Lah 246 1923 Lah 622

—S 464—False document—Kabinnama—Intention to claim property

A Mahomedan who executes a false kabinnama in favour of his alleged wife within the intention of claiming her property is not guilty of making a 'false document' within the meaning of S 464 I P C (*Sanderson, C J and Panton, J.*) GUNJAR MAHOMED v SHURU/ ALI  
69 I C 451 23 Cr L J 723.

—Ss. 464 and 465—Making false document—Addition to entries in account book

Every false or fabricated document is not a forged document. There must be acts that constitute the document a false or fabricated one, that is to say, the case must fall within S 464 and the false document must have the character or tendency described in S. 463, I P C. An entry in his books by the creditor making an assertion of a right to interest not purporting to have been agreed to by the debtor does not constitute an offence under Ss 464 and 465, I P C (*Scott Smith, J*) BADAN SINGH v EMPEROR  
1923 Lah 11 (1)

—S 471—Guilty intention necessary

A finding that the articles were possessed by the accused dishonestly with the knowledge or with reason to believe that they were stolen property is necessary for conviction. Mere possession of stolen property is no offence. To retain valuable property which does not belong to the accused does not in itself prove that a man's possession is dishonest (*Campbell, J*) ARJAN DAS v EMPEROR  
1923 Lah 340

—S 494—Bigamy—Daughter married by mother without father's knowledge—Subsequent marriage arranged by father. See (1922) DIG COL 906 GAUA NAND v, EMPEROR

71 I C 215 24 Cr L J 87 64 I C 500

—S 494—Bigamy—Mahomedan law—Ahamadiyans—Apostacy—Re marriage

The Ahamadiya faith is within the pale of Mahomedanism and a Mussalman who embraces the Ahamadiya faith does not become an apostate. Where a Mahomedan husband becomes an Ahamadiya and thereafter the wife treating him as an apostate marries another, she is guilty of bigamy. There is no question of the application of *Meusrea* in the case of offence under S. 494, I P C (*Oldfield and Krishnan, JJ*) NARANTA KATH AVULLAH v PARAKKAL MAMMU,  
71 I C 65 24 Cr L J. 17 1923 Mad 171.

—S. 498—Complaint by husband—Death of husband—Prosecution if abates

A criminal prosecution does not abate merely on account of the death of the injured party. A husband filed a complaint against certain persons charging them with having abducted his wife. After the trial had come to an end and judgment was reserved the husband died. Held that the prosecution did not abate on the death of the husband and that the accused could be convicted of an offence under S 498 of I P C, 25 P. R.

## PENAL CODE, S 498

1919, 2 Lah 27, 44 M 417 followed (*Broadway and Martineau, JJ*) *EMPEROR v MAUJ DIN*  
4 Lah 7 71 I C, 77 24 Cr L J 29

—S 498—Continuing offence—Prosecution—Acquittal prior to charge—Effect *See* (1922) DIG COL 1098 *NADAR v EMPEROR*  
24 Cr L J, 636 73 I C 524

—S 498—Kidnapping minor girl and theft of jewels—No allegation of intention to have illicit intercourse—Offence

Where the complaint was of the offence of kidnapping and theft of jewels, and there was no allegation that the purpose was to have illicit intercourse *Held* a conviction under S 498 was illegal (*Spencer, J*) *In re ARUNACHALAM CHETTY*  
45 M L J 543 (2) (1923) M W N 876  
74 I C 949 24 Cr, L J 837

—S 498—What constitutes offence

It is clear that to constitute an offence under S. 498, it is not necessary that the woman should be physically restrained or that she be actively prevented from the exercise of her free will or action—The gravamen of the offence consists as held in 4 M. H. C. R. 20, in depriving the husband of his proper control over his wife for the purposes specified in S 498 and a detention occasioning such deprivation may be brought about by means other than mere physical constraint e.g., even by the influence of allurements and persuasions (*Moti Sagar, J*) *RATI RAM v EMPEROR*  
69 I C 458 23 Cr L J 780 1923 Lah 45

—Ss 499, 500—Defamation—Libel—Publication—Imputing ingratitude—Complaint—What should contain

To constitute the offence of defamation, there must be publication to a stranger of the libel complained of. To maintain a prosecution in a particular court, there must be a publication within the jurisdiction of the court.

The original of the libel alleged should be adduced in evidence. The complaint need not contain the specific letter in which the libellous passage occurs, provided the charge is specific and the defamatory words are mentioned therein. *Quere* if a charge of ingratitude is defamatory (*Odgers and Hughes, JJ*) *BURKE v, SKIPP*

45 M L J, 754 18 L W 718  
33 M L T 168 (H C). (1923) M W N 913

—S 499—Exception 7—Defamation—Good faith—Head of Caste—Ex-communication—Ex parte edict—Bona fides

Caste associations are autonomous, the powers vested in their constituted heads being, subject to any special custom, those necessary for the protection of the interests committed to their charge. The Court's only duty is to see that these powers are exercised in accordance with the principles of natural justice, that is, in the majority of cases, after the person to be affected by their exercise has been heard and his defence has received fair consideration. Where the head of a caste issued a temporary interdict against two members of the caste on the ground that they broke the caste rules by intermingling with Panchamas, and in order to prevent the two members from taking part in a caste dinner which was coming off

## PENAL CODE, S 503

immediately the Swami passed an ex parte order of prohibition. *Held* that in the absence of anything to show that the head of the caste was not going to follow up the temporary edict with his final decision after hearing the persons affected, he could not be convicted of the offence of defamation. Exception 7 to S. 499 I P C applies a, his case (*Oldfield and Ramesam, JJ*) *HIS HOLINESS SRI SUKRATHENDRA THIRTHA SWAMIAR v PRABHU*  
45 M L J 116  
17 L W 500 72 I C, 165 24 Cr L J 325  
1923 Mad 587.

—S 499 Exp. 9—Defamation—Good faith—Privilege *See* (1922) DIG COL 907 *BANGA CHANDRA DE v, ANNODA CHARAN CHOWDHURY*  
69 I C 269 23 Cr L J 685

—S. 449 Exception 9—Defamation—Complainant privilege—Extent of *See* (1922) DIG COL 907 *DINSHAW EDALJI v JEHANGIR COWASJI*  
47 Bom 15

—S 500—Defamation—Abuse—Heat of passion—Offence—Penalty

Where in the heat of passion abusive words are exchanged between two persons the offence does not require a severe sentence (*May Oung, J*) *MAUNG MAUNG v EMPEROR*  
2 Bur L J 10 1923 Rang 148

—S 500—Excommunication from caste—publication—Defamation

Where a number of persons professing a particular faith met together and resolved for proper reasons not to associate with a person excommunicated by their religious head and sent a copy of the resolution to the person in question it does not amount to defamation (*Pratt, J*) *NGA ON THIN v EMPEROR*  
1923 Rang 16

—S. 503—Offence under—Self-Constituted panchayat—Service of notice of claim and of notice of day fixed for hearing

The accused was the President of a self constituted Arbitration Court. He caused a notice to be sent over his signature to the complainant asking him to be present on a certain date and defend a certain claim which had been made in the arbitration Court. The notice recited that if the defendant did not appear and give an answer on that date the suit would be decreed ex parte. *Held* that the accused was guilty of an offence under S 503, I P C, *Per Buckland, J* on a difference of opinion between (*Newbould and Suhrawardy, JJ*)

A threat of a decree is a threat of harm to an individual in his person, reputation or property and it is immaterial that the tribunal is incompetent to execute its decree (*Buckland, J*) *PRIYA NATH GUPTA v LAL JHI CHOWKIDAR*

37 C L J 526 27 C W N 479 72 I C 508  
24 Cr. L J 396 1923 Cal. 590

—Ss 503 and 506—Offence—When complete

The accused demanded of the complainant certain property of theirs in the possession of the latter and used threats. *Held*, the offence of criminal intimidation was complete even if the object of getting possession was not achieved (*Sulaiman, J.*) *ONKAR v EMPEROR*  
21 A. L J 877,

## PENAL CODE, S 511

## —Ss 511 and 420—Attempt—Preparation—Cheating

There is a wide difference between the preparation and an attempt to commit an offence. Preparation consists in devising or arranging means necessary for the commission of an offence while an attempt is the direct movement towards the commission after the preparations are made. In the case of a mere preparation the Court assumes that better reason would prevail at any moment and the man would change his intention to commit a crime before the actual consummation hereof. Where a clerk in a Railway company to weigh goods entered the gross weight of certain goods at a figure above its actual weight in a register but had not filled up other particulars fixing liability upon the railway company the writing of the false figure constituted a mere preparation for commission of the offence of cheating and was therefore not punishable (*Jwala Prasad, J*) LAKSHMI PRASAD *v* EMPEROR 1923 P 307

## —S 560—Evidence of general reputation of the person defamed—Relevancy

In an action for damages for libel or slander evidence may be given in mitigation of damages to show that the plaintiff had general bad character (8 Q B D. 491 and *Odgers Libel and Slander* 5th Edition page 402), Similarly in criminal prosecution where it is essential, in order to constitute the offence of defamation, that the person who makes or publishes the imputation complained of, should intend to harm, or know or have reason to believe that the imputation will harm the reputation of the person concerning whom it is made or published, the question what reputation the complainant had, is relevant if it is proved that the complainant had notoriously bad reputation as a bribe taker the imputation made as to his having taken a bribe on the particular occasion even if false could not damage his reputation as he had none to lose (*Martineau, J*) DEVI DIAL *v* CROWN 4 Lah 55 1923 Lah, 225 73 I C, 805 (2) 24 Cr L J, 693 (2)

PENSIONS ACT (1871) Ss 511 and 420—Attempt—Preparation—Cheating Sec (1922) DIG, COL, 908 LAKSHMI PRASAD *v* EMPEROR (1923) P 307

## PLEADINGS—Alternative relief claimed—Grant of one—Effect

Where the plaintiff asks for one of two alternative reliefs and he is granted one of them he cannot afterwards say he does not want the relief he has been granted but desires to have the other one (*Sanderson, C J and Ghose J*) REAUDDIN PATWARI *v* SYED ABDUL JOBBAR 69 I C 504

## —Alternative reliefs—Grant of one—If plaintiff can claim both in appeal

A plaint for declaration of title or in the alternative for joint possession was filed and the declaration was granted. Held the plaintiff cannot be heard to claim that joint possession also should be decreed (*Piggott, J*) MT SARJO KUAR *v* SHEKH ENAIT 74 I C, 331

## PLEADINGS

## —Case not specific in plaint—Prejudice

Where in the plaint an allegation was made that the karnavan used forward money in effecting a transaction in favour of his daughter, but it did not specifically say that the deed was benami or that it was meant to be a gift, the daughter is not prejudiced in her defence as she has at all events to show how the money came to her and if she knows of its character, (*Oldfield and Devadoss, JJ*) MEENAKSHI NETHIAR AMMA *v* CHERIYA PAR VATHI NETHIAR (1923) M W N 657 74 I C 1012,

## —Case set up in plaint not proved—Effect

Where the plaintiff fails entirely to prove case of adoption set up in the plaint, he cannot succeed to the extent of one item of property as regards which one of the defendants admits his claim, the adoption cannot be valid so as to affect that item alone (*Lindsay and Sulaiman JJ*) KUNDAN LAL *v* MAKUNNI KUNWAR 45 All 571

## —Inconsistent claims—Alternatives—

A claim of ownership and a right of easement can only be advanced in the alternative, (*Ghose, J*) AMRITANATH BISWAS *v* JOGENDRA CHANDRA BATTACHARJEE 69 I C, 183 (2)

## —New case—Suit for possession—Mortgage challenged as fraudulent—Redemption

Where a plaintiff has sued for possession on the ground that a mortgage of the property was fraudulent and void and fails in proving his case he cannot turn round and change his case and claim redemption, on the footing that the mortgage is good and enforceable 17 C W N 219 5 C L J 527, 5 C L J, 653 3 C W N 325 Ref (*Chatterjee and Pearson, JJ*) NITYA GOPAL TEWARY *v* RAMSAST ROY 1923 Cal 296

## —Point of limitation under special law—To be Specifically set out—Effect of failure—If can be raised in appeal for the first time Sec C P CODE O 8, R 2 69 I C, 194

## —Proof—Variation—When permitted

The principle is well established namely, that the determination in a cause should be founded upon a case either to be found in the pleadings or involved and consistent with the case thereby made 11 M I, A 7, 14 C 801, 33 C L J 171, 18 C W N 473, 34 C L J 178 34 C L J 319, 34 C L J, 529 referred to (*Mookerjee and Chotner, JJ*) ANNADACHARAN SIL *v* HARGOBIND SIL.

27 C W N 496 37 C L J 552 75 I C 557 1923 Cal 570

## —Scope of—Plea that debt not binding

In a suit to recover from the properties of a mutt debts incurred by a deceased matahipati, a plea that 'the debts are not binding as they were not and could not have been contracted for its benefit' includes both the legitimacy of the purpose for which the debt was borrowed and the necessity to borrow (*Krishnan and Ramesam, JJ*) LAKSHMINDRA THIRTHASWAMIAR *v* VIJUDHA-PRIYA THIRTHASWAMIAR

44 M L J 187 17 L W, 274 72 I C 109 1923 Mad, 288.

## —Suit for rent—Lease not proved—Use and occupation

## PLEADINGS

In a suit for rent, where the lease deed is for some reason not admissible in evidence, a decree can be given on the basis of use and occupation (*Ashworth, J. C.*) *AJODHYA SINGH v KAIWAN BABU NAWAB KHUSRO BEGUM*

90 & A L R 321 74 I, C, 582

**POLICE ACT (1861) S 29—Escape of prisoner—Police custody—Negligence—Offence**

An under trial prisoner was being conducted from one place to another by the usual mode of conveyance available, namely, a camel cart and the prisoner in the course of a dark night cut the rope tied round his hands and made his escape when he was allowed to get down to make water. Held that the constables could not be convicted of an offence under S 29 of the Police Act, inasmuch as they were not guilty of breach or neglect of any rule while escorting the prisoner (*Dalal, J. C.*) *EMPEROR v GANESH PRASAD*

90 & A L R 928

—S 29—Alternative case—Suit on tenancy—Decree on the strength of permissive possession See (1922) DIG COL 910, *BALKISHAN v RAGHUBAR DAYAL*

45 All 81

74 I C 991 1923 A 409

—Ss 30 and 32—Resistance—Execution of law or any legal process—Offence created by statute—By Law—Force of—Notification under the Police Act prohibiting meetings in general

*Per Mullick and Coutts, JJ (Das, J., dissenting)* The words of S 30 of the Police Act are sufficiently general to enable the superintendent of Police to issue a general notification containing a prohibition against convening or collecting assemblies or directing or promoting processions without license. If the person or persons against whom the notice is directed convene or collect an assembly or promote or direct a procession without license he or they will be punishable under S 32 of the Act.

There is nothing in the Act which renders a person liable to punishment for joining an assembly or procession which has already been convened or collected if he has no notice that the convenor or promoter has omitted to take out a licence but if after becoming aware that the person whose duty it was to take out a license has failed to do so, he persists in remaining with the assembly or procession then it may be said that he shares the common subject of such persons to resist the execution of the Superintendent's order. His conduct may then amount to an offence under S 141, I P C.

When a notification is issued by an executive authority in exercise of a power conferred by statute, that notification is as much a part of the law as it had been incorporated within the body of the statute at the time of its enactment. The command is in every respect, a command by the appropriate legislative authority (*Mullick Coutts and Das, JJ.*) *EMPEROR ABDUL HAMID*,

1 Pat L R 199 (Cr)

2 Pat 134 1923 P 1

**POSSESSION—Actual possession not possible—Effect** See (1922) DIG, COL 911 *LALA GIRJA PRASAD v JUDAS KISHORE*

70 I. C 853

## PRACTICE

**PRACTICE—Abandonment of point—If can be raised again** See (1922) DIG COL 912 *DODDAIA v YELLAWA*

70 I C 417

—Alternative reliefs claimed—Grant of one—If can claim the other See PLEADINGS

69 I C 504

—Appeal—Dismissal for default—It bars a fresh appeal See APPEAL

4 Pat L T 405

—Appeal—Party relying on documents must pay for printing

When a person has obtained a decree in his favour the onus is on the appellant in a Court of Appeal to show that the decision is wrong. This proposition no doubt is generally correct. But it is not the duty of the defendant appellant to get those documents printed upon which the plaintiff respondent relied in the Court below and on which to rely in the High Court. (*Scott Smith and Moti Sagar, JJ.*) *KARTAR SINGH v LABH SINGH*

5 Lah L J 190 74 I C 685 1923 Lah 355

—Appeal—Question of fact appeal on—inding of fact—When to be disturbed on appeal

In all cases where there is an appeal on questions of fact, it is a good working rule that the appellate tribunal will not lightly interfere with the findings of fact of the Court below. This rule applies most strongly where there has been a conflict of oral testimony and the judge had the advantage of seeing the witnesses and of observing their demeanour. But it is a rule which should not be pressed too far for there are many cases where there has been a conflict of evidence in the Court below in which the Court of appeal is bound to give effect to its own view if it differs from that of the judge, e.g., probabilities may be strongly against the view of the judge or there may be documents consistent with the evidence of appellant and inconsistent with that of respondent etc. The demeanour of witnesses is not invariably a safe guide to the truth of their evidence (*Schwabe, C J and Krishnan, J.*) *ADAM HAJI PEERA MOHOMED ISHACK v SACAVATH HUSSAIN AKBARI*

70 I C 736 1923 Mad 103.

—Appellate court—New plea—Question of law—Interpretation of document

A question depending on the interpretation of a cause in a deed is one of law and may be raised for the first time on appeal. (*Robinson, C J and Macgregor JJ.*) *KO THINE v ISMAIL CASSIM MORAD*

69 I C 204 1923 Rang. 61.

—Appellate Court—New plea—Question of law—Duty to entertain

Where a question of law raised for the first time before an appellate court turns upon the construction of a document or upon facts admitted or proved, the appellate court is bound to entertain the plea (*Lord Atkinson*) *THE YORKSHIRE INSURANCE v, THOMAS CRAINE*

32 M L T (P C.) 25 (P C.).

—Appellate Court—New plea—When entertained

An appellate Court is not competent to base its decision upon a point which was neither asserted

## PRACTICE

nor put in issue and about which evidence was not let in. (*Leslie Jones and Dundas, JJ*) MANGAL SINGH v MAHMAN SINGH 5 Lah L J 17

—— Appellate Court—New question of fact—When allowed See (1922) DIG COL 13 KUAR NAGESHAR SAHAI v KUAR MATA PRASAD 69 I C 730

—— Bombay High Court — Notice of motion—Limitation—Filing of notice with Prothonotary — Sufficiency of—See BOMBAY RENT ACT S 10 A 25 Bom L R 484

—— Change in relief claimed—Appeal

Where the relief claimed in appeal is entirely different from that claimed in the courts below, the application should be dismissed (*Burn, J M*) MIRZA EZA/ ALI BEG v AMIR ULLAH 17 L W 627 32 M L T. (H C) 296 72 I, C 668 1923 Mad 581.

—— Chief Court—Punjab—Rulings of—Value due to North West—Frontier Province

There is invariably a presumption that Punjab rulings should be followed in preference to those of the Allahabad High Court in the Courts of the North West Frontier Province (*Pipon, J C*), AYA RAM v PARSHOTAM LAL 71 I C 145

—— Commissioner—Powers of—Examination of witnesses—Discretion,

The Commissioner appointed by the Court has complete power to stop proceedings and to take the direction of the Court whenever it appears to him that the pleader cross examining a witness is abusing his position, and exceeding the limits of propriety, and the Court, in appointing a Commissioner should in each case give him instructions so as to make it clear to him that he is not so powerless as it is imagined, and that he should exercise his power and stop proceedings for the purpose of taking the direction of the Court whenever he should think that it is necessary to do so, (*Das and Adams, JJ*) MT BIBI KANIZ ZAINAB v SYED MOBARAK HUSSAIN 72 I, C 748

—— Costs—Divorce proceedings—Liability of husband—Rule and exceptions—Appeal See DIVORCE 45 M L J 327

—— Courts if can take notice of later events See (1922) DIG COL 914 DINANATH MAHISH v NABAKUMAR HAJRA 70 I C 542.

—— Criminal appeal dismissal for default

There being no provision in the Cr P Code to dismiss an appeal for default of appearance, the court should in such cases peruse the records and decide the appeal judicially (*Stuart, J*) RAM CHANDAR v EMPEROR 21 A L J. 100 73 I C 694 24 Cr L J 662 L R 4 A 7 1923 A 175 (2)

—— Death of party—Decree

It is illegal on the part of a court to continue to hear a suit against a dead person, whose death had been brought to its notice and to pass a decree against that person (*Abdul Raoof and Campbell, JJ*) DEBI PERSHAD v. MT BHAGO 5 Lah. L J 187

74 I. C 682 1924 Lah. 33

## PRACTICE

—— Default of appearance—Fault of party or his legal advisers—Proper course for the Court — Costs sufficient punishment for party in default

It is contrary to principles of natural justice, that cases should be decided on the hearing of one side only if the other side is ready and willing to be heard In such case adequate punishment is to be found in the remedy of costs

Where the defendants did not appear owing to a mistake of their Vakil and owing partly to their not having received a telegram which had been sent by their Vakil in such time that if it had been received in the normal course, he would have got them on the second day of hearing, it is not a fit case for trying the suit *ex parte* against the defendants (*Schwabe, C J. and Wallace, J*) LAKSHMINARAYANA v THE STANDARD OIL COMPANY, NEW YORK 44 M L J 488 17 L W 627 32 M L T. (H C) 296 72 I, C 668 1923 Mad 581.

—— Delay in Indian litigation—Expression of disapproval by Privy Council

The Privy Council granted special leave to appeal with reluctance, regretting that notwithstanding their efforts, it had been impossible to accelerate the procedure of business in the Courts of India, so as to prevent instances of delays which bring discredit on the administration of justice (*Lord Buckmaster*) UDHAM SINGH v GURDIP SINGH 45 M L J 254 38 C, L, J 298 (P C)

—— Discovery—Order for—Hearing of preliminary issues

Where it is necessary before an order for discovery can be made that certain questions in suit should first be decided, the proper order is that the suit should be set down for the settlement of issues The judge would then be in a position to decide which of the issues were necessary to be determined before the question of inspection or discovery could be decided The same procedure should be followed when one party suggested that the suit could be decided on the hearing of a preliminary issue (*Macleod, C J and Crump, J*) THE EAGLE STAR AND BRITISH DOMINIONS INSURANCE CO v DINANATH 47 Bom 509 . 25 Bom L R 164 72 I C 266 . 1923 Bom 249

—— Document produced suspicious—Duty of Court

Where a certain document filed by one party is alleged to be a forgery, the Court is not bound to enquire into the details but the party alleging that it is a forgery must *prima facie* make out a case of forgery before asking the Court to reject the document as a forgery (*Coutts and Das, JJ*) LACHMI NARAIN v MUKHARAM MARWARI 72 I C 971 24 Cr L J 507 (1923) P 31

—— Ejectment — Redemption could be decreed.

A Court can in its discretion pass a decree for redemption in a case in which the plaintiffs have sued in ejectment (*Broadway, J*) PALU v RASHLU. 1923 Lah. 675.



## PRACTICE

—Examination of witnesses on commission—*Propriety*

Examination of witnesses on commission should not be allowed except in exceptional circumstances as the judge is thereby prevented from seeing the demeanour of witness etc. This is specially so when he is accused of fraud. Long delay in submitting the report after the examination on commission is a grave irregularity (*Lord Atkinson*.) SATISH CHANDRA CHATTERJEE *v* KUMAR SATISH KANTHA ROY 45 M L J 363 33 M L T 325 (P C) 73 I C 391 (1923) P C 73

—Ex-parte order—Notice necessity of *See* (1922) DIG COL 915 MOHANLAL AMRIT LAL *v*, BAI MAHAJAVERI 70 I C 859 (1)

## —Findings—Point not put in issue, decision on

According to the plaint the only ground on which the plaintiffs came into Court was that there was a gift in favour of one R on condition that the land would revert to the donor if R's line died out. No other ground of claim was put forward, and the only issue upon which the parties went to trial was whether there was or was not a gift in favour of R of the type set up by the plaintiffs in their plaint. The trial Court found the gift established and decreed the plaintiff's claim. On appeal the lower appellate court found the gift not established and further found that the subject of the gift reverted to the donor on the failure of the direct descendants of the donee. Held this issue having been found against the plaintiffs the suit ought to have been dismissed and the defendant is fully justified in complaining that the lower appellate court has decided the case upon a point which had never been put in issue, and upon which the parties had never been given an opportunity of producing their evidence (*Moti Sagar J*) KIRPA *v* MT CHINTI 1923 Lah 530,

—High Court—Original Side—Commissioner's report—Objections to—Appeal from the decision of the Court—Final decree passed before hearing of the appeal—Effect of—Appeal from final decree,

In a case tried on the Original side of the High Court there was a reference to the Commissioner and on that reference, a report was made. The plaintiff filed exceptions to the Commissioner's report which were heard by the trial Judge. The plaintiff dissatisfied with the decision of the trial Judge filed an appeal and succeeded to a certain extent on the appeal. When the appeal proceedings were pending the case was set down before the trial Judge for directions and costs on the Commissioner's report. The Court having made an order on further directions a decree was drawn up. Held that while the hearing of the exceptions was pending in the Appellate Court the lower Court was not competent to hear any application for further direction on the Commissioner's report which had not been finally settled; and that as the lower Court had passed a final decree the remedy of the plaintiff was

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only by way of appeal from the decree (*Macleod, C J and Crump, J*) ELIAS HAJI AHMAD *v* HAJI ESMAIL SAIT 25 Bom L R 237 72 I C 401 (1) 1923 Bom 200

## —Injunction—Nuisance

A court ought not to grant an injunction on the ground of nuisance unless the nuisance, which is a question of fact, is proved, (*Marten and Fawcett, J J*.) SHA BULAKHIDAS JAMARDAS *v* SHAH GANPATRAM 1923 Bom 281

—Joinder of claims—Pro note—Suit upon and in the alternative upon the original consideration—Maintainability—Amendment of plaint—Suit upon pro note—Amendment so as to make it one upon original consideration also—Propriety,

There is no reason why a claim for money due based on the original loan or dealings should not be combined with a claim for the same money as due under a pro note. In case there is any difficulty in enforcing the note, the party is entitled to fall back on the original consideration.

Amendment of a plaint in a suit on a pro-note so as to make the suit one on the original consideration also upheld (*Krishnan, J*) SUNDARA IYER *v* ARUMUGAM PILLAI 44 M L J 361 17 L W 374 32 M L T (H C) 118 (1) 72 I C 325

—Judgment silent on points raised in memorandum of appeal—Presumption

Where an appellate judgment states specifically certain points were argued, but the memorandum of appeals contains other points besides, the presumption is that they were given up (*Harrison and Zafar Ali, JJ*) HARJI MAL *v* DEVI DITTA MAL 4 Lah 364

## —Judgment—Vague—Remarks,

Where the lower appellate court reverses the judgment of the lower court on the ground that the plaintiff has failed to discharge the burden of proof which lay very heavily upon him, and dismissed the suit, without at all considering the evidence. Held in second appeal that the appellate trial was not proper (*Gokul Prasad, J*) BHAGWAN SAHAI *v* GOPAL RAI 1923 A 412

—Judicial orders—Vacating of—Remedy by petition—Nullity

When the order and decree of a court is a nullity a party interested in showing it to be a nullity may apply to the court to vacate it and if the court is satisfied about the fact, it ought to do so. Such an application need not be filed under any section of the Code and the absence of a section does not render the application incompetent (*Spencer and Ramesam, JJ*) SUBBARAYA MUDALIAR *v* KANDASAMI MUDALI 32 M L T (H C) 124 70 I C 168 1923 Mad 58

## —Medical certificates

If a court sees good reason to distrust a medical certificate presented on behalf of a party, its proper course is to summon the doctor who has given the certificate and to insist upon his attendance. It is not fair to penalise a party on mere

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suspicion (*Mears C J and Piggot, J*) KRISHNA DASS v. RAM UGRAH SINGH 21 A L J 500  
L R 4 A. 423 74 I C 845 1923 A 549

—New plea—First appeal

Where the point is one of law and patent upon the face of the record it may be raised for the first time in appeal (*Moti Sagar, J*) JAINARAIN v RAMJI LAL 1923 Lah 608 (2)

—New plea—Non objection cures defect

Per *Marten, J*—Where the issue was wide and both parties led evidence on a point not concerned by the pleadings, no party can object to the evidence as being not covered by the pleadings (*Macleod, C J Marten and Crump, JJ*) ALFRED WILKINSON v WILKINSON, 47 Bom 843 25 Bom L R, 945 1923 Bom, 321

—New plea—Point of limitation—Not raised in court below—Effect See C P CODE S 100 17 L W 169

—New plea—Second appeal

When a point is not taken in the lower Court that is a conclusive bar on an appeal in High Court. As soon as it is established that the point ought to have been taken in the court of first instance the court should refuse to allow it to be raised in appeal (*Mears, C J and Banerji, J*) SYED SAMASUL HASAN v SYED HASAN 75 I C 612 1923 A 430

ON APPEAL FROM 1923 A 173 (2)

—Objection to admissibility of evidence—Effect of not taking

Where the objection as to inadmissibility of the deed was taken in the first Court in the written statement but was afterwards dropped and it was not taken in the grounds of appeal to the lower appellate Court held, no reason for remanding the case for an inquiry into the actual value of the property covered by the deed, was clearly made out (*Broadway and Campbell, JJ*) BASHES HAN NATH v MEHR CHAND 1923 Lah 21

—Parties—Same person if can be both plaintiff and defendant—Different capacities

The same individual even in different capacities cannot be both a plaintiff and defendant in one and the same action. When the same persons are both executors and beneficiaries under a will, all possible conflicting interests should be represented and some should represent the executors while the others can argue for their individual rights (*Heaton, C J and Marten, J*) JAMSHEDJI NAOROJI GAMADIA v SORABJI NAOROJI GAMADIA 25 Bom L R 1137

—Patna High Court—Effect of Calcutta High Court rulings, See (1922) Dig Col 916 AMRIT LAL v MURLIDHAR 1 Pat 651

—Plea not clearly set out—If can be allowed to be raised

Where in an ejectment suit, the defence set up was one of adoption and that failed, the defendant cannot fall back upon a claim as collateral

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Per *Pearson, J M* The claim as collateral is also involved in the claim as adopted son and hence can be enquired into (*Pearson, J M and Burn, J M*) RAJA RAM v SITAL PRASAD L R 4 All, 128 (Rev)

—Pleader's fees—Dismissal for default—Withdrawal of suit

A withdrawal of a suit after several witnesses have been examined is not tantamount to a dismissal for default and pleader's fees should not be calculated as in the case of a suit dismissed for default. In the case of a withdrawal the opposite party is entitled to his full costs (*Das and Adams, JJ*) RAMKISHEN DAS v BENI PRASAD 1923 P 90

—Pleader's fee—Suit for injunction—Valuation for purposes of Court fee—Taken as the basis for calculating pleader's fee See COURT FEES ACT S 7 Cl 4 (d) 69 I C 577

—Pleader's fee—Bombay High Court—Suit in ejectment—Valuation

In a suit to eject the defendant from a house, the property was valued at Rs 30 for purposes of jurisdiction and at Rs 5,000 for pleader's fees. Held that the pleader's fee was payable on 500 Rupees (*Macleod, C J, and Crump, J*) GULAM MOHIUDDIN v DAYABHAI 25 Bom L R 447 73 I C 442 (1) 1923 Bom 398

See also UNDER PLEADINGS.

—Pleadings—Alternative case—Right by prescription—Easement

A suit is not liable to be dismissed because the plaintiff claims in the alternative over the same plot of land both rights of ownership and easement 84 C 511 foll (*Kanharya Lal, J*) SRI RAM v MANI RAM 21 A L J 569 L R 5 A 24 74 I C 922

—Pleadings—Court's duty confined to

Courts should confine themselves to the pleadings of parties and not try to dispense justice unhampered by pleadings or evidence (*Dalal, J C*) SAHDEO v RAGHUBAR 90 & A L R 1089

—Pleadings—Limitation—Exemption from

When a suit or an application is in the face of it barred it is for the plaintiff or the applicant to satisfy the Court of the circumstances which prevent the statute from having its ordinary effect (*Daniels and Dalal, A J, C*) MIRZA YAQUB BEG v MIRZA RASUL BEG 10 O L J 86 74 I. C 517 1923 Oudh 254.

—Pleading and Proof—Variance between—Rule against—Scope of

As a general rule parties should be kept to their pleadings, but this is not of universal application and every variance between pleading and proof is not fatal. The rule that the pleading and proof must correspond is intended to serve a double purpose, first to appraise the defendant distinctly and specifically of the case he is called upon to answer, and secondly, to preserve an accurate record of the cause of action as a protection against second proceeding upon the same allegations. The test is whether the defendant will be taken by surprise if relief is granted on facts established by the evidence. A variance

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between a pleading and what is proved is immaterial unless it hampers a defence or unless it relates to an integral part of the cause of action. The court will depart from the rule that proof must conform to pleading where it is satisfied that justice will not be done between the parties if the suit were dismissed on a technical ground, with the prospect of a further litigation for the determination of a controversy then substantially ripe for settlement. (*Mookerjee and Chotzner, JJ*)  
**ANANDA CHANDRA CHAKRABARTI v BROJA LAL SINGH**  
 50 Cal 292 74 I C 793  
 1923 Cal 142

—Pleadings—Relief to be given as at the date of suit.

The general rule is that relief will be granted according to the state of things at the date of institution. Court is not precluded from granting the plaintiffs a declaration because that relief has ceased to be appropriate owing to events occurring after institution. (*Dalal and Simpson, A J, C*)  
**FATEH SINGH v JAGANNATH BAKHSH SINGH**  
 10 O L J 132  
 74 I C 549 1923 Oudh 242

—Point abandoned at admission stage—If can be argued at final disposal

A point which is abandoned by counsel when the case comes up for admission, cannot be allowed to be argued at the final disposal of the case. (*Pipon, J C*)  
**GHULAM HAIDAR v MANAGER, COM-MITTEE SAMADH BABA PHULA SINGH,**  
 73 I C 711

—Point not raised in lower court—If can be allowed in second appeal. See (1922) DIG COL 917. **PRITHI MAHTON v JAMSHED KHAN.**  
 1 Pat. 593

—Precedents—English Law

*Per Crump J*—The opinions of jurists, how ever eminent, are entitled to Indian Courts' respectful consideration but the Courts are not bound by those opinions, and the judgments of English Courts stand in the same category. (*Mac leod, C, J Marten and Crump, JJ*)  
**ALFRED WILKINSON v. G E N. WILKINSON**  
 47 Bom. 843 25 Bom L R 945  
 1923 Bom 321 (F B).

—Precedents—Subordinate Courts—Duty to follow its own High Court.

A lower Court is bound to follow the ruling of that High Court to which it is subordinate in preference to the rulings of other High Courts where the two courts differ. (*Gokul Prasad and Stuart, JJ.*)  
**BADRI PRASAD v. MOHAR SINGH**  
 1923 A 231

—Privy Council—Stay of execution—Order for.

The Privy Council ordered stay of execution of the decree which was the subject of appeal to them, on terms which were in variation of those imposed by the High Court. (*Lord Buckmaster*)  
**SHELA PRASAD SINGH v RANI PRAYAG KUMARI DEVI**  
 21 C W N. 1004 32 M L T 189 (P C)

—Procedure—Partition—Suit for—Preliminary decree declaring plaintiff's share—Defendant's death, subsequent to, and before final

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decree—Plaintiff becoming entitled to whole of suit property by survivorship—Procedure on—Application to bring deceased's daughter on record as legal representative—Application for amendment of plaint to include share of deceased also—Maintainability

In a suit by plaintiff against her sister for partition and possession of a moiety of the stridhanam property of their mother the defendant died after the passing of a preliminary decree, recognising plaintiff's right to half the property, but before the passing of a final decree after ascertainment, by metes and bounds, of such share. On applications by the plaintiff, one for having the deceased's daughter impleaded as her legal representative, and another for an amendment of the plaint to enable plaintiff to obtain a decree for the other moiety to which she claimed to be entitled by survivorship on the death of her sister, held that the first application ought to be granted, but that the 2nd must be dismissed.

The first that by the death of her sister the plaintiff has lost the character of a joint tenant and has acquired in its stead a right to the whole estate is not sufficient to deprive her of her original cause of action, when the proceedings have been instituted and have resulted in recognition of her right in a preliminary decree. The ascertainment of plaintiff's half share and the making of a final decree can be done against any person who like the person sought to be impleaded as legal representative has come into possession in succession to the deceased.

Application for amendment of the plaint—

The case is no exception to the ordinary rule that an amendment should not be made to introduce a new cause of action. The cause of action assumed in the amendment is the death of the plaintiff's sister, and that was not available when the original plaint was presented. Plaintiff must be left to sue separately for the other moiety. (*Oldfield and Devadoss, JJ*)  
**LAKSHMI AMMAL v ALAMELU AMMAL**  
 45 M L J 811  
 18 L W 874 (1923) M W N. 839

—Procedure—Plea of want of—Cause of action

The plaint must be read before anything else done and if it discloses no cause of action, the suit dies without reaching the point when jurisdiction can be discussed, or rather there can be no jurisdiction unless there be a cause of action. (*Harrison, J*)  
**JAWAHAR SINGH v N D SASSOON AND CO, KARRACHI.**  
 75 I. C 165  
 1923 Lah 290

—Receiver—Compromise—sanction of court—who to grant, See RECEIVER  
 25 Bom L. R. 1180

—Relief claimed under wrong provision of law—Effect

A court of justice should not refuse an application which on the merits it ought to grant, simply because the applicant asks the court to exercise its powers under a wrong provision of law. (*Abdul Raoof and Moti Sagar, JJ.*)  
**UTTAM SINGH v MT. RUTTA DEVI**  
 5 Lah L J 217 :  
 74 I C 688. 1924 Lah 28

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———Reversal and remand of—Suit—Point decided not open *See* (1922) DIG COL 1917  
**SYED SADAQ REZA v KHOSHMOHINI DASI**  
 71 I C 346

———Solicitor and client—Right to retain sum—belonging to client—Extent of the right *See*  
**CALCUTTA HIGH COURT RULES CH 36**  
 27 C. W N 537

———Substantive law and adjective law  
 Where there is a direct provision of positive Statutory law, that positive provision of substantive law cannot be overridden by the application of an adjective law (*Kennedy, J C Raymond and Kemp, A J C*) **MT HURI v ROSHAN KHU DABUX**  
 16 S L R 112  
 71 I C 161 1923 Sind 5

———Summons, issue of court's duty to enforce attendance *See* (1922) DIG COL 918, **JADU NANDAN SINGH v SHEONANDAN PRASAD SINGH**  
 1 Pat 644

———Trial—Arguments—Submission of written arguments—Propriety of

When a case has been fully argued before the Court it ought not to be necessary for the pleader to submit notes of their argument. It is the duty of the Court to take such notes of the arguments as it thinks fit when they are being submitted. If Judge feels that he has not fully appreciated any part of the arguments which have been submitted to him, it is open to him to call the parties before him so that any further arguments may be presented in open court in the presence of the other side. If it becomes necessary, as in some exceptional case it may become necessary, for the Court either to require or to receive notes of the pleader's arguments, such notes ought not to be submitted to the Court by the pleader on one side without first submitting the notes to the pleader on the other side. If in any case a pleader desires to submit to the Court the notes of his argument, or of any further argument, which he thinks in the interest of his client ought to be put before the Court, he should submit them to the pleader on the other side so that the latter may have an opportunity of making any remarks or any criticism in respect thereof. It is in any case highly undesirable for a Judge to accept notes of argument in the form of a draft judgment (*Sanderson, C J and Walmsley, J*) **AMJAD ALI v SURESH RANJAN PAL**  
 37 C L J 42  
 73 I C 706

———Vakalatnamah—Execution proceedings—Claim petition—Fresh petition if necessary

Where a decree holder's pleader has put in his Vakalatnamah in a proceeding in execution, it is not necessary that he should put in a fresh Vakalatnamah in a claim petition (*Macleod, C J and Crump, J*) **DAGDU RAJARAM v LAXMAN**  
 25 Bom L R 462 73 I C 455  
 1923 Bom 412 (1)

———Vakalatnamah—Name of pleader intended to be engaged not filled up—Effect of

Where the name of the pleader was left blank and it was clear that none but Mr. Jankar was intended to be employed and that he accepted the

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employment, the omission was a mere irregularity which does not vitiate his employment or the power of attorney (*Kotwal, A J C*) **MUL CHAND v RADHABAI**  
 6 N L J 179.  
 73 I C 251 1923 Nag 281

PRE-EMPTION *See also* UNDER MAHOMEDAN LAW.

———Agriculturist—Sheikhs—Notification by local Government

A sheikh who bore the title of "sheikh" not by reason of conversion but by reason of his membership of some tribe of sheikhs domiciled in other part of India, could not claim to be a member of the agricultural tribe of sheikhs as notified by the local Government in the Peshawar and Kohat Districts. When a person claiming the privileges of an agriculturist of the Kohat Districts is not even a member of any tribe of sheikhs but has merely received the application "sheikhs" by reason of conversion, it is inconceivable that he can thereby assume membership of the notified agricultural tribe. His title of sheikh however universally, conceded, is nothing more than an honourific appellation. It can no more alter the legal status of the recipient than any other appellation which is conferred upon him by popular opinion. He does not become a member of un-agricultural tribe and cannot without fulfilling the condition laid down in the proviso to S 11 of Act II of 1905 sue for pre-emption in respect of agricultural land (*Pipon, J C*) **MUAZAM SHER v. FAZAL RAHMAN**  
 71 I C 312

———Basis of

The law of pre-emption is derived from three sources, *i e*, Mahomedan Law, the necessities of the existence of the racial communities and public and private convenience. Necessity for pre-emption discussed (*Pipon, C J*) **MAHOMED ALI KHAN v MAKHAN SINGH**  
 73 I C 855

———Basis of—Contiguity—Three portions of house—If each should be adjacent

Where a house the subject of a suit for pre-emption consisted of 3 portions, the mere fact that all of them were part of a single house is not sufficient in law to claim pre-emption in respect of any particular portion if the latter is not independently subject to that right (*Moti Sagar, J*) **GENDA RAM v RAM CHANDER**  
 73 I C 1018.

———Basis of—Custom in the village

A person who was neither a co-sharer nor a relation of the vendor claimed pre-emption on the basis of residence in a village where there was a custom of pre-emption. *Held*, there was nothing unreasonable in such a claim and if the custom is proved, the right could be enforced (*Lindsay and Sulaman, JJ*) **GAYAN SINGH v BABU LAL**  
 21 A L J 822 L R 4 A 557  
 90 & A L R 1019.

———Cause of action arising subsequent to suit—Suit for money—What Court should do *See* C P CODE, O, 7, R 11 1923 Lah 590

———Claim must be for whole and not a portion.

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A would be pre-emptor cannot claim pre-emption of the property sold but must sue to take another whole bargain (*Campbell, J*) *ASA SINGH v JAG JIT SINGH* 73 I C, 679 1923 Lah 147 (2)

——— *Contract — Wajib ul-arz — Document containing extraneous matter*

Where the record, which is relied upon for the purpose of showing custom, contains a number of extraneous matters some of which could only have relation to a contract entered into between the parties and which could not possibly be based upon custom then it ought to be taken that the whole *Wajib ul-arz* is not properly a record of custom at all 16 A L J 879 *Foll (Rafique and Lindsay, JJ)* *SITA RAM TEWARI v FAUDAR RAI* 45 A 490 74 I C 315 1923 A, 525

——— *Contract — Waj b ul-arz — Reference to extraneous matters*

A *wajib-ul-arz* referred, besides pre-emption to other matters, namely, the manner of inheritance the powers of the widow in possession after her husband's death, the manner of succession when a deceased co-sharer left two widows and provisions for the exclusion of daughters and daughter's sons from inheritance *Held* that the *wajib-ul-arz* was a record of custom 18 A L J 879, 36 All 471, *Dist (Lindsay and Sulaiman, JJ)* *ALAMA CHAND v. CHHAJJI* 45 A 559 74 I C 339 1923 A 530

——— *Cosharers—Right of—Entries in wajib ul arz*

The *wajib-ul-arz* of 1860 and 1885 allowed pre-emption among co-sharers but differed in the order of preference but agreed that a near relation of the co-sharer was the first to be entitled to it *Held*, a suit based on such relationship was maintainable (*Lindsay and Sulaiman, JJ*) *DHANRAJ MISIR v RAMESHWAR MISIR* 21 A L J, 928 L R 5 A 14

——— *Custom—Arasidars*

Arasidars have no right of pre-emption according to custom (*Rafiq and Lindsay, JJ*) *SURWAN PRASAD TEWARI v BASDEO NARAIN SINGH* 45 A, 237 21 A L J 65 L R 4 A 57 74 I C, 124 1923 A 129

——— *Custom or contract—Wajib ul arz—Construction—Jis se razi ho—Meaning*

A *wajib ul-arz* provided that a co-sharer is at liberty to sell his share but that he must first offer it to co-sharers in his own *patli*, preference being given to near relations, that if none of the persons just mentioned were willing to take the property he is at liberty to sell to co-sharers in any other *thok* or *patli*. These words however were qualified by the addition of the words '*jis se razi ho*' *Held* that the plaintiff, pre-emptor cannot maintain a suit unless he can show that he is a person whom the vendor approved of as a purchaser of the property. Bearing in mind the unusual language of this document it is not proper to treat it as a valid record of an existing custom (*Rafique and Lindsay, JJ*) *PANDIT NATHU RAM v. GHANSHIAM* 74 I C 824 1923 A 519.

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——— *Custom or contract — Wajib ul-arz — Entry in*

An entry was made in the *wajib ul-arz* giving a right of pre-emption as regards a village which had been confiscated by government and then regranted *Held* it was a record of contract and not of custom (*Rafiq and Lindsay, JJ*) *SHIB DEI v KANIZ FATIMA* 21 A L J 99 L R 4 A 362 73 I C 536 1923 A 282 (1)

——— *Custom—Entry in wajib-ul-arz—Rebuttal of.*

A claim for pre-emption based on an existing custom as proved by the entries in a *wajib-ul-arz* is not rebutted by a note in the settlement records that the land was waste or desolate, (*Rafiq and Piggot, JJ*) *BANSI v RAM BARAN* 45 A 185 L R 4 A 305 21 A L J 60 1923 A, 150.

——— *Custom—Entries in Wajib-ul-arz*

The plaintiff in a suit for pre-emption relied on a *wajib ul-arz* which laid down the existence of a right to pre-empt in the village in question and provided for how disputes were to be settled. There were also some provisions relating to matters of contract *Held*, it was also a record of custom on which the party could rely (*Lindsay and Kanhaiya Lal, JJ*) *SHER MAHOMED KHAN v PARBHU LAL* 21 A L J 801

——— *Custom—Evidence of—Entry in Wajib-ul-arz—Value of*

A clause in a *wajib-ul-arz* relating to the transfer of property by a cosharer was to the effect that in case of a transfer by a cosharer of his share by sale or mortgage he must give preference to his cosharers over a stranger. It further went on to say that in case a mortgage given by a cosharer had matured and the mortgagor was unable or want of funds to redeem the mortgage any of his cosharers could pay off the mortgage and retain the share so redeemed until the original mortgagor is in a position to pay his co-sharer *Held* that the terms of the *wajib ul-arz* did not show that they were a record of custom (*Rafiq and Lindsay, JJ*) *SHEO BADAN TEWARI v SAHEBZADI KOER* 21 A L J 378 L R 4 A 221 45 A 459 1923 A 523 (1)

——— *Custom—Proof—Entry in Wajib-ul-arz—Interpretation*

*Prima facie* entry in the *Wajib ul-arz* is to be treated as an entry of a custom. That has been laid down time and again and has the authority of their Lordships of the Judicial Committee of the Privy Council. It has, however, always been held that the presumption is liable to be overthrown either by external or internal evidence. In a *wajibu-l-arz*, the pre-emption clause relied upon was to the following effect: In cases where a mortgage has been made by a co-sharer and where that co-sharer is unwilling to redeem the mortgage created by him at the time when a redemption may be sought, other co-sharers in certain order may come forward and demand and get redemption of the mortgage and may take over the property and keep it for themselves *Held*, that the clause provided clearly that persons who are strangers to a mortgage have a right of redemption and have a right to recover the property

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from the mortgagee and hold for themselves after they have paid the mortgage (*Lindsay and Sulaiman, JJ*) SHEIKH MAHOMED ALI *v* SHEIKH SULTAN AHMAD L R 4 A 339

———Custom—Wajib ul-arz—Birtdars—Contract

An entry in the wajib ul arz that among birtdars the other birtdars must be given the first refusal in cases of transfer was later on changed by introducing the preferential right of nearer co sharers. *Held*, the whole record embodied only a contract which ended with the period of the settlement and a right of pre-emption based on custom could not be supported. (*Rafiq and Piggott, JJ*) JHINAK SINGH *v* RAM BARAN SINGH 21 A L J. 95 L R 4 A 110 71 I C 424 (1) 1923 A 414 (1) (1923) A 260

———Custom—Wajib-ul-arz—Construction

A paragraph in a *wajib-ul-arz* provided that in the case of a transfer by a co sharer to a stranger some relations in the first instance and failing them co sharers were to take the property in preference to the stranger. *Held*, this did not prove a custom of pre-emption in the village. (*Rafiq and Piggott, JJ*) ABDUL KARIM KHAN *v* QASIM ALI KHAN 21 A, L J 61 70 I C 951 L R 4 A 82 1923 A 254

———Custom—Wajib ul-arz—Construction

Under the custom of a village as recorded in the *wajib ul arz* a co-sharer who wished to alienate his share was bound to offer it in the first instance to a "Qarib Ekjad" *Held* that on a proper construction of the *Wajib ul arz*, a great grand father's descendant could fairly be described as a "Qarib Ekjad" i.e. a near descendant of the same common ancestor. *Held* further that the alienor was entitled to choose any co sharer from amongst the whole body of persons who would fairly be descendants of the same common ancestor with himself. (*Rafique and Piggott JJ*) KUNDAN *v*. SOBHAN RAM 71 I C 655 1923 A 375

———Custom—Wajib ul-arz—Evidence of custom

An entry as to the right of pre-emption recorded in a *Wajib-ul-arz* is certainly good *prima facie* evidence of the existence of the custom unless there is internal evidence in the *wajib-ul-arz* itself or some other evidence or circumstance to rebut it. If a *wajib-ul-arz* is of an unusual nature and in the very same clause in which reference is made to pre-emption, reference, is also made to number of other matters which could not possibly have been matters of custom, the presumption would be rebutted. An entry which lays down that a right exists which cannot be based on a custom having the force of law, is valueless as evidence to prove such custom. (*Lindsay and Sulaiman, JJ*) BALWANT SINGH *v* MARE SINGH 21 A L J 542 L R 4 A 281. 74 I C 322 1924 A 52

———Decree—Compliance with terms.

A decree for pre-emption provided that the money was to be paid within a certain time to the vendee and on his failing to receive it to be

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deposited in court. A desposit of the same to the credit of the vendee in the treasury without informing the court or directing issue of notice to the vendee is not a sufficient compliance with the decree. (*Rafiq and Piggott, JJ*) AJODHIA PRASAD *v* GOBIND PRASAD 45 A 276 21 A L J 63 L R 4 A 90 71 I C 1034 1923 A 250

———Decree—Death of pre-emptor

Where the pre-emptor died after the decree and pending the appeal and the original vendor himself is his legal representative the suit need not be dismissed on appeal, 130 P R 1916 Fol A pre-emption decree could not be affected by anything which happened after it was made. (*Campbell, J*) GANDA SINGH *v*, BHAN 73 I C, 758 1923 Lah 310.

———Decree—Deposit of amount—Deduction of costs

In a suit for pre-emption plaintiff obtained a decree in his favour with costs and deposited the amount specified in the decree less the amount of costs. On appeal the amount of the price was raised and each party was ordered to bear his own costs in both the Courts. The plaintiff failed to pay the amount of costs which he had deducted out of the decree amount in the first Court. *Held* that, the decree for pre-emption had not been complied with and that the suit should stand dismissed for non-deposit of the proper amount in time 10 A 400 34 A 596 distinguished. (*Abdul Raoof, J*) ISHAR SINGH *v* PESHAWKI RAI 69 I C 516

———Decree—Equitable relief—Power of court to award

The court need not attach any sanctity to the pre-emptor's right to be given possession nor is the Court in granting a pre-emption decree precluded from moulding the relief according to the justice of the case.

The general principle is that a plaintiff suing for possession will not obtain an unconditional decree in cases, where the party in possession has satisfied an encumbrance subsisting upon the estate at the time he came into possession, which otherwise the plaintiff himself will have to meet. There may be cases in which a Court would hold that the vendee had paid off encumbrances in bad faith or improvidently and would refuse to add this payment to the money payable under the pre-emption decree. Only the interests of the third parties may be involved. But the general rule does apply to pre-emption decrees like other decrees for possession of property. (*Dalal and Simpson, A J C*) BALDEO SINGH *v* THE DEPUTY COMMISSIONERS OF KHERI 100 I J 112. 90 & A L R 587. 74 I C 503. 1924 Oudh 1

———Decree for—Time if can be extended—waiver of rights—Estoppel

The time for payment of purchase money in accordance with a pre-emption decree cannot be extended by the trial court but should be paid in time. But if all the parties concerned agree to a deposit out of time, it amounts, to a waiver of rights and all are estopped from resiling from that position. (*Dalal, A J C*) SHAMSHER SINGH *v* RAM KALLI. 90 & A L R 424 74 I C 784.

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*—Demand—Proof of—Tala-i-ishtishad—Lestimony of witnesses*

To prove of a demand in preemption cases governed by the Mahomedan Law it is not necessary for the plaintiff to produce the witnesses in whose presence the talab was made. The statement of the plaintiff if believed, is sufficient (*Rafiq and Lindsay, JJ*) *AMJAD ALI v WAJID ALI*  
L R 4 A 115

*—Gift—Fictitious deed—Evidence of*

The circumstances that the donor belongs to different castes from the donee, that the gifted property was small and that the deed of gift was given after the institution of a suit for pre-emption do not show that the deed of gift was intended to be fictitious (*Rafiq and Piggoit, JJ*) *SHIB LAL v BIDHA SINGH*  
21 A L J 329 72 I C 140 L R 4 A 375  
1923 A 508.

*—Law or custom—Hindus—Applicability of—Cities and villages—Distinction*

There should be no extension of the Mahomedan law of pre-emption among Hindus beyond the limits established by proof of custom. The law of pre-emption which applies to villages does not necessarily apply to property in cities, 45 B 604 toll. A decree for pre-emption of the year 1865 in the locality would not be sufficient proof of the existence of the custom of pre-emption in the city. The absence of such instances after 1865 strongly militates against the existence of the custom (*Rafiq and Lindsay, JJ*) *RAM CHAND KHANNA v GOSWAMI RAM PURI*.

45 A 501 21 A L J 385 L R 4 A 430  
74 I C 379 1923 A. 513

*—Liability of pre-emptor—Personal covenant—Pre-emptor whether bound by*

The pre-emptor stands in the shoes of the vendee and is bound by all the conditions and obligations by which the vendee is bound. But these conditions and obligations must be found in the deed of sale and cannot be looked for in any subsequent document which does not create any interest in the lands sold. Where the sale was a complete transaction in itself any subsequent agreement (though entered into immediately after the execution of the sale deed) cannot be read into the conveyance so as to vary its terms and impose conditions or obligations which would be binding on the pre-emptor. (*Broadway, J*) *ALI BAKHSH v GHULAM MAHOMED*  
72 I C 484

*—Limitation—Vendee already in possession.*

Plaintiffs brought a suit for pre-emption within a year from the date of the mutation in question but more than a year after the date of the alleged oral sale. The defendant-vendee had been in possession before the sale in the capacity of a tenant. Held that limitation must run from the date of the mutation 3 Lah 261, 88 P L R. 1055 toll. The question is really one of notice and as the potential pre-emptor received no notice whatever until the date of mutation, the limitation must be held to run from that date (*Harrison and Zafar, JJ*) *GYAN SINGH v GYAN SINGH*  
1923 Lah 654

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*—Mortgagee in possession—Rights of.*

A mortgagee in possession does not get a proprietary interest in the property and is not entitled to claim or resist a suit for pre-emption (*Lindsay and Sulaiman, JJ*) *PADAM SINGH v UMRAO SINGH*  
L R 4 A 272

21 A L J 527 75 I C 104 1924 A 48

*—Numerous sales and as many suits effect of dismissal of last one*

Where as the result of numerous sales, as many suits for pre-emption were filed and were all decreed, except the last which was dismissed for default, the dismissal does not affect the prior claims (*Lindsay and Sulaiman, JJ*) *SRI BHAKUR RADHIKA RAMAN BIHARIJI v BOHRA SHIAM SUNDER LAL*,  
45 A 561 21 A L J 518  
L R 4 A 257 74 I C 382 1923 A. 526

*—Partial consideration—True—Market value is the test*

Where a part of the consideration is found to be bogus the High Court on the admission of defendant that market value should have been determined remanded the case for finding it (*Le Rossignal, J*) *TARA SINGH v JAWALA DAS*  
1923 Lah 308 (1)

*—Pendency of Suit—Sale to superior pre-emptor—Effect*

Where pending a suit for pre-emption, a person having a superior right to that of plaintiff purchases the property within the prescribed period of limitation the suit for pre-emption must fail. The fact that the third party purchased at a private sale does not make it any the less a purchase in the exercise of the right of pre-emption (*Martineau, J*) *DHARAM SINGH v KIRPAL SINGH*  
69 I C 409, 1923 Lah 31 (2)

*—Purchase under sale by Pre-emptors—Pre-emptor's, brother's suit.*

Where one of the four brothers as pre-emptor bought a property from the vendee but resold it to the vendee under a compromise.

Held the other brothers could not after resale claim to pre-empt which would be by enforcing pre-emption against their brother and the sale in favour of vendee had ceased to exist (*Abdul Raoof, J*) *KIDAR NATH v DEVI SAHAI*  
1923 Lah 259 (2),

*—Purchaser of share in village—Rights of*

Where a person purchases a plot of land situate within the share in a village, he is a co sharer and must be treated as such though his name does not appear in the revenue papers (*Lindsay and Kanhaiya Lal JJ*) *RAM GOVIND PANDE v PANNA LAL*  
21 A L J 763 L R 4 A 507

*—Right to—Acquiescence—Waiver—Acceptance of mortgage money from vendee*

Where a person who is a mortgagee of the properties sold by the vendor accepts the mortgage money from the vendee, he does not thereby lose any right of pre-emption which he might have in respect of the property sold. Such acceptance of the mortgage money does not amount to waiver or acquiescence 35 C. 402 followed (*Broadway and Brasher, JJ*) *KANSHI RAM v, BHOJA RAM*,  
69 I. C. 648.

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—Right to—Alienation by father—Suit to set aside by sons—Rights of pre-emptor

Where the sons sue to set aside an alienation by the father as not being supported by necessity a pre-emptor from the vendee stands in no better position than the vendee himself, except that less strict proof of enquiry into the necessity for the loan would be sufficient in the case of the pre-emptor. The onus of proving necessity is not however shifted to the son (*Ashworth, J C*)  
JAMNA PRASAD v BALBHADAR

90, L J 601 25 O C 388 74 I C 353 (2)  
1923 Oudh 147

—Right to—Contract—Termination of—Right to sue on cause of action accrued during subsistence of the Contract

Where the plaintiff brings a suit for pre-emption basing his cause of action on a contract with the vendor, the mere fact that the time fixed in the contract had expired before the suit was brought does not affect its maintainability (*Rafiq and Piggott, JJ*) RAM BHAROSE TIWARI v PANDIT CHANDRA SHEKHAR DAT PANDE,  
73 I C 295 L R 4 A 85 1923 A 135

—Right to—Co-sharer—Mortgage of entire share by conditional sale—Rights of co sharer to pre-emption—Partial pre-emption.

Though a cosharer in a village has mortgaged his entire share of the properties by conditional sale, he remains a cosharer and as such entitled to pre-emption. Unless the pre-emptor claims to re-empt the whole of the property sold, his action must fail. But if the vendor has included properties which the plaintiff has no right pre-empt he can exclude them 8 A 462, 6 A 423 Ref (*Kanhaya Lal and Sulaiman, JJ*) RAJAH MOHINDRA MAN SINGH v, THAKUR MAHARAJ SINGH  
45 A 72 70 I C 132 1923 A 48.

—Right to—Cosharers—Partition of mahals—Effect of.

Where there is a perfect partition of a village which is split up into a number of mahals, there is thereafter no community of interest between the co-sharers of one mahal and those of another mahal and consequently the former cannot be regarded as co-sharers of the property of the latter 22 A 1 foll (*Rafique and Lindsay, JJ*) RUP SINGH v BHULLAN SINGH  
L R 4 A 15 71 I C, 408 1923 A 52

—Right to—Cosharer—Subsequent sale of property

In a pre-emption suit the plaintiff must prove his right to pre-empt not only at the date of the suit but also at the date of the decree, whereafter the suit and before the decree, the vendee, a stranger sold the property to a co-sharer, the plaintiff's suit must fail (*Rafique and Lindsay, JJ*) HER KESHI v MEWA RAM  
90 & A L R 495 72 I C 247  
1923 A. 294

—Right to—Cosharer—Widow entitled to maintenance—Plaintiff joining a person having no right—Effect of

A widow of a deceased coparcener in a joint Hindu family has nothing more than a right to maintenance and is not co-sharer. A plaintiff who

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has in himself a right to claim preemption loses the right by joining in a suit along with a person who is a stranger to the property and has no such right, 7 A 860 foll (*Rafiq and Lindsay, JJ*)  
UDIT NARAIN LAL v RAM LACHMAN RAI,  
L R 4 A 55 1923 A 161 (1),

—Right to—Custom—Wajib ul araz

Where in a Wajib-ul araz the words 'haq-i shufa jaiz hai' occurred held that the words meant that the co sharers could enforce the right of pre-emption according to Mahomedan Law, 28 A 60 referred to (*Rafique and Lindsay, JJ*)  
SHYAM LAL v PADAM SINGH 71 I C 1025  
L R 4 A 349 1923 A 296

—Right of—Distant relations—Bhai and biradarzadah—Meaning of

The expression 'bhai' and "biradarzadah" in a wajbularz giving a right of pre-emption are general terms and are not limited in their application to own brother or brother's sons but include more distant relations descended from a common ancestor (*Rafiq and Lindsay, JJ*)  
FAZAL HAQ v AZIZ HASAN L R 4 A 23

—Right to—Foundation of—Ownership of property—Lease in perpetuity

The *milkiat* or ownership of the property is *sine qua non* for the exercise of the right of pre-emption must have the *milkiat* or ownership in the property on account of which he claims the right of pre-emption

No right of pre-emption arises in respect of property leased in perpetuity 25 W R. 43, 5 P L J 740 foll.

The law of pre-emption was founded on the supposed necessities of a Muhammedan family arising out of their minute sub division and inter-division of ancestral property. It is purely a creature of the Muhammedan Law, and as the exercise of the right is adverse to public interest, the Courts are not disposed to recognise this right beyond the strict limits of the Muhammedan Law or beyond the decision of the Courts (*Das and Adam, JJ*) DHIRAK SHAL SINGH v TRILOKI PRASAD SINGH (1923) Pat 22 71 I C 318  
1923 P 217.

—Right to—Grant of lease—Perpetual heritable and transferable—If a sale,

A right of pre-emption does not arise on the grant of a perpetual lease on a nominal rent where under the lessees gets a heritable and transferable estate, is such a transaction does not amount to a sale (*Simpson and Delat, A J C*)  
RAM NARAIN SINGH v. RAM SUKH.  
90 & A L R. 625.

—Right to—Involuntary sale—Insolvency—Sale by official Receiver

There is a right of pre-emption even in the case of an involuntary sale as in the case of a sale by the Official Receiver in an insolvency (*Rafiq and Lindsay, JJ*) BIRI NARAIN RAI v, KEDAR NATH. 71 I, C 836 1923 A 57.

—Right to—Plaintiff joining another person not entitled—Effect

Where the plaintiff in a suit for pre-emption joins with him another person having an inferior



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right to the vendee (defendant) the plaintiff loses the right 34 A 592 toll (*Rafiq and Piggott JJ*)  
 RAHIMA v RAZZAQ ALI, 21 A L J 184  
 L R 4 A 132 71 I C 562 1923 A 256

— *Right to Relationship—Aziz qarib and Aziz baed*

Death or divorce dissolves the tie and relationship between a woman and her husband under the Mahomedan Law, especially if the woman after the death of her first husband marries into another family. Consequently an uncle of the deceased husband or a Mahomedan widow cannot pre-empt a sale by her as being "aziz qarib" or "aziz baed" (*Rafique and Piggott JJ*) JAHANGIR KHAN v, SYED ABDUR RAHAMAN 1923 A 128

— *Right to—Remedy of pre-emptor—Procedure*

A pre-emptor is not confined to a suit in the Civil Court to enforce his right. He must do one of two things within limitation: he must institute a suit for pre-emption or he must obtain a conveyance from the vendee. If he has done neither of these things, the mere fact that he has stated that he possesses the right, that he has approached the vendee or that they have referred their matter to arbitration, will not prevent the bar of limitation. A pre-emptor who refers the claim to arbitration and then makes an application under Sch. II para 20 is proceeding by suit and the case is governed by the limitation applicable thereto (*Simpson and Wasir Hasan, A J C*) SHEO DUTT BAHADUR SINGH v BISHUNATH SINGH 74 I, C 206 1923 Oudh 91

— *Right to—Sale by Mahomedan to Hindu—Law applicable—Intention of parties*

One of two Mahomedan co-sharers in the Bombay Presidency agreed to sell his share in a village to a Hindu, the agreement being made subject to a right in the co-sharer to pre-empt, and as a complete and immediate sale although part of the purchase price was to be paid later and a sale deed executed. The vendor informed his co-sharer that he had sold, and invited him to pre-empt the share sold. The co-sharer thereupon performed the ceremonies of pre-emption and claimed as pre-emptor to recover the share from the purchaser.

*Held*, that the co-sharer had a right of pre-emption in accordance with the intention of the parties, which had to be looked at, to determine what system of law was to apply and what was to be taken as the date of the sale with reference to which the ceremonies were performed (*Viscount Haldane*,) SITARAM BHARUA DESH MUKH v SYED JAUL HASAN SIRAJUL KHAN 1923 P C 41

— *Right to—When arises—Right when lost*

The right to enforce pre-emption arises immediately a sale takes place. It is undoubtedly qualified by the restriction that the pre-emptor himself must maintain his quality as a pre-emptor up to the institution of his suit, but he cannot be prejudiced by the vendee's action subsequent to the sale. There is, of course, one exemption to this rule, namely, in certain cases where a vendee prior to the institution of the suit retransfers the

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property, to a person who has equal rights with the plaintiff. But it is clearly understood that this exception rests upon one principle only, and that is that the Law recognises claims for pre-emption brought privately and out of Court and that a vendee is entitled to satisfy such a private claim just as much as he is bound to satisfy a claim brought against him in a court of law. In such a case it is the plaintiff who has been prejudiced in respect of his pre-emptive right by the vendee improving his own position but it is a person who is equally entitled with the plaintiff who has enforced his right out of Court, and unless a re-transfer by the vendee is proved to be in satisfaction of such claims a pre-emptor's suit is not affected by any transfer. For purposes of pre-emption the Court must ordinarily take the respective position of the plaintiff and the vendee as they stood at the time of the sale, and not as they stood at the institution of the suit (*Pipon, J C*) AYA RAM v PARSHOTAM LAL 71 I C 145

— *Sale by official Receiver—Involuntary sale—Rights of co-sharers*

A sale in favour of the defendant, by an official receiver, does not stand on the same footing as a sale at a public auction and would not defeat the right of pre-emption.

With regard to properties sold at court auction there is a mode of pre-emption prescribed which is to be found in order 21, rule 88 (*Rafiq and Lindsay, JJ*) BRIJ NARAIN RAI v KEDAR NATH 45 A 186

— *Sale—Purchase by mortgagee—Right to set up mortgage*

Where a mortgagee purchases a share of the property mortgaged there is a merger and the mortgage is extinguished to that extent. Consequently the mortgagee purchaser could not set up his own mortgage as still subsisting against a pre-emptor (*Daniels, A J C*) KALLOO SINGH v BAKHTAWAR SINGH 26 O C 289

90 & A L R 113 74 I C 360  
 90 L J 657 1923 Ouch 121

— *Subject of Serai—Shop—Building—Liability to pre-emption*

Where in order to defeat pre-emption the property conveyed is expressed to be a *serai*, the Court must look outside the terms of the deed to ascertain its real character. It is never an easy question to determine the character of a building for the purpose of pre-emption in as much as the word *serai* has not been defined by the legislature. The essentials of a *serai* seem to be that there is general access to the inferior by the public and that it is used for the temporary accommodation of travellers. A building containing rooms let out to different persons or extended periods is not *prima facie* a *serai*. The mere fact that an infinitely small portion of the building is used for a shop does not affect the question. A single building should not ordinarily be divided into pre-emptible and non-preemptible portions. It must follow the main characteristics of the whole. That is to say, if the principal use of the building is residential the whole building will be pre-emptible notwithstanding that a small portion may also be used as a shop. Conversely, if the

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main characteristics of the building are the use of a portion of it for a shop then the whole building will be non pre-emptible. As regards the passing of title to the property it does not pass if there is an intention common to both the parties that ownership should not pass until payment of consideration (*Pipon, J C.*) *AYA RAM v PARSHOTAM LAL* 71 I C, 145

———*Subsisting right of pre-emptor*

The usual method of dealing with suits to enforce a statutory right of pre-emption should be to regard the state of affairs existing when the plaintiff cause of action arose. I. L R III Lah, 267, Foll. But there may be circumstances in which a court may be justified in refusing to enforce such right unless it is maintained intact throughout the progress of the suit (*Campbell J*) *LADHA RAM v JIDHU RAM*, 1923 Lah 339

———*Suit for—Court Fee—Market value of the property* See COURT FEES ACT, S 7 CL 5 (b) 69 I C 650.

———*Suit for—Decree not complied within time—Extension of time*

The decree holder in a pre-emption suit must comply with the terms of the decree within the time fixed therein. Where the terms are clear he cannot get an extension of time. *Broadway, J*) *KHAN MUHAMMAD v, AHMAN* 73 I C 891

———*Suit for—Right of pre-emptor—Existence of on three important dates material*

A plff pre-emptor in order to be able to maintain a suit for pre-emption must establish his right to pre-emption on three important dates. He must have a right of pre-emption at the time when the sale took place, otherwise he would have no cause of action at all. He must also have the same right at the time when the suit is brought or else he would have no *locus standi* to sue.

The subsequent loss of the share by the plff, can in no way affect the right he possessed at the time when the decree in his favour ought to have been passed by the first Court (*Lindsay and Sulaiman, JJ*) *BALDEO MISIR v RAM LAGAN SHUKUL* 45 A 709 21 A L J 648 L R 4 A 353; 1924 A 82

———*Suit for—Sale of interest under a pre-emption decree*

Where a person obtains a decree for pre-emption on depositing a certain sum of money in court, but sells his right in the decree and the purchasers deposit the money in court, and thereafter another person brings a suit for pre-emption in respect of such sale, held the same was maintainable as what was sold was an interest in immovable property (*Kanhaya Lal, J C.*) *THAKUR BIKRAM SINGH v SURAJ BAKSH SINGH* 26 O C 295.

———*Suit for—Separate suits by plaintiffs having equal rights—Procedure*

Where three suits for pre-emption are brought by three pre-emptors having equal rights of pre-emption the property consisting of shares in a village. Held, that the plaintiffs were each entitled to a 1/3rd share in pre-empted property 21 M

## PRESY SM C COURTS ACT

167, 28 A 416 Ref (*Lindsay and Sulaiman, JJ*) *HARGOBIND SINGH v. HUKUM CHAND*, 45 A 608 21 A L J 551 75 I C 351.

———*Suit for—Transfer by vendee to co-sharer after Suit—Effect of*

Where after the institution of a pre-emption suit the vendee who was a stranger transferred a property to a co-sharer of equal decree with the pre-emptor, this was held sufficient to defeat the pre-emptor's right. 24 A, 68, 18 A L J 55 fudd (*Rafiq and Lindsay, JJ*) *HAR KESHI v MEWA RAM*. L R 4 A, 347

———*Suit for—Vendee—If can prove real nature of transaction*

It is open to a vendee to prove the real nature of transaction against a third party in a pre-emption suit (*Daniels, A J C*) *BANKE BEHARI LAL v. MANNA LAL*

90 & A L R 79 73 I C 372

———*Vendee and pre-emptor of the same category—Effect*

Where the *wajib-ul-arz* divided persons entitled to claim pre-emption into three categories and the vendee and the pre-emptor belonged to the same category, a suit for pre-emption does not lie (*Rafiq and Piggott, JJ*) *RAGHUNANDAN SINGH v MULAK RAJ SINGH* 21 A L J, 84 L R. 4 A 87 1923 A 255

———*Wajib-ul-arz—Death of signatory—Enforceability of right against heirs.*

The owners of a permanently settled village entered into a *wajib ul-arz* to evidence a contract of pre-emption and signed the same. After the death of the signatories the question arose whether a transfer was subject to pre-emption in the hands of their heirs. Held that the Contract could no longer be enforced. 47 B 191 applied (*Rafiq and Piggott, JJ.*) *BALLI SINGH v RAGHUBAR SINGH* 45 A 492 21 A L J 413

L R 4 A. 231 1923 A 511

———*Wajib-ul-arz—Hissedar Karbi—Meaning of*

In a suit for pre-emption the plaintiff relied on the use of the words *hissedar Karbi* in the *wajib ul arz*. Held, he must show the expression necessarily means a co-sharer who is nearer in space with the vendor. It is an ambiguous expression and may apply either to a co-sharer who is nearer in space or in blood relationship (*Lindsay and Sulaiman, JJ*) *BHOLAI PANDEY v KHHIALI PANDEY* L R 4 All 550.

———*Suit for—Valuation for purposes of jurisdiction*

Any compensation found to be payable by the pre-emptor to the vendee on equitable grounds and not a part of the price paid, by the vendee is not to be taken into consideration in determining the value of a suit in a pre-emption case (*Le Rossignol and Harrison, JJ*) *CHIRAGH DIN v SERAJ DIN* 5 Lah L. J 137 1923 Lah 207.

## PRESIDENCY SMALL CAUSES COURTS ACT—

Right to—Vendor owning some property and being mortgagee of another—Duty of pre-emptor

## PRESY SM C COURTS ACT, S. 19.

See (1922) DIG, COL 924 IQBAL HAIDAR KHAN v MT. WASI FATIMA BIBI 45 A 53 74 I C 1004 1923 A 358

———S 19 (g)—*Suit to recover ornaments*

A suit for the return of ornaments and cloth presented by custom by the prospective bridegroom at the time of betrothal is not a suit for compensation for breach of promise of marriage and therefore the Small Cause Court has jurisdiction to try it (*MacLeod, C J and Crump J*) MADHURAO VISVANATH v SHRIKRISHNA GOVIND RAO 1923 Bom 393

———S 22—*Applicability—Amount beyond jurisdiction of Small Cause Court—Decree for some within jurisdiction—Costs.*

A suit was filed in the High Court for a sum which was beyond the jurisdiction of the Presidency Small Cause Court, but the decree was an amount which it was competent to the Small Cause Court to award. *Held*, S 22 did not apply and the High Court is competent to award costs (*Page, J*) CHANDMULL KANGORIA v DEBI CHAND 28 C W N 6.

———Ss. 38 and 92 —*Application for retrial—Summer vacation Presentation of the application on the re-opening day—Whether in time—Notification of summer vacation—Presentation of "other papers"—General Clauses Act, S 10.*

The notification for the midsummer vacation of 1921 for the Presidency Small Causes Court at Madras drawn up under S 92 of the Presidency Small Cause Court Act provided in paragraph 6 that "plaints, execution proceedings and other papers will be received on only the days on which the judge (the vacation Judge) sits." The judgment in a suit in the Presidency Small Causes Court at Madras was pronounced on the 10th May 1921. That court was closed for the summer vacation from the 16th May to 16th July inclusive. An application for retrial under S 38 of the Presidency Small Cause Courts Act, which allows eight days within which to make an application for a new trial, was made on the date of the re-opening after the summer recess. *Held* that the application was out of time as it could have been presented during the summer recess on day on which the vacation Judge sat. When a court is adjourned for the vacation but the notification states that it will be opened on certain days for the reception of complaints, petitions and other papers, the court cannot be treated as closed on those days when it was open for the above purpose, 5 M 189, 29 I C 449 13 M 447 451 foll.

S 10 of the General Clauses Act does not apply to validate the presentation made on the re-opening date after the recess as it was done in due time. The words "other papers" in the notification are very wide and include applications for retrial. Such a notification providing for the work to be done during the vacation does not contravene S 92 of the Pres Sm C. C Act (*Spencer and Venkatasubba Rao, JJ*) THE BRITISH INDIAN STEAM NAVIGATION CO v H M SHARAFUDIN 46 Mad 938 44 M L J 100 17 L W 705 70 I C 889 1923 Mad 435.

## PRESY. SM C COURTS ACT, S 48

———Ss 38 and 69—*Reference to High Court—Application under S 69—Reference by two of the Judges—Legality of—Form of reference to the High Court*

The Small Cause Court is competent to make a reference under Sec 69 on an application under S 38 of the Pres. Towns Ins Act

S 69 authorises a reference when two or more Judges of the Small Cause Court sit together in any suit and differ in their opinion as to any question of law or usage having the force of law or the construction of a document, which construction may affect the merits. The term "suit" is not defined either in the Presidency Small Cause Courts Act or in the Code of Civil Procedure, and its meaning cannot be determined apart from the context. Although S 38 provides for a more extended jurisdiction than what would be technically called a new trial, a jurisdiction analogous to an appeal, yet there is no appeal on facts. But though the power of interference is thus restricted, the application under S 38 is nevertheless an application in the suit and attracts the operation of S 69, providing for a reference to the High Court.

S 69 contemplates a statement of the facts of the case drawn up by the Court, that is, by two or more Judges where the case is heard by more than one Judge. This cannot create any difficulty because when an application under S 38 is heard, the Judges cannot disagree on the facts. There is no appeal on the facts and the facts as found by the trial Judge must be accepted. Consequently, the first step, when a reference is to be made under S 69 is to draw up a statement of the facts of the case to be signed by the Judges. They must then formulate the point on which there is a difference of opinion which is to be accompanied by the statements of the reasons assigned by each Judge in support of his view (*Mookerjee and Rankin JJ*) M L CHAKRABARTY v OLOF BORIN 50 Cal 919 27 C W N 883 38 C L J 275

———S 41—*Right to—Vendor owning some property and being mortgagee of another—Duty of pre-emptor* See (1922) DIG COL 924 IQBAL HAIDAR KHAN v MT WASI FATIMA BIBI 45 A 53 74 I C 1004 1923 A 358

———S. 47—*Stay of proceedings in ejectment suit—Procedure*

When proceedings of a summary nature are taken under S 41 to eject an occupant, and the occupant applies for a stay of proceedings the court has no discretion to refuse it on the ground it was not supported by an affidavit. Ordinarily the statement of his vakil that he was going to file a suit in the High Court and that he was willing to give the security bond is sufficient.

There is nothing in S 47 to warrant the interpretation that the application for stay should be made at an early stage in the proceedings (*Schwabe, C J*) KRISHNA AYYAR v SUBRAMANIA AYYAR 44 M L J 386 17 L W 179 32 M L T. (H C) 294 72 I C 154 1923 Mad 323

———S. 48—*Ejectment order—Obstruction to carrying out of—Removal—Jurisdiction—O 21, R 98, C. P. C.—Applicability to proceedings under Chapter VIII of the Act*

**PRESY. TOWNS INSVCY. ACT (III OF 1909).**

S 48 of the Presidency Small Cause Courts Act applies the provisions of the Code of Civil Procedure to proceedings under Chapter VII and the language of it is wide enough to include a power to act under Or 21 R 98 C P C. The Presidency Small Cause Court has jurisdiction to remove an improper obstruction to the carrying out of its order in ejectment (*Krishnan, J*) DAROGA MAHOMED GHOUSE SAHIB v SHAIK MOHIDEEN SAHIB 45 M L J 66

18 L W, 135 (1923) M W N 882  
73 I C 985 (2) 1924 Mad 74

**PRESIDENCY TOWNS INSOLVENCY ACT, (III OF 1909)—Rules framed thereunder R 136—Costs—Scale of in insolvency proceedings**

In insolvency proceedings, unless an order is made to the contrary, only half the attorney's fees should be allowed as costs, whether or not the costs are made payable out of the estate (*Schwabe, C J and Wallace J*) OFFICIAL ASSIGNEE OF MADRAS v DORAIAPPA AIYAR

44 M L J 411 17 L W 350  
32 M L T (H C) 172 (1923) M W N 359  
1923 Mad 484 (1)

—Ss 7, 30 and 52—Hindu Law—Joint family Manager—Insolvency—Official Assignee's right—Possession of joint property—Right to—Alienation of a joint property for paying insolvent's debts—Validity against his minor sons

On the insolvency of the managing member of a joint Hindu family the Official Assignee succeeds to (1) the undivided interest of the insolvent in the joint property and to his rights as managing member so far as they can be exercised for his own benefit. He is not entitled to have vested in him the shares of the other members although he can deal with them if the insolvent could lawfully have done so if there had been insolvency. He can alienate the interest in the joint property of the minor sons of the insolvent for the purpose of paying the insolvent's debts unless the debts in question were incurred for an illegal or immoral purpose, the presumption being that they were not. The Official Assignee is not an alienee but the representative of the insolvent and is entitled to all his rights including the right to possession of the joint property except such rights as are in their nature personal to member of the family as such (*Sir Walter Schwabe, C J and Coutts Trotter, J*), THE OFFICIAL ASSIGNEE OF MADRAS v A. N. RAMACHANDRA AIYAR

46 Mad 54 1923 Mad. 55

—Ss 8 and 41—Adjudication—Jurisdiction of Registrar to annul.

S 6 of the Act authorises the delegation to an officer of the matters set out in sub-cl (2) which includes (c) matters to be dealt with in chambers. Applications for annulment do not require to be dealt with in Court (see R 5) and can therefore be heard and determined in chambers. The Registrar has jurisdiction to make an order of annulment. Under S 8 of the Act the Court can review its orders, but as the order of annulment was passed by the Registrar he is the person to whom the application for review must be made (see Or 47, C P. C.) An appeal of

**PRESY. TOWNS INS. ACT (III OF 1909), S 21.**

course lies to the High Court from the order of the Registrar (see sec (2) (a) but that must be made within 20 days (see sec 101). The High Court can extend the time under S 90 (5) in a proper case (*Greaves, J*) MEGHRAJ PUROHIT *In re* 27 C W. N. 916

1924 Cal 83

—S 9—Insolvency—Application for adjudication of a firm as insolvent—Departure of partner from place of business—Intention to defeat or delay creditors.

Under S, 9 of the Pres Towns Ins. Act where one partner departs from his usual place of business, it is a matter personal to him and the firm cannot be adjudged insolvent. One man cannot as an agent for another depart from his usual place of business and the departure of one partner is not a constructive departure of the others. The departure from the usual place of business with intent to delay and defeat the creditors, must be a departure of both the partners and not merely the departure of one of them. (*Marten, J*) MAHOMED HASSAM AND CO *IN RE* 75 I C 203 (2) 1923 Bom 107

—S 17—Hindu father—Insolvency—Adjudication—Vesting of sons interest official assignee—Remedy of sons

On the insolvency of a father governed by the Mitakshara Law the whole of the joint family property including the interest of his sons, vests in the official assignee. But the sons have their remedy on their establishing that the debts of the father were illegal or immoral and that their sharers would not be liable for the same. 48 I C 526 49 I C 848 not foll 7 B 438, 11 B 37, 19 M 74, 42 C 225 Ref (*Shadi Lal, C J, Chevris and Abdul Raoof, JJ*) BIHARI LAL v SAT NARAIN 69 I. C 486 1923 Lah 1

—S 17—Scope of—Effect of, on limitation

S, 17 of the Act is not an absolute bar to the creditor's right to institute a suit so as to enable the creditor to claim a deduction of the time during which the insolvency proceedings were pending, in computing the period of limitation in any suit brought by the creditor after the insolvency proceedings are quashed (*Macleod, C. J, and Shah, J*) SIDHRAJ BHOJARAJ v. ALLI HAJI 47 Bom 244 1923 Bom. 33 (2)

—S 18—Jurisdiction of commissioner insolvency to stay proceedings in District Court—Practice—Procedure, See (1922) DIG COL 26 MANEKCHAND VIRCHAND PATNI *In re* 47 B 275 75 I C 61

—S 21—Annulment of adjudication—Abuse of the process of Court

On 22-2-1919 the insolvent was adjudicated on his own petition. On 12-5-1919 he filed a schedule but failed to apply for his discharge within the time provided by the Act and his adjudication was annulled on 9-5-1922. Subsequently on his own application he was adjudged an insolvent on 21-6-22 and a creditor applied to annul the order of adjudication. Held that the order of adjudication ought to be annulled. 21 C. W. N. 298, 21 C W. N. 497 Ref (*Greaves, J*) BALLAV CHAND SEROWGEE *In re*, 27 C. W. N. 739 1923 Cal. 703.

## PRESY TOWNS INS ACT (III OF 1909), S 30

—S 30 (2) — *Application by creditor against guarantor under composition scheme—Power to vacate order*

It is a novel proposition, that a person who has made himself liable as a guarantor for the payment of a composition in insolvency, should be subject to the insolvency jurisdiction so as to be liable to be dealt with for contempt of Court, if he does not carry out any order made under such jurisdiction. Once a person is re-adjudged an insolvent there is an end of the composition and the liability of the guarantor also ends. A scheme of composition was made so long ago as the 10th of December 1910. By its terms the composition was to be paid within a month from the date, of the order annulling the adjudication order. The adjudication was annulled on the 14th September 1911, and it was not until 29th July 1922 that the Respondents applied for the covenant to be enforced against the appellant. Held that under these circumstances, the peculiar jurisdiction under S 30 (2) of the Presidency Towns Insolvency Act should not be exercised against the appellant, in his capacity as guarantor, even assuming that the Court has jurisdiction to deal with such a matter under that section. (*Sanderson, C. J. and Richardson, J.*) *GOVIND DAS PITY v. JARDINE SKINNER & CO* 27 C W N 908

—Ss 38 and 90—*Examination of witnesses—Witnesses residing more than 200 miles—Power to summon and examine—C P Code, O 16, R 19*

S. 36 (1) of the Insolvency Act provides that the Court may, on the application of the Official Assignee or of any creditor who has proved his debt, at any time after an order for adjudication has been made, summon before it the insolvent or any person known or suspected to have in his possession any property belonging to the insolvent or supposed to be indebted to the insolvent or any person whom the Court may deem capable of giving information respecting the insolvent, his dealings or property.

The person to be summoned does not, at any rate in all cases, fall within the category of an ordinary witness to whom the provisions of O 16 relate. It deals rather with the discovery and recovery of property than with the ordinary testimony which a witness can give, and the proviso to S 90 (1) of the Insolvency Act makes it clear that it was not intended to fetter the Court in the exercise of its jurisdiction under S. 36 by any limitation imposed by the Code of Civil Procedure. (*Greaves, J.*) *DINARAM SOMANI In re*, 27 C W N. 370 1923 Cal 427

—Ss. 38 and 56—*Fraudulent preference—Application by Official Assignee—Depositions given before—Registrar—When admissible—Burden of proof*

Where a creditor of a person who was in pecuniary embarrassment knowing of the condition of his debtor made repeated demands for payment and threatened him with legal proceedings such acts do not constitute *bona fide* pressure and do not prevent a transfer by the debtor to the creditor from being an undue preference over other creditors within S. 56 of the Pres Towns Ins. Act 1909. Ch. D. 589 Ref. Once it is

## PRESY TOWNS INSVCY ACT, S 52

established that an assignment by the insolvent to a creditor was fraudulent and void as against the Official Assignee the onus lies upon the transferee if he desires to bring himself within S 56 (2) of the Act to show that not only did he give consideration for the assignment but also that he acted in good faith.

Where an Official Assignee applies to set aside an assignment on the ground that it was fraudulent and void within S 56 of the Pres T Ins Act and he intends to rely upon depositions which have been given by the parties before the Registrar in Insolvency, he should give notice of his intention to do so and such notice should specify the depositions on which he intends to rely. (*Sanderson, C. J. and Richardson, J.*) *MADHURAM RAGHUMULL v THE OFFICIAL ASSIGNEE*, 27 C W N. 611 1923 Cal 631

—S 36—*Any creditor who has proved his debt—meaning of*

The words "any creditor who has proved his debt" in S 36 mean not merely a creditor who has lodged proof of his debt but a creditor whose proof has been admitted by the Official Assignee under the provisions contained in S 25 of the 2nd schedule to the insolvency Act. The mere fact that a person's name was included in the schedule filed by the insolvent and that so far his claim has not been challenged does not assist him if his debt has not been admitted by the Official Assignee. (*Greaves, J.*) *In re ABUL SAMAD* 70 I C 468 1923 Cal 305

PRESIDENCY TOWNS INSOLVENCY ACT, Ss 51, 52 and 57—*Goods in the order or disposition of the insolvent—Equity of redemption in goods pledged—Bona fide transferee after insolvency and before adjudication. See (1922) DIG COL 927 OFFICIAL ASSIGNEE OF MADRAS v VELLAPA CHETTY* 69 I C 968

—S 52 (2) (c) — *Property hypothecated—Possession with insolvent with permission of creditor—If passes to official Assignee—Withdrawal of consent—Effect*

Hypothecated property remaining in the possession of the insolvent with the permission of the creditor will pass to the official Assignee on insolvency. But if the consent is withdrawn even in an informal manner he cannot be said to be in possession "with the owner's consent" and no title will pass to the official Assignee. (*Robinson, C. J. and Beasley, J.*) *OFFICIAL ASSIGNEE v MD, E NAIKWARAH*, 1 Rang 153 2 B. L. J 248 74 I C 919 1924 Rang 27

—S 52 (2) (c) — *True owner—If includes owner of equitable charge—Consent of garnishee—Withdrawal*

The words "true owner" in S 52 (2) (c) include the owner of an equitable interest in the property. Where the insolvent was in possession of a motor car with the consent of the garnishee but before the insolvency, the garnishee determined such consent by means of a letter demanding the car, the official Assignee cannot be entitled to the car, as the insolvent was not at that time in possession with the consent of the owner.

**PRESY TOWNS INSOLVENCY ACT, S 55**

(Schwabe, C J, and Krishnan, J) ABURU  
BAMMAL v OFFICIAL ASSIGNEE OF MADRAS  
45 M L J 81 19 L W 54  
33 M L T (H C) 217

—Ss 55 and 56—Right to apply under—  
Rights of creditor—Official—Assignee *See* (1922)  
DIG COL 927 SURAJMULL MUNGLE CHAND  
*In re* 70 I. C 463 (1)

—S 56—*Fraudulent preference—Who constitutes—Motive*  
To find out whether a particular payment amounted to fraudulent preference one must look to the mind of the bankrupt at the time and see if the dominant view was to give preference to a particular creditor. If his real object was only to continue his business and to save himself from serious consequences, the act does not fall within S 56. But if the act was merely to stave off bankruptcy for a short time or to assist in reinstating him afterwards, it would be a fraudulent preference (Schwabe, C J and Wallace, J) SAMU PAT TAR v WILSON 18 L. W. 696 73 I C 532

—S, 82—Misfeasance, neglect or omission—Distribution of assets without disposing of claims—Personal liability of Official Assignee *See* (1922) DIG COL 927 ARCHIBALD GILCHRIST PEACE *In re* 70 I C 507.

—S 106 (a)—*Summary administration—Order by Court—Refusal of leave to appeal—Leave of appellate court*

Where the insolvency court refused leave to appeal under S 106 (a) of the Pres Towns Insolvency Act, it is open to the unsuccessful party to apply to the Court of Appeal for special leave to appeal. The appellate court can, if a question of principle is involved, hear the appeal, under its inherent power (Macleod, C J and Crump, J) PANA CHAND NARSEY v STANLEY 23 Bom L R. 161 72 I C 260 1923 Bom 240

**PRESS ACT (III OF 1910), S 4 (1)—Good faith, if material—Individual officers if contemplated**

If the words in their plain grammatical meaning are of the nature mentioned in S 4 (1) it is immaterial whether the editor acted in good faith or otherwise. The operative portion of S 4 (1) (c) does not make the motive or intention of the writer material to deciding the question.

Where the article complained of referred only to the police officials at a certain place, they cannot be regarded as "the government established by law in British India" 22 Bom. 112 and 6 Bom L R 421 referred to (Shudi Lal, C J Scott Smith and Martineau, JJ) RAJ PAL v THE CROWN (1923, Lah 61 71 I C 519 24 Cr L J 167.

**PRESS AND REGISTRATION OF BOOKS ACT (1867), Ss 14, 4—False statement in declaration not subscribed**

Any false or untrue statement made in the course of making a declaration is made punishable under the Press Act. A false statement in a declaration, which is not made and subscribed before a Magistrate as provided by S 4 cannot

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be said to have been made in making a declaration (Zajar, Ali, J) EMPEROR v INAYAT 73 I C 689 24 Cr L J 607 (1923) Lah 440

**PRESUMPTION**—Lost grant—Easement—Right of way—User for thirty years *See* EASEMENT 70 I C. 173

—*Marriage—Habit and repute—Surmounting circumstances*

The presumption of marriage arising from co-habitation must rest on habit and repute. The habit and repute which alone is effective is habit and repute of that particular status which in the country in question is lawful marriage (Heald and May Oung, JJ) MA SHWE YIN v MAUNG BA TIN 1 Rang 343 2 Bur L J 114 1923 Rang 218

**PREVENTION OF SEDITIOUS MEETINGS ACT (X OF 1911), S 6—Promoting and conducting—Distinction between**

The word 'promotion' implies some action anterior to the existence or occurrence of the thing promoted and therefore when the thing is actually taking place, it cannot be said to have been promoted. There is a distinction between the 'promotion' and 'conduct' of a public meeting (Zajar Ali, J.) HAKIM BAHADUR SING v EMPEROR 1923 Lah 342.

**PRINCIPAL AND AGENT—Accounting liability**

In a case of joint principals, an agent cannot get a discharge by accounting to only one of them Hals Vol. 1 p. 159, 187, 149 E R 943 15 Eq 204 (old) (Dus and Kulwant Sahay, JJ.) JAGDIP PRASAD SAHI v, MT RAJO KUER 2 Pat 580 4 Pat L T 531 (1923) Pat. 177 1923 P. 464

—*Agent—Death of agent—Liability of representatives to account—Extent of*

It is well established that the representatives of a deceased agent are not liable to render an account in the sense in which the agent, had he lived, might have been called upon to do so. The liability to render accounts is a personal one attaching to the agent and cannot be enforced against his heirs. This does not mean, however, that the heirs must necessarily escape liability altogether for the default or breach of duty of the agent if the principal can prove that he had suffered loss thereby. The burden of proof that the representative have got assets of the deceased agent in their hands and that they are therefore liable is on the plaintiff. (Miller, C J and Foster, J) RAMESWAR SINGH v VARENDRANATH DAS 71 I. C 916 1923 P. 259

—*Agent—Authority of agent—Contract of sale—Estate or house agent—Power to enter into contract.*

An estate or house agent authorised to procure a purchaser, has no implied authority to enter into an open contract of sale. There is a substantial difference between an authority to sell and an authority to find a purchaser. Authorising a man to sell means an authority to conclude

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a sale, authorising him to find a purchaser means less than what it means, to find a man willing to become a purchaser or to find him and also make him a purchaser 1900 2 Ch 267 Ref (*Mookerjee, and Cuming, JJ*) DURGA CHARAN MITRA *v* RAJENDRA NARAIN SINHA

1923 Cal 57

—Authority—Construction See (1922) DIG COL 929 PURNA CHANDRA DUTT *v* INDRA CHANDRA RAY, 69 I C 978

—Authority—Construction of—Ambiguity—Bona fide interpretation See 1922 DIG COL 930, SEETHALAKSHMI AMMAL *v* CO OPERATIVE DISTRIBUTIVE SOCIETY, MAYAVARAM 70 I C 636

—Commission—Right to—Sale—Title not approved—Effect of

The question when under a contract of commission agency the commission is earned depends on the intention of the parties as deduced from the contract and the surrounding circumstances. If a contract bring about a sale when the agent says Commission is due to him as soon as he introduces a purchaser irrespective of whether he becomes one or not very clear evidence is necessary to bring about such a result English Law considered (*Schwabe, C J and Odgers, J*) AYYANNAH CHETTY *v* SUBRAMANIA AIYAR 45 M. L. J. 409 (1923) M. W. N. 675 18 L. W. 560

—Criminal liability.

There is no warrant for the proposition that if the agents of the petitioners broke the rule of law the petitioners are guilty. (*Moti Sagar, J*) SHEO RAM *v* EMPEROR. 1923 Lah 603.

—Direction by principal to agent to pay funds in his hands for the discharge of the principal's obligation—Communication of the direction to the creditor of the principal—Creation of an equitable assignment in favour of the creditor—Principal, company going into liquidation—Rights of parties in law and equity

The plff placed orders for 2½ tons of a certain yellow metal with the first defendant who was the agent of the 2nd deft., an English Company. The yellow metal arrived and was with the National Bank, Madras and the plff was directed to accept a draft for £462-10-2 when presented by the Bank. It was subsequently agreed by the parties that the plff would remit to 2nd deft a sum of Rs 400 for the yellow metal which he did. But the 2nd deft, had to pay a sum of Rs 359 to the National Bank before they could get delivery of the goods and the 2nd deft wrote to the plff on the 13th January 1921 a letter acknowledging receipt of Rs 400 "As this (amount) has still to be paid to the National Bank to release the documents, we are making the necessary arrangements." The 2nd deft cabled to the 1st deft and also wrote to the 1st deft on the 20th January 1921 "we got this cash and wired to know if you had sufficient cash of ours to hand some Rs 350 or so to the Bank to get the goods. This should save us paying either the Bank or you which is unnecessary while you have funds of ours as we understand at present"

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Then the 2nd deft company went into liquidation and neither the money nor the yellow metal was handed over to the plff. In a suit by the plff against the defts 1 and 2 in the alternative *held*, that the 2nd deft was liable in the sum of Rs 400 to the plff and that the plff was entitled to a charge for the same on the funds of the 2nd deft in the hands of the 1st defendant.

Where there are funds in the hands of an agent belonging to the principal and when the principal gives a mandate to the agent to deliver them in extinguishment of an obligation of the principal to a third party and when the mandate is communicated to the creditor, then there arises on the part of the agent an obligation on which he can be sued both in law and equity in law as on a contract and inequity as upon implied assignment of such funds as there may be in his hands to satisfy *pro tanto* with those funds the claims of the creditor.

The 1st deft was entitled to pay out of the funds the amount due to the plff in spite of any pressure by the liquidator, as the plff's equitable claim is entitled to preference over the legal rights of the Bank or of the liquidator (*Coutts Trotter, J*) ANANTHACHARI *v* MRS. RATNAM AND SARATHI 45 M. L. J. 83

18 L. W. 674 75 I C 161 1923 Mad 713

—Joint principals—Liability of agent—Discharge of agent by one of the principals—Effect of

The liability of an agent to account is not a liability that arises by virtue of a contract between the parties but is a liability that is annexed by law to the office of the agent.

So far as the liability of an agent to account to joint principals is concerned the authorities are unanimous that an agent cannot get a discharge by accounting to only one of two co-principals.

Co-principals may jointly appoint an agent to act for them and in such case become jointly liable to him, and may jointly sue him. The agent is not bound to account separately to one of several co principals and if he has done so he is not thereby discharged from liability to the other or others unless the co-principals are also partners.

Where the moneys are received on behalf of joint principals the agent is liable to account to them jointly, and not discharged by payment to one or more of them only, unless by authority of all (*Das and Kulwant Sahay, JJ*) JAGDIP PARSAD SAHI *v*, MT RAJO KUER

2 Pat 585 1923 Pat 177

4 Pat L T 531 1923 P 464

—Liability of principal—Criminal Acts—Possession of agent

A man is not ordinarily liable for the criminal acts of his agent except when he puts his servant to do business for him and the servant acts outside his powers. If *mens rea* is relevant, it must be shown the principal had knowledge. Control may amount to criminal possession although actual legal possession may be with another. (*Walsh and Ryves, JJ*) EMPEROR *v* ZAWAR HUSAIN

45 A. 541. L. R. 4 A 99 (Cr) 21 A. L. J. 481; 73 I. C. 929. 24 Cr. L. J. 705. 1923 A 592.

## PRINCIPAL AND AGENT.

## —Paka Adatia—Relation

Relationship between *pacca adatis* and their constituents is not one of principal and agent but of principal and principal (*Kotwal, A J C.*)  
*HARNARAYAN JODHRAJ v RADHAKISHAN CHANDRA BHAN.*  
 1923 Nag 324

—Payment by a debtor to agent authorised to receive—Receipt by agent as such—Subsequent misappropriation by agent—Whether debtor can recover the amount from the agent.

Plaintiffs owed first defendant a sum of money paid it to the 2nd defendant 1st defendant's agent, as such The second defendant misappropriated it subsequently and did not account for it to the first defendant 1st defendant then obtained a decree against the plaintiffs for the amount as the latter did not appear or plead the discharge  
*Held*, in a subsequent suit by the plaintiffs to recover the amount from the 2nd defendant that they were not entitled to recover the amount

In the above case the 2nd defendant received the amount as his principal's money and plaintiffs who could have pleaded against the 1st defendant in the former suit that he did so receive, cannot, by their failure so to plead enable themselves to recover the amount from the 2nd defendant

In the absence of any mistake on the part of the person paying the amount to the agent, or duress or misconduct on the part of the agent, at the time of the payment of the money, the person who pays the money is not entitled to recover it from the agent, although the agent might not have accounted for the same to his principal

*Ellis v Goulton*, (1893) 1 Q B 350 *Bumford v Shuttleworth* 11 A & E 926 *Stepens v Badcock* 5 B, and A 354

*Obiter dictum* in *Cary v Webster* 1 Strange 480 not followed.

*Pollard v Bank of England*. L R 6 B 623  
*Taylor v Metropolitan Railway*, (1906) 2 K B 55  
 Referred to (*Oldfield, J*) *KULANDAIVELU PILLAI v RAMASWAMI NAICKER* 44 M L J 495  
 17 L W 448 (1923) M W N, 230  
 72 I C 770. 1923 Mad 770

—Money had and received—Basis of action  
 —Principles underlying *Sec BROKER*

25 Bom L R 1014

—Relationship between—Agent not entitled to treat himself as principal—Unreasonable custom

No agent can without the consent of his principal or without a term in his contract authorising him so to do, turn himself into a principal and use his own principal's money and the advantages which he has obtained from his position as agent make a profit for himself. An agent in the true sense of the word is a medium of communication between the two contracting parties and it is imperative that he should not divest himself of his character as agent and become a principal to the transaction. A custom to the contrary is unreasonable and cannot be imported into a contract of agency (*Piggott and Walsh, J.J.*) *KISHORI LAL v. JIWAN LAL*  
 1923 A. 242.

## PRIVY COUNCIL.

PRISONS ACT (IX OF 1894) S 3—Judicial lock up  
 —If a prison—Person committed to custody—If a prisoner

A judicial lock-up is a prison within the meaning of S 3 of the Prisons Act and a person committed to custody in pursuance of a warrant, though not convicted is a criminal prisoner within the meaning of the section (*Shadi Lal, C J and Lumsden, J*) *EMPEROR v KHANU*  
 4 Lah 448

—S 42—Communicating with a prisoner  
 —If an offence—Assaulting constable

A person who communicates or attempts to communicate with any prisoner commits an offence and if he assaults a constable who is authorised to prevent the commission of such an offence he can also be convicted under S 353 Penal Code (*Shadi Lal, C J and Lumsden, J*) *EMPEROR v KHANU*  
 4 Lah 448

—S 42 (3)—Communication with prisoner  
 —Offence—Abetment

Where the first accused a prisoner in jail, secretly communicated with the second accused, another prisoner in the same jail, by means of a letter sent through a warder, and the second accused read the letter, wrote a reply thereto and handed it to the warder for transmission *Held* that the first accused was guilty of an offence under S. 42 of the Prisons Act and the second accused under S 42 of that Act read with S 107 I P C (*Venkatasubba Rao, J*) *SREENIVASA CHETTY v EMPEROR*

44 M L J 585 (1923) M W N 274  
 18 L W 80 72 I C 609 24 Cr L J 449  
 1923 Mad 596

## PRIVY COUNCIL—Additional evidence.

There is no restriction on the powers of the Board to admit evidence for the non-production of which at the initial stage sufficient ground has been made out (*Mr Ameer Ali*) *RAJAH INDRAJIT PRATAP BAHADUR SAHI v AMAR SINGH.*

2 Pat 676 33 M L T 233 (P C)  
 45 M L J 578 18 L W 728  
 25 Bom L R 1259 28 C W N 277  
 74 I C 747 53 I A 183  
 21 A L J 554 4 Pat L T 447  
 L R 4 P C 123 1 Pat L R 345  
 (1923) P C 128 (P C)

## —Appeal—Grounds not taken before

Where a party though he had opportunity to raise a particular ground in the courts below, failed to do it, he should not be allowed to do it for the first time in the Privy Council (*Lord Buckmaster*) *BALIRAM SINGH v. SETH NARSINGHDAS*

45 M L J 403  
 L R 4 P C. 197 75 I C 546  
 18 L W 137 (1923) P C 93.

—Concurrent findings of facts *See* (1922) DIG COL 931 *MOHANT BHUGWAN RAMANUJ DAS v RAMAKRISHNA BOSE.*  
 74 I C 561.

—Costs—Cause—Delay. *See* (1922) DIG COL 932 *MAHOMED SHER KHAN v RAJI SETH SWAMI DAYAL.*  
 28 C. W. N. 79.



## PRIVY COUNCIL

Costs — Delay — Successful party deprived of costs See (1922) DIG COL 931  
BEHARI LAL v KUNDAN LAL

(1923) M W N 388  
27 C W N. 509 32 M L T (P C) 15  
69 I C 356 (P C)

Criminal appeal—Limitation See (1922)  
DIG. COL 932 MUKUGA GOUNDAN v EMPEROR  
1 Pat. L R (Cr) 31 69 I C 831 (1)  
23 Cr L J 743 (1)

Final decree—Preliminary decree if  
can be challenged

In an appeal to the privy Council against a final  
decree in a suit, questions decided by the prelimi-  
nary decree cannot be agitated (*Ameer Ali,*  
SETH KEVALDAS TRIBHOVANDAS v SANKERLAL  
BULAKHIDAS)

45 M L J 763 33 M L T. (P C) 424  
(1923) P C 178

Order in Council R 2—Certificate of  
High Court—Conclusive effect. See (1922) DIG  
COL 931 RADHAKRISHNA AYYAR v SUNDAR  
SWAMIER

74 I C 584.

Practice—Issues abandoned—Effect.

Where in the course of the trial certain issues  
were abandoned, they cannot be raised again in  
appeal (*Lord Sumner*) ANNADA MOHAN ROY v  
GOUR MOHAN MULLICK

50 Cal 929 45 M L J 617 L R, 4 P C 164  
(1923) M W N 803 25 Bom. L R 1269  
33 M L T. 365 (P. C) 74 I C 499  
21 A L J 718 4 Pat L T 609  
50 I A 239 (1923) P C 189. (P. C)

Practice—Pleadings—Construction

It is not the practice of their Lordships of the  
Privy Council to construe the pleadings too  
strictly or to exclude a plea, which was not  
embodied in the plaint from being made an issue  
in the case (*Lord Salvesen*.) THE SECRETARY  
OF STATE FOR INDIA IN COUNCIL v LAXMI BAI

44 M L J 471 17 L W 405  
47 Bom 327 28 C. W N 49 72 I C 898  
32 M L T (P C) 111 37 C L J 464  
25 Bom L R 527 50 I A 49  
(1923) P C. 6 (P C)

Printing of records -Unnecessary matter  
included See (1922) DIG COL. 932, JAI INDRA  
BAHADUR SINGH v BIJAI RAJ KUNWAR

21 A. L J 125 27 C W, N 221

Printing of records — Unnecessary  
printing

The Privy Council disapproved of the printing  
of an enormous mass of wholly irrelevant and  
unnecessary matter which had been allowed in  
the case (*Viscount Cave.*) SHEO DARSHAN  
SINGH v. THE DUPUTY COMMISSIONER, PARTAB-  
GARH

(1923) P C 44 (1)

Translation and printing of documents—  
Application for, to make to what Bench of the  
High Court See (1922) DIG. COL 933 SHIBA  
PRASAD SINGH v RANI PRAYAG KUMARI DEBI

49 Cal. 967 . 70 I C. 519

## PROBATE AND ADMINISTRATION ACT, S 21.

PRIZE COURT—Condemnation of ship—Decla-  
ration of war—Naturalized neutral—Commercial  
domicil in enemy country—Intention to divest  
himself of that character—Proof of See SHIP-  
PING 25 Bom L R. 116

## PROBATE—Essentials

Before the applicants are entitled to probate or  
grant of letters of administration they must show  
that they are executors or that under the will the  
property has vested in them (*Kotwal and*  
*Priveaux, A, J C*) AMBADAS v KASHIBAI.

(1923) Nag 27 71 I C 979 (2)

PROBATE AND ADMINISTRATION ACT, S 4—  
Will—Application for letters—Right of survivor-  
ship—Claim by applicant.

Where persons applying for letters of adminis-  
tration allege that the deceased testator was joint  
with them and that they had therefore taken the  
estate by survivorship the application for letters  
must fail In that case the deceased had no  
estate whatever to which letters of administra-  
tion could be granted (*Das and Adams, JJ*)  
KALI KUMAR v, MT NUFABATI KUMARI

70 I C 155 (1923) P 96 (1).

Ss. 4 and 90—Mahomedan will—Exe-  
cutors—Sale of property—Probate not obtained  
See (1922) DIG, COL 933 MAHOMED YUSUF v  
HARGOVINDAS

47 Bom 231 70 I C 268.

Ss 14 and 15—Applicability of—Intestate  
—Letters of administration

Ss 14 and 15 of the Prob and Admn Act refer  
to cases where letters of administration have  
been granted to the estate of an intestate Where  
on the other hand letters of administration have  
been granted not upon intestacy but with copy  
of the will annexed, the first portion of S 12 is  
applicable Probates and letters of administra-  
tion with copy of the will annexed are conclusive  
evidence of factum and validity of the will, in  
the same way as letters of adm nistration are con-  
clusive of the intestacy of the deceased 28 C.  
327, 31 M L J 277, 7 H L C. 124 Ref.  
(*Mookerjee and Cuming, JJ*) CHAKU CHANDRA  
PRAMANIK v NAHUSH CHANDRA KUNDU

50 Cal, 49 74 I C 630 1923 Cal 1.

S 17—Renouncing of executorship—  
Withdrawal of

On an application put in by one of several  
executors for probate of the will, notice was  
issued to the others Thereupon one of them re-  
nounced his executorship and contested the will  
Later after the grant of the probate, he applied  
for withdrawing the renunciation and for being  
appointed executor. Held, he was too late as the  
grant had already been made (*Woodroffe and*  
*Cuming, JJ*) HARE RAM SINGH CHOUDHURY v.  
RAM SINGH CHOUDHURY

75 I C. 218 1923 Cal 444.

S 21—Letters of administration—Gift  
of residue to idol—Application by purohit—  
Shebait

Where a Hindu testator directed by his will  
the payment of a legacy of Rs. 50 to the priest of  
an idol and the residue was bequeathed to the idol

**PROBATE AND ADMINISTRATION ACT, S 52.**

itself, the proper person to apply for letters of administration is the shebait and not the priest. The shebait appoints the purohit but that does not transfer the management of the debutter estate from the shebait to the purohit. 16 W. R. 99, 25 C W N 201 Ref. (*Mookerjee and Rankin, JJ*) *KALI KRISHNA RAY v MAKHAN LAL MUKHERJEE* 50 Cal 233 72 I C 686

27 C W N 411 (1923) Cal 160

**S 52—District delegate—Grant of probate by Additional District Judge**

An Additional District Judge cannot grant probate unless he is appointed a District Delegate by the High Court or exercises powers as a District Judge (*Kotwal, A J C*) *RAM SINGH RAJPUT v MURTIBAI* 1923 Nag 41

**S 56—Fixed abode—Meaning of jurisdiction of Court.**

The expression fixed abode in S 56 of the Probate and Administration Act does not mean permanent residence at one place in a man's life but residence for a considerably long time. Where the deceased has left some moveable property within the jurisdiction and where all the witnesses to the will reside within the jurisdiction the Court has power to entertain an application for probate (*Batten, J C*) *GOVIND v ANANT* 6 N L J. 49, 19 N L R 54 71 I C 816 1923 Nag 145

**S 67—Verification—Effect of absence**

The provisions of S 67 as to verification are directory and not mandatory and hence the omission can be cured (*Kotwal, A J C*) *RAM SINGH RAJPUT v. MURTIBAI* 1923 Nag 41

**S 76—Date of grant—Which is**

The date of grant of probate is the day on which the order granting it is passed and not the date of the order that probate should issue (*Woodroffe and Cumming, JJ*) *HARE RAM SINGH CHOWDHURY v RAM SINGH CHAUDHURI* 27 C W. N 285 75 I C 218 1923 Cal 444

**S 83—Decision of Probate Court—Title to property—Decision not res judicata.**

In proceedings under S 83 of the Prob and Adm Act the Court decides the question of representation to the estate and not of distribution and it is only for the purpose of determining the former question that the Court decides the right of a party to the whole or part of the estate. Consequently the decision comes to by the Court as to the right of a party to inherit does not operate as *res judicata* in a suit for administration or possession of the property belonging to the estate. 5 L B. R 78 1918 P. R. 63 101 48 Cal 694 dist. (*Pratt and Duckworth, JJ.*) *MG. TUN YIN v MA SEIN YIN* 1923 Rang. 9

**S 89—Death of party—Abatement of cause of action—Suit for damages for malicious prosecution—Actio personalis moritur cum persona.**

The expression "personal injuries not causing the death of the party" in S 89 of the Probate and Administration Act does not mean injury to the body merely, but all injuries which do not

**PROMISSORY NOTE.**

necessarily cause damage to the estate of the person wronged. 44 M 357 101 31 C 993 not 101. Consequently a suit for damages for malicious prosecution abates on the death of the plaintiff (*Macleod, C J and Crump, J*) *MOTILAL v HARNARAYAN* 47 Bom 716 : 25 Bom L R 435 73 I C 365 1923 Bom 408.

**S 90—Administrator—Conveyance by leave of court—Want of—Effect of**

An administrator has the whole estate vested in him. If he is also an heir and conveys the estate without reciting the capacity in which he conveys he must be taken to have sold the greatest he could and the fact that he did not describe himself as administrator should make no difference. A sale made without the leave of the court is voidable and not void. (*Robinson, C J. and Heald, J*) *A L A R FIRM v MAUNG THWE* 74 I C 54 1923 Rang 69

**Ss 112 and 116—Legacy—Vested interest—Assent of executor—Effect of**

As a protection to the executor the law ordains that every legatee, whether general or specified and whether of chattels real or personal must obtain the executor's assent to the legacy before his title as legatee can be complete and perfect, before such assent however, the legatee has an inchoate right to the legacy such as is transmissible to his own personal representatives in case of his death before it be paid or delivered. Though on the assent of the executor, the full title passes to the legatee, the assent creates no new title it merely perfects the title acquired under the will and if the legacy is void the assent avails nothing. It cannot be said that till the executor has signified his assent express or implied, legatee has no interest whatever in the subject-matter of legacy. The assent of the executor has relation back to the time of the testator's death and confirms an intermediate alienation by the legatee of his legacy (*Mookerjee and Cumming, JJ*) *KHAGENDRA NATH MOOKERJEE v KSHETRA NATH PAL*. 50 Cal 171 71 I C 314 1923 Cal 21

**PROMISSORY NOTE—Consideration, failure of—Burden of proof**

In a suit on a promissory note, if the defendant pleads want of consideration the onus lies upon him. Nevertheless, if as a result of the plaintiff's evidence in the witness-box the court is satisfied that no consideration passed, the defendant can avail himself of that and get a decree (*Mears, C J. and Banerjee, J*) *MAHOMED SHAFI KHAN v KUNWAR MUHAMMAD MOAZZAM ALI KHAN* 1923 A. 214.

**Consideration—Forbearance to sue on prior note**

Forbearance to sue on a prior promissory note in favour of a new relation of the promisee is sufficient consideration for a subsequent promissory note (*Daniels, J C*) *MT ABIDA BEGAM v RAM CHARAN* 26 O C 204.

**Consideration—Onus**

The onus of proving that no consideration on a promissory note was paid is upon the defendant (*Motilal Sagor, J.*) *HANS RAJ v LACHMI NARAIN*. 1923 Lsh. 388.

## PROMISSORY NOTE

—Failure of—Original consideration reverts

Where there was no intention on the part of both parties that the taking of the promissory notes was to be the absolute discharge of so much of the debt, and the notes fail and no third party is endangered, the creditor is entitled to fall back on the original consideration (*Robinson, C J and May Oung J*) *DAWSONS BANK LTD v C, R V V CHETTY FIRM*

1 Rang 121 1923 Rang 254

—Joint Hindu family—Manager execution of pronote—Suit on—Liability of other members for the debt See HINDU LAW, JOINT FAMILY MANAGER

25 Bom L R 151

—Payee—Village community—Promissory note in favour of—Enforceability See C P Code O 1, R 8

44 M. L J 240

PROVINCIAL INSOLVENCY ACT—(1907)—Hindu joint family—Adjudication of manager—Interest of minor members *SATHIVASAGAM PILLAI v MEENAKSHISUNDARAM AIYAR*

69 I C 485

—Official Receiver—Sale held by—Interference by Court—Powers of.

The Courts' power to interfere with a sale held by an official Receiver is not limited to cases where there has been some malafides on the part of the Receiver or of the purchaser. It can also interfere in a case in which the action of the Receiver was irregular and has prejudiced the general interests of the creditors. (*Spencer and Venkatasubba Rao, JJ*) *RAMABADRA CHETTY v RAMASWAMI CHETTY*

44 M L J 284

17 L. W 622 73 I C 374 1923 Mad 350

—Old and new Acts—Procedure

Where the Act of 1907 was in force when the petition in insolvency was presented but the adjudication order was passed after the Act of 1920 came into force, the procedure under the new Act will govern. But orders passed under the old Act or rights obtained thereunder are unaffected by the new Act. (*Kumarasamy Sastry, J*) *RANGIAH CHETTIAR v ANNABAMY ALWAR AYYANGAR*

(1923) M. W N 840 18 L W 836

—S 3—Adjudication of father of Hindu joint family—Son's shares if vest in Official Receiver—Procedure

Where in a joint Hindu family consisting of a father and his minor sons, the father was adjudicated an insolvent and the sons object to the sale of the whole family properties by the Official Receiver on the ground that they are not liable to the debts of their father, it is the duty of the official Receiver to decide, before he puts up the property for sale, the question whether the son is liable for the father's debts. Notification of the son's objections to the bidders at the sale is insufficient and improper. 41 M 985 ref (*Spencer and Venkatasubba Rao JJ*) *PANJA RAMACHANDRA RAO v. GURRAJU*

18 L W 282

—Ss 16 and 45—Adjudication in Insolvency—Right of creditor not scheduled to execute decree.

## PROVINCIAL INSOLVENCY ACT.

Where a person has been adjudicated an insolvent under Act, 3 of 1907, the protection given by S 45 Cl 2 (b) of the Act applies and a creditor is not entitled to proceed against an insolvent in execution without the leave of the Court even though his name has not been entered in the schedule (*Spencer and Venkatasubba Rao, JJ*) *NATESA CHETTIAR v. ANNAMALI CHETTIAR*

17 L W 319 32 M L T (H C) 157

73 I C 213 1923 Mad 487 (1)

—S 16—Insolvency—Adjudication—Effect of—Vesting of property in receiver—Rights of decree holder against insolvent See (1922) DIG, COL 939 *SRIPAT SINGH DUGAR v RAI HARIRAM GOENKA*

74 I C 697

—S 16—Liability to arrest under Act of 1920.

A person who was adjudicated insolvent under the Provincial Insolvency Act of 1907 and has not been discharged is not liable to arrest in execution of a decree in accordance with the provisions of the Act of 1920 even if he does not take out a protection order (*Daniels, A J C*) *RADHEY SHIAM v HAKIM SAIYED MOHAMMAD TAQI*

90 & A L R 37 72 I C 911

1923 Oudh 36

—S. 16—Receiver—Position of—Conduct of proceedings. See (1922) DIG COL 940 *NARASIMHAM v HANUMANTHA RAO NAIDU*

70 I C 572

—S 16—Right to receive debt—When vests—Relating back.

The right to receive money due is property within the meaning of S 16 (2) and by reason of relation back under S 16 (6) the right to receive the debt vests in the receiver from the date of the application in insolvency (*Kotwal, A J C*) *ONKARSA v BRIDICHAND*

6 N L J 213 19 N L R 144 73 I C 1037

1923 Nag 290.

—S 16—Suit against insolvent—Permission of court—Necessity for See (1922) DIG, COL 940 *TRIMBAK v SHEORAM*

19 N L R 126

—S 16 (2)—Suit against son

A father was joined as a necessary party, but no relief was actually sought against him but only against sons. The plff did not seek relief against any of the property which had come into the hands of the Receiver under the insolvency proceedings. Held the suit was maintainable. Further, the joining of the Receiver as a party would have been sufficient to cure any irregularity. (*Stuart, J*) *SHAMBHU DIYAL SINGH v ISWAR SARAN*

75 I C 597 1923 A 306.

—S 16 (2) 20—Suit by official receiver—Leave of insolvency Court—Necessity (1922) DIG COL 944. *OFFICIAL RECEIVER, COIMBATORE v KANGA*

69 I C 908

—Ss 16 (6) and 36—Transfer more than 2 years prior to adjudication—Relation back—English and Indian law

The transfers in question were effected 6½ months before the petition for insolvency was presented, and more than 2 years before the

**PROVINCIAL INSOLVENCY ACT, S 22**

order of adjudication was passed. The Court below considered that S 36 of Act III of 1907 was governed by S 16 (6) of the same Act and that, consequently the transactions could be annulled since they took place within two years of the date of the presentation of the petition. *Held* that the decision was erroneous and ought to be set aside.

S 36 of the Provincial Insolvency Act (III of 1907) provides that a transfer of property may be annulled if the transferor is adjudged insolvent within two years after the date of transfer. Under S 16 (6) an order of adjudication shall relate back to and take effect from the presentation of the petition on which it is made, but this cannot mean that for all purposes the date of adjudication is to be taken as identical with the date of presentation of the petition. If there were any doubts on the subject it would be removed by the difference in the phraseology employed in Ss 36 and 37 of the Act. S 37 allows the annulment, in certain cases of transfers, in favour of creditors 'where the transferor is adjudged insolvent on a petition presented within three months after the date of the transfer'. If the framers of the Act intended that the period provided by each section should terminate on the date of the presentation of the petition for insolvency it is obvious that the words "once a petition presented" which occur in S 37 either should have been inserted also in S 36 or on the supposition that S 16 (6) would apply, should have been omitted altogether. (*Blasler and Scott Smith, JJ*) *GHULAM MAHOMED v PANNA RAM*

72 I C 433.

—S 22—Score of. See (1922) DIG COL 941, *KUNDAN LAL v KHEM CHAND*

70 I C 97.

—Ss 24 (3), 39 (4) and 46—Debt—Proof in bankruptcy—Right of creditor—Insolvent if an aggrieved person—Debt—Bankruptcy—Effect of—Limitation

Where the Insolvency Court admits the proof of a creditor whose debt is alleged to be not provable in insolvency, it is open to the insolvent to appeal against the order. The insolvent is a 'person aggrieved' by the order within the meaning of S 46 (1) of the Act III of 1907.

There is nothing in S 24 (3) of Act III of 1907 making it obligatory on a creditor to tender proof of his debt before the discharge of the insolvent. The law of insolvency allows proof of debts at any time during the administration so long as there are assets to be distributed.

An order of discharge of an insolvent on condition that he should, subject to his right to an allowance of Rs 25 per month, for the maintenance of himself and his family, place at the disposal of the Court all property he might afterwards acquire does not amount to such a discharge as is referred to in S 24 (3) of Act III of 1907.

Where a person had a decree which was executable against the insolvent on the date of adjudication, the mere fact that during the pendency of the insolvency proceedings the period of twelve years prescribed by S 48, C P C had expired, does not prevent the decree-holder from proving his debt in insolvency. In bank

**PROVINCIAL INSOLVENCY ACT, S 37**

ruptcy a debt does not become barred by lapse of time if it was not at the commencement of the bankruptcy. (*Oldfield and Venkata Subba Rao, JJ*) *SIVA SUBRAMAN PILLAI v THEETHIAPPA PILLAI*

45 M L J 166 18 L W 636  
(1923) M W N 895 75 I C 572.

—S 34 (1)—Provincial Insolvency Act V of 1920, S 51—Official Receiver—Property of insolvent—Attachment before judgment in a suit—Adjudication subsequent to attachment—Petition by Official Receiver to raise attachment—Averse order—Nature of—Suit to set aside—Limitation. See (1922) DIG COL 941 *BALAKRISHNA MENON (OFFICIAL RECEIVER) SOUTH MALABAR v RANGAN PATTAR*

69 I C 328

—Ss 36 and 37—Fraudulent transfer—Sham transaction—Power of Insolvency Court to annul—Provincial Insolvency Act (V of 1920) S 4

Ss 36 and 37 of the Provincial Insolvency Act (III of 1907) are only rules of evidence or special rules of substantive law applicable to particular kinds of transfer by the insolvent and apart from the provisions of these sections the Court has power to enquire into the real existence of an alleged secured debt in favour of a particular scheduled creditor of the insolvent. In cases not falling within Ss 36 and 37 of the Provincial Insolvency Act, the mere fact that a transfer by way of a mortgage is found to be voluntary, does not entitle the Insolvency Court to set it aside.

*Per Venkatasubba Rao, J.*—The preponderance of authority is in favour of holding that under Act III of 1907, the Court in the exercise of its insolvency jurisdiction cannot decide questions relating to adverse claims by or against third parties. Cases reviewed, (*Oldfield and Venkatasubba Rao, JJ*) *DRONAPULA SRIRAMULU v PONAKAVIRA REDDI*

45 M L J 105  
72 I C 105 18 L W 426  
(1923) M. W. N 306 1923 Mad. 641

—S 36—Transfer of property—Voluntary transfer—Voidable by Official Receiver

A transfer of property falling under S 36 of the Prov. Ins. Act remains valid until it is set aside by the Official Receiver and the only court having jurisdiction to annul the transfer is the insolvency Court. 42 M 322 foll., 19 O C 192, 28 C L J 536, 21 C 266 Ref. (*Ashworth and Simpson, J C*) *SHARFUZZAMMAN v SIR HENRY STANFORD*

70 I C 253 1923 Oudh 80

—S 37—Fraudulent preference.

Where the debtor in order to save himself from exposure and from proceedings in Court and in order to appeal the Ludhiana Mills Company, one of the creditors, made equitable mortgage in favour of the Company. *Held*, under these circumstances the mortgage cannot be said to be created with a view of giving preference to the company over the other creditors. (3 Lah L J, 44 Foll. (*Abdul Raouf, J*) *PURANCHAND v PURANCHAND*

75 I C 441 1923 Lah 652 (2)

—S 37—Receiver—Powers

A decree obtained against the judgment debtor is not binding against the Receiver in insolvency. There is always a possibility of its having been

## PROVINCIAL INSOLVENCY ACT, § 37.

collusive between the parties, when the judgment-debtor has nothing in the world to bless himself with and does not care whether he has decrees or an unlimited amount against him or not (*Walsh and Ryves, JJ*) *MIR SHAHAMAT ALI v RAHIM BUX* 1923 A 33 (1)

———§ 37—Secured creditor—sale in favour of *Fraudulent preference*

Where the purchasers from the insolvent were secured creditors and they were entitled to be paid to the full extent of their debts so secured in preference over other creditors, the case may not fall within § 37 of Act III of 1907. There is a distinction in the Act between a creditor and a secured creditor and the purchasers in the above case do not come within the expression 'creditor' as contemplated in sec 37. § 37 does not apply to these purchasers (*Walmsley and Ghose, JJ*) *JADUNATH HALDAR v MANINDRA NATH CHANDRA* 27 C W N 816 1923 Cal. 689

———§ 37—Transfer—Annulment of—*Limitation*

An application by the official Receiver to have a transfer annulled is one that could be made at any time during the pendency of insolvency proceedings, the right to do so being one that accrued from day to day.

*Quære* whether Art 181 of the Lim. Act applies to the case (*Le Rossignol and Abaul Qadir, JJ*) *PIRTHI NATH v. BASHESHA NATH*. 69 I C 403

———§ 38—Objects of—Payment of debt to insolvent before—*Adjudication—Effect*

§ 38 is meant to protect debtors who have paid their debts to their creditors without knowledge of the latter's insolvency and its benefit must be given to persons who pay their debts after application but before adjudication (*Kotwal, A J C*) *ONKARSA v BRIDICHAND* 6 N L J 213 19 N L R 144 73 I C 1037 1923 Nag 290

———§. 46—Aggrieved person—Insolvent—Admission of debt—Right of insolvent to appeal *See PROV INSOL ACT Ss 24 (3), 39 (4) AND 46* 45 M L J 166

———§. 55—Assignment by insolvent of surplus remaining after distribution of dividend—*Rights of assignee*

It is possible for an insolvent to assign to a purchaser the prospective surplus that may remain over after his estate has been administered in insolvency. The Receiver in insolvency is a mere trustee for the bankrupt in respect of the surplus. But neither the insolvent nor his assignee could interfere with the administration of the estate by the Receiver (*Macleod, C J. and Crump, J*) *RAM CHANDRA NARAYAN DATAR v NIPUNGE*, 25 Bom L R 499 73 I C 379 1924 Bom 49

———§. 68—Sale by official receiver—Refusal to confirm—Appeal to District Judge—*Reversal of order of Official Receiver*

The official Receiver refused to confirm a sale held by him on the ground that the purchase money had not been paid by the purchaser within

## PROVINCIAL INSOLVENCY ACT, (V OF 1920), § 2

the time noted in the proclamation of sale and resold the properties to another person. The original purchaser applied to the District Judge who rescinded the order of the Official Receiver without giving reasons. Held that the order of the District Judge was not supportable and the case must go back for an adjudication after hearing the evidence tendered by the two purchasers (*Spencer and Venkatasubba Rao, JJ*) *PANJA RAMA CHANDR, RAO v GURRAJU* 18 L W 282

———§s 75 and 69 *Conviction—Appeal heard by Judicial Commissioner—Nature of*

For the North-West Frontier Province an appeal heard by the Judicial Commissioner under § 75 of the Act against an order passed by the District Judge under § 69 of the same is a first Civil appeal heard in the exercise of the Civil jurisdiction of the Court (*Pipon, J. C*) *GHULAM HAIDAR v EMPEROR* 73 I C 129

———§. 75, Cl 1—Subordinate invested with insolvency jurisdiction—*Appeal from order—Forum*

Although the Insolvency Act provides that, so far as or general proceedings under it are concerned a subordinate court when it is specially invested with insolvency jurisdiction shall exercise it concurrently with the District Court yet for the purpose of appeal it makes that court subordinate to the District Court. Under the Act therefore the appeal lies to the District Court (*Kotwal, A. J. C*) *MADHORAO DEORAO v NAGO* 71 I C 37 1923 Nag 80

———§ 78—*Suspension of limitation Old Act*

Where a person tries to execute a decree and wants to deduct the period of the insolvency of the judgment-debtor § 78 which gave him the right will not apply unless he has proved his debt under the Act. There was no provision similar to § 78 in the Act of 1907 (*Mullick and Buckmill, JJ*) *SHEIKH AKHAJ KHALIFA v RAMLAL MARWARI*, 1923 Pat 271 1924 P 40

PROVINCIAL INSOLVENCY ACT (V OF 1920) —*Receiver—Proceedings against—Leave of Court*

A Receiver in insolvency does not occupy the same position as a Receiver in a suit. The permission of Court is not necessary for instituting proceedings against him (*Das and Kalwant Sahay, JJ*) *SANT PRASAD SINGH v SHEODAT SINGH* 2 Pat 724

———*Suit against Receiver—Civil Court.*

Where a person sues in a civil court for declaration of title to property which the Official Receiver proceeds against as belonging to the insolvent the Receiver is a proper party, and can be impleaded without obtaining the permission of the Insolvency Court (*Lindsay and Sulaiman, JJ*) *MAHRANA KUNWAR v DAVID* 21 A L J 737 L R 4 A 483 1924 A 40.

———§ 2 (b)—*Property—Share in the joint family property—Receiver's suit for partition.*

The insolvent's undivided share in the property of the joint family of which he is a member, is 'property' within the meaning of the Insolvency

## PROVINCIAL INSOLVENCY ACT (V OF 1920), S 2

Act and therefore the Receiver can sue for partition of the share of the insolvent 3 Cal 198 (P C) Ref 5 O L J 665 Dist (*Damels and Dalal*, 4 J C) LAL BAHADUR v PASPAT PRASAD 100 L J 31 90 & A L R 173 1923 Oudh 154

## —Ss 2 (1) (d) and 28—Joint-family property—If vests in Receiver

Under the Prov Ins Act, property is defined to include any property over which or the profits of which any person has a disposing power which he may exercise for his own benefit Joint family property does not vest in the Receiver out an order of adjudication against a Hindu father (*Das and Kulwant Sahay*, J) SANT PRASAD SINGH SHEODUT SINGH 2 Pat 724

## —S. 2 (d)—Property—Undivided interest of sons

Under the Mitakshara Law a father has the right to dispose of his son's interest in ancestral immovable estate for the payment of his own debts not contracted for immoral purposes and such interest therefore is "property" within the meaning of S 2 of the Prov Ins Act 54 I C 931 158 P R 1919 Foll 39 A, 437 P C Cons Dis (*Raymond A J C*) CHELLARAM v OFFICIAL RECEIVER 75 I C 497 1923 S 20

## —S 3—Power of District Judge—Transfer to Sub-Judge

Under S 3 of Prov Ins Act a District Judge cannot transfer a petition for disposal to a Sub-Court, as the former is the only court that can deal with creditor's petitions (*Spencer and Deva Dos*, JJ) PREMCHAND INDOJI v SOLETI GOPA-LAPPA 45 M L J 689 18 L W 685 (1923) M. W N 754

## —S 4—Decision of Insolvency Court—Finality of

Where certain property is attached by the receiver in an insolvency as the property of the insolvent and a person claiming that property prefers an objection which is adjudicated upon by the insolvency Court under S 4 of the Prov. Insolvency Act such decision is final and binding upon the parties and cannot be reargued in a suit in a Civil Court (*Banerji*, J) BARRA BEGAM v SHEO NARAIN 71 I C 979 1923 A 293 (2)

## —Ss 4, 53—Property if belongs to insolvent—Question how to be decided

The question whether a certain property belongs to the insolvent has to be decided not summarily under S. 53, but under S 4 (1) after framing issues and recording evidence (*Dalal*, J C) MT SURJA v GIRINDRO NATH CHATTERJEA 90 & A L R 419

## —S 4—Question of title—If to be raised only in insolvency court

S. 4 of the Insolvency Act gives the court full power to decide questions of title or priority and the decision therein is binding as between the parties in all subsequent proceedings But this does not mean that exclusive jurisdiction is vested only in such courts, any stranger to the proceedings can maintain a civil suit regarding his rights

## PROVINCIAL INSOLVENCY ACT (V OF 1920), S 16.

(*Lindsay and Sulaiman*, JJ) MAHRANA KUNWAR. v DAVID 21 A L J 737 L R 4 A. 483 1924 A 40

## —S 4—Question of title—Right to decide—When not to be exercised

Though an Insolvency Court can adjudicate on questions of title, still if such adjudication by the Court will not remove a person from the possession of property because the insolvent himself has not a present right to remove him it should not be embarked upon (*Spencer and Davados*, JJ) THE OFFICIAL RECEIVER, SOUTH ARCOT v PERUMAL PILLAI 18 L W 884 33 M L T (H C) 230

—S 4 sub-S (1)—Decision on question of title—Powers of insolvency Court—Taking of evidence See (1922) DIG GOL 943 JITENDRA NATH BHATTACHARJEE v FATEH SINGH, 72 I C 320

## —S 5—Power of Insolvency Court to review its own order

Under S 5 an Insolvency Court has the same powers and follows the same procedure as in the exercise of its civil jurisdiction and hence it has power to review its own order (*Spencer and Venkatasubba Rao*, JJ) OFFICIAL RECEIVER, TANJORE v, NATARAJA SASTRIGAL 46 Mad 405 44 M L J 251 (1923) M W N 212 72 I C. 225 1923 Mad 355

## —S. 10—Debtor—Right to present insolvency petition—Liability to pay debts—Proof of

Where a debtor applies to be adjudicated an insolvent on the ground that he is unable to pay his debt he need furnish only such proof as is sufficient to satisfy the Court that there are *prima facie* grounds for believing his allegation (*Oldfield and Venkatasubba Rao*, JJ) LAKSHMINARAYANA AIYAR v SUBRAMANIA IYER 45 M L J 129 (1923) M. W N 328 73 I C 74 1923 Mad, 585

## —S 10—Insolvency—Right of debtor to adjudication—Conditions to be fulfilled

Under S 10 of the new Provincial Insolvency Act the debtor has to fulfil certain conditions to get himself adjudged an insolvent and if those conditions are fulfilled the Court has no option but to declare the person applying an insolvent. The conditions are that the debtor must establish first, that he is unable to pay his debts and, second that either his debts amount to Rs 500 or he is under arrest or imprisonment in execution of a decree of any Court for the payment of the money, or an order of attachment in execution of such a decree has been made and is subsisting against his property. If the Court investigates these matters and is not satisfied as to the existence of these conditions on such materials as are placed before the Court by the party making the application for adjudication of insolvency the Court may reject the application (*Das and Adams*, JJ) GOSHAIN GOBIND PRASAD GIR v KRISHN LALL DHOKRI 69 I C 622

## —S 16—Insolvency—Vesting order—Suit against his property—Decree—Execution—Effect,

## PROVINCIAL INSOLVENCY ACT (V OF 1920), S 24

of. See (1922) DIG COL 940 MOKSHAGUNAM SUBRAMANIA AIYAR v. RAMAKRISHNA AIYAR

70 I C 357

———S. 24—*Proviso A—Application for adjudication—Inability to pay debts—Test of—Joint application*

Where an application is made for adjudication as an insolvent on the ground that the debtor is unable to pay his debts the Court must enquire into the present value of the property and decide whether having regard to proviso A to S 24 of the Act the debtor has proved his inability to pay his debts. Where the debtor is a firm the application for adjudication must be made in the name of the firm and the manner in which such application is to be signed is laid down in Rr 22 & 24 of the Rules framed by the High Court (*Chatterjee and Cuming, JJ*) SATISH CHANDRA v FIRM RAJ NARAYAN PAKHRA 72 I C 60

———Ss 24 (1) (a) and 9—*Petition by creditor—Proof of debt*

When a petition in insolvency is put in by the creditor to adjudge his debtor an insolvent, the court must allow him under S. 24 to prove his debt and not require him to prove it in a regular suit. (*Pratt and Duckworth, JJ*) A K N M C T CHETTY FIRM v MAUNG AUNG BWINT. 1923 Rang 21

———S 28—*After acquired property—Suit for recovery—If insolvent can maintain—Share in partnership—If vests*

An insolvent has a right to maintain a suit for the recovery of "after acquired" property, subject to the right of the receiver to intervene at any stage. The defendant cannot be heard to say such an action is not maintainable by the insolvent.

The share of an insolvent in a partnership business vests in the Receiver an insolvency (*Krishnan and Odgers, JJ*) KUPPU RAMANADHA AIYAR v NAGENDRA AIYAR 45 M L J 827 18 L W 868

———S 28—*Joint Hindu family—Adjudication—Creditor's petition—Right of suit.*

Where the father of a joint Hindu family which includes minor sons as well as himself seeks the protection of the Insolvency Court, he must place all his property at the disposal of the Court. The members of a joint Hindu Family can be adjudicated insolvents in a single petition by a creditor if they are liable on a joint debt or have been guilty of a joint act of insolvency. Where therefore the adult members of a joint family have been declared insolvents the creditor must prove the whole debt in the insolvency Court. He cannot split up the debt and sue the minor members in respect of a portion thereof (*Prideaux, A J C*) VITAL v RAM CHANDRA 19 N L R, 128 72 I C 327 1923 Nag 257

———(V of 1920) S 28—*Right to sue for debt after adjudication—English law*

In English law, the general rule is that the right of action except for personal injuries and like pass to the trustee in bankruptcy but even where the right has passed to the trustee, a bankrupt can sue subject to the right of the

## PROVINCIAL INSOLVENCY ACT (V OF 1920), S 43

trustee to claim the proceeds. In India the case falls under S 28 of the Prov Ins Act as regards which there is conflict of opinion in the several High Courts (*Mullick and Macpherson, JJ*) UMAR BAHADUR v, KHAJA MOHAMMAD KARIM (1923) Pat 287

———S 28 (3) and (6)—*Goods—Possession with mortgagor—Rights of trustee in bankruptcy.*

If the goods have been mortgaged the mortgagee is the true owner and if the mortgagee allows the mortgagor to continue in possession of the goods until his bankruptcy the goods pass to the trustee (*Chatterjee and Pearson, JJ*) SHAMAL DAS v PHANINDRA NATH 72 I C 467 1923 Cal 532

———S 28 (6)—*Secured creditor—Charge—Rights of*

Where a creditor has a registered mortgage over certain moveable property of the insolvent, he is a secured creditor holding a legal charge. If the Receiver realises the property, the debt constitutes a charge of the amount so realised. (*Piggott and Walsh, JJ*) MOTI RAM v, ROWELL 21 A. L. J 32 90 & A L R 216 1923 A. 159.

———Ss 28 (6) and 47—*Secured creditor—Election—Order for sale—Priority of*

In the absence of an election by a secured creditor under S. 47 of the Prov Ins Act, a court cannot direct the Receiver to take possession of his security and sell it, allowing the creditor to rank first as to priority. Remedies open to secured creditor considered (*Das and Kulwant Sahay, JJ*) SANT PRASAD SINGH v SHEODUT SINGH 2 Pat. 724

———S 34—*Provable debt—Meaning of—Obligation incurred*

A debt to be provable under S 34 of Act V of 1920 must be a debt to which the insolvent has become subject by reason of an obligation incurred before the date of adjudication as an insolvent. The words "obligation incurred" in the section refer to an obligation incurred by the insolvent himself (*Hatufar, A J C*) KESHEORAO v GOVINDRAO 6 N L J 279 1923 Nag 142.

———S 34 (2)—*Debt—Limitation for—Power of court to reject application*

The point of time with reference to which the question as to whether the recovery of a debt is barred by time or not should be determined is the date of the adjudication.

When a debt is held to be provable under S. 34 (2), it is still open to the court to reject the application for entering the name of the creditor in the schedule on grounds other than that of the debt being barred by limitation (*Wazir Hasan and Daniels, A J C*) SYED IJAZ HUSAIN v LACHMAN DAS 90 & A L R 796

———S 37—*Separate suit—Maintainability* See (1922) DIG COL 945 ALLAH BAKSH & Co., v KARIM BAKSH 69 I C 752

———S 43—*Creditor applying—If a person aggrieved—Appeal.*

Where a creditor's petition to take action under S. 43 is dismissed, he is a person aggrieved and

## PROVINCIAL INSOLVENCY ACT (V OF 1920), S 53

has a right of appeal (*Spencer and Devadoss, JJ*) KARUTHAN CHETTIAR *v.* RAMAN CHETTI  
45 M L J 804 18 L W 837  
(1923) M W N 838

—Ss. 53, 54—*Alienation in fraud of creditors—who can move to set aside.*

Generally the official Receiver alone should move the court in the matter of setting aside an alienation in fraud of creditors. On the matter being taken to his notice, by any of the creditors he must set the law in motion under Ss 53, and 54, if necessary after obtaining an indemnity for costs from the creditor who impugns. If he fails before the District Court, he should in the same way carry it in appeal. But if the official Receiver in spite of funds being placed at his disposal, refuses to move in the matter or to appeal, it is open to a creditor to take action in the matter (*Spencer and Devadoss, JJ*) PANNAI ANANTANARAYANA Aiyar *v.* RAMASUBBA Aiyar  
18 L W 857

—S 53—*Power to annul transfer—Proceedings in the name of receiver*

A fraudulent transfer can be avoided only by the Receiver under S 53 of the Prov Ins Act and the proceedings should be taken only in his name. If no receiver is appointed for the insolvency then the Court itself can move or the creditors can move the Court to annul the transfer (*Prideaux, A J C*) BANSILAL *v.* RANGALAL  
6 N L J 47 19 N L R 32 71 I C 418  
(1923) Nag 97

—S. 53—*Transfer prior to insolvency—Absence of consideration—Transferee paying part of consideration to mortgagee—Effect*

A transfer was made shortly prior to insolvency but no consideration passed. The transferee agreed to pay off some mortgagee of the insolvent. The order of adjudication was cancelled but pending an appeal from the same, the transferee paid off the mortgagee. Held, the transfer was voidable under S 53, Insolvency Act, and the payment pending appeal was not *bona fide* as he was aware of the insolvency proceedings (*Spencer and Devadoss, JJ*) KOLLURI VENKATARATNAM *v.* OFFICIAL RECEIVER, GODAVARI DISTRICT  
18 L W, 610 (1923) M W N 780

—S 54—*Fraudulent preference—Surety—Transfer in favour of*

The insolvent in January 1920 brought certain goods on credit and the appellant orally stood surety for him. The vendors pressed for payment and called upon the appellant to fulfil his guarantee. He demanded security from the insolvent before he did so, and on the 3rd of June 1920, an agreement Ex D, was executed by which the insolvent agreed to sell the appellant a piece of land and a house for Rs 1600. The agreement provided that the appellant was, out of the purchase money, to pay off a mortgage that existed on the properties and to pay the two persons, from whom the insolvent had brought goods on credit, the amounts due to them with interest. The insolvent agreed to give possession as soon as the debts to be paid were liquidated. The sale was to be completed and the conveyance was to

## PROVINCIAL INSOLVENCY ACT (V OF 1920), S. 66

be executed within the following January. In addition to this debt the insolvent owed the appellant Rs 1000 which remained due on a promissory note for Rs 2,000 executed by him and another on 12-2-1920. Shortly before the adjudication the insolvent executed a conveyance in favour of the appellant. Held that the appellant was a creditor of the insolvent and that the conveyance in his favour was vitiated by S 54 of the Prov Ins Act (*Robinson, C J and Macgregor, J*) SADDIK AHMAD *v.* M K, M FIRM  
2 Bur. L J 52 1923 Rang 149

—S 57—*Appointment and removal of Receivers—Powers of Court*

There is nothing in S. 54 of the Provincial Insolvency Act or in R 11 and of the Rules framed by the High Court under the Act, to prevent the Court from removing an Official Receiver from his position as receiver in a particular insolvency and appointing a special Receiver in his place. The Court may not only at the initial stage appoint a special Receiver for valid reasons but it may, if good grounds are shown remove the Official Receiver originally appointed at any time whatsoever.

It is desirable that the Official Receiver should be given the control of all insolvencies in the District unless very exceptional reasons, such as those connected with the personality of the Receiver, are put forward (*Spencer and Venkatasubba Rao, JJ*) OFFICIAL RECEIVER, TANJORE *v.* NATARAJA SASTRIGAL  
46 Mad 405.  
44 M L J 251 (1923) M W N, 212.  
72 I C 225 1923 Mad. 355

—S. 59—*Sale by Receiver—Provisions of C P Code apply*

The provisions of the C P Code do not apply to a sale of an insolvent's property by an official Receiver under S 59 of the Provincial Insolvency Act (*Dalal, A J C*), MT HUSAINI *v.* MUHAMMAD ZAMIR  
26 O C 319 9 O & A L R 440  
74 I C 802

—S. 66, Sub-S 2—*Allowance for insolvent Reasonable allowance—Discretion of Court*

S 66 Cl. 2 of the Prov Insolvency Act is taken from the English legislation on the subject and the insolvency Courts in this country, in spite of the fact that they cannot attach the half salary which is removed from the grasp of creditors by S 60 C P Code have an absolute discretion to make a further reasonable allowance appropriate to the condition and the circumstances of the insolvent out of the remaining half which is otherwise divisible among the creditors. Trades people who either in the stress of business, or out of kindness, encourage persons in a humble condition of life to go on purchasing on credit in a way which they must know is beyond their means, have only themselves to thank if, in the end they lose their money altogether and if they are merely delayed in payment. They suffer no loss because the ordinary risks of trade which occurs through bad debts and unwilling payers, fall as a rule, upon the honest consumers who pay promptly and whose charges must include the loss of the tradesman who would otherwise have to close business. A tradesman who continues to supply



## PROVINCIAL INSOLVENCY ACT (V OF 1920), S. 68

goods after it is obvious that the customer is unable or unwilling to pay for the arrears which are due bring upon himself such losses as he may suffer, and a Judge sitting in Insolvency has to consider these matters, that is to say the conduct of the creditors as well as the conduct of the debtor in the general public interest to serve which bankruptcy law has been devised (*Walsh and Ryves, JJ*) *KADHA MOHAN v. M C, WHITER*

45 A 364 21 A L J 216  
73 I. C 413 1923 A 466

—S 68—Official Receiver refusing to take action—Remedy

The word "act" in S 68 cannot mean a mere omission or refusal to take steps at the request of a creditor. Where an official Receiver refuses to take action under Ss 53 and 54, the creditor's only remedy is not by way of appeal under S 68. He can at any time himself move the court under Ss 53 and 54 (*Spencer and Devadoss, JJ*) *PANNAI ANANTANARAYANA AIYAR v RAMASUBBA AIYAR*

18 L W 857

—S 68—Scope of

S 68 of the Pro Ins Act provides a speedy remedy to which recourse can be had if the person aggrieved chooses to seek it. But it is not the only remedy open to him. If he seeks the remedy mentioned there, he must come within the time fixed (*Lindsay and Sulaiman, JJ*) *MAHRANA KUNWAR v DAVID*

21 A. L J 737 L R 4 A 483 1924 A 40

—S 68—stranger aggrieved—Remedy

A stranger to the insolvency proceedings if aggrieved by any act of the official Receiver may seek his redress in the ordinary Civil Courts or may apply under S 68 to the insolvency court. In the latter case, he must comply with the terms of the section (*Dalal, A J C*) *MT HUSAINI v MAHAMMAD ZAMIR*

46 O C 319  
90 & A L R 440 74 I C 802

—S 75—Persons aggrieved—creditor

Where a creditor is a party to an application to take action under Ss 53 and 54 of the Pro Ins Act, and the same is dismissed, he is a "person aggrieved" and has a right of appeal (*Spencer and Devadoss, J*) *ANANTANARAYANA AIYAR v PANNAI RAMASUBBA AIYAR*

18 L W 857

—S 75—Person aggrieved—Official Receiver superseded by special receiver—Right of appeal.

Where by an order of Court a special Receiver is appointed in supersession of the Official Receiver, who had been originally appointed receiver the Official Receiver is a person aggrieved by the order and has a right of appeal against it under S 75 of the Provincial Insolvency Act 14 Ch D 558 and 33 M 134 relied on (*Spencer and Venkatasubba Rao, JJ*) *OFFICIAL RECEIVER, TANJORE v NATARAJA SASTRIGAL*

46 Mad 405 44 M L J 251  
(1923) M. W. N 212 72 I C 225. 1923 Mad 355

—S 75—Receiver—Powers of to get in the insolvent estate—Remedy by suit

A receiver appointed by the Resident's Court at Aden not under the provisions of the Provincial

## PROVIN. SM C CS ACT (IX OF 1887.) S 17

Insolvency Act has no power to make an order against the debtors of the insolvent. If the debtors do not comply with his demand, the remedy of the Receiver is to sue for the debt. If such a receiver makes an order against the debtors of the insolvent, the aggrieved party can appeal to the Court appointing the receiver or to the higher Court (*Macleod, C J and Crump, J*) *MOSES MENAHIM v AHRRAIN SOLOMON*

47 Bom 548 25 Bom L R 155 1923 Bom 233

—S 78—Not retrospective—General Clauses Act, S 6—Provincial Insolvency Act (III of 1907), S 6 (4)—Creditor's petition to adjudge debtor an insolvent—Presentation to wrong Court—Representation to proper Court more than three months after the act of insolvency—Power to excuse delay Limitation Act, S 5

On 28-6-1919 a creditor presented a petition for adjudicating his debtor an insolvent under S 6 (4) of Act III of 1907. The petition having been presented to a wrong Court was returned and represented to the District Court (which was the proper Court) on 1910—1919. The act of insolvency on which the petition was founded was an alleged fraudulent transfer by the debtor of his property on 31-3-1919 and the insolvency petition was presented to the District Court more than three months after that date. On 21-2-1921 the District Court purporting to act under S 78 of Act V of 1920 excused the delay in the presentation of the petition and ordered an enquiry on the merits. Held on appeal that the petition had become barred while Act III of 1907 was in force and that the District Court had no power under S 78 of Act V of 1920 to excuse the delay so as to revive a barred right.

*Per Spencer, J* S 6 (4) of Act III of 1907 makes the occurrence of an act of insolvency within three months of the date of the presentation of a creditor's petition, a condition precedent to a lawful presentation and this provision is quite independent of the statute of limitations (*Spencer and Venkatasubba Rao, JJ*) *AIYAPARAJU v VENKATA KRISHNAYYA*

44 M L J 303 18 L W 35  
(1923) M. W. N 195 72 I C 488  
1923 Mad 462

—S 78—Power of court to excuse delay.

S 78 Pro Ins Act empowers a court to excuse delay in the presentation of an appeal or application if it is a fit case for excusing delay (*Spencer and Devadoss, JJ*) *PANNAI ANANTANARAYANA AIYAR v RAMASUBBA AIRAR*

18 L W 857

—S 78—Scope of to excuse delay

S 78 Pro Ins Act does not create for the first time or take away any substantive right but merely regulates the procedure applicable to appeals and applications. The Court has power to excuse delay under S 5 Lim Act (*Spencer and Devadoss, JJ*) *KARUTHIAN CHETTIAR v RAMAN CHETTI*

45 M L J 844  
(1923) M. W. N 746 18 L W 808.

PROVINCIAL SMALL CAUSE COURTS ACT (IX OF 1887), S. 17—Attachment before judgment—Power to order—Objections if can be heard.

A Court of Small Causes has no power to order an attachment before judgment of immoveable

## PROVIN. SM. C. CS. ACT (IX OF 1887), S. 17

property or to adjudicate on claim proceedings resulting out of it (*Rankin and B. B. Ghose, JJ.*)  
SADEK ALI v. SAMED ALI 28 C. W. N. 16

—S. 17—Ex parte decree—Application to set aside—Delay—Power to excuse

The period of limitation for an application to set aside an ex parte decree is 30 days and the Court has no power to excuse delay in presentation on the ground that the applicant was *bona fide* prosecuting the application in a Court which had no jurisdiction to entertain (*Lindsay J.*)  
GADRE v. BRIJNANDAN SARAN, 45 A. 332  
21 A. L. J. 205 L. R. 4 A. 144 1923 A. 319 (2)

—S. 17—Ex parte decree—Setting aside—Deposit of decree amount—Delay in issuing chalan—Power of Court to excuse delay

Where a person seeking to set aside an ex parte decree of Small Cause Court applied within 30 days for a chalan to deposit the Court's delay in issuing the chalan the deposit was made after the expiry of the 30 days *Held* that in the circumstances of the case the application for chalan was equivalent to a deposit and that even if there was a delay in depositing the amount the Court had power to extend the time under S. 5 of the Limitation Act 45 Mad 628 Rel. 37 All 591 foll. (*Ramesam, J.*) KOILPILLAI SAMBAN v. SAPANIMUTHU SAMBAN, 44 M. L. J. 247  
17 L. W. 187 72 I. C. 220 1923 Mad 354 (2)

—S. 17—Ex parte small causedecree—Setting aside without security—Ultra vires

The setting aside of an ex parte decree in a Small Cause suit in the absence of deposit of the decree amount or security being furnished therefor, is *ultra vires*. The provisions of S. 17 of the Pro. Sm. C. C. Act are mandatory. 43 M. 570 F. B. Ref. (*Ayling, O. C. J. and Odgers, J.*)  
PERLA VENKATAKRISHNAMMA v. B. VENKATARATNAM 69 I. C. 178 1923 Mad 83

—S. 17—Provisions of mandatory

The provisions of S. 17 of the Prov. Small Cause Courts Act are mandatory and it is not competent to the dispenser with the security or to accept the word of the defendant. 42 M. 577 foll. (*Krishnan, J.*) VENKATAPATHI DEEKSHATHALU v. CHENGA REDDI 32 M. L. T. (H. C.) 316  
17 L. W. 579 72 I. C. 900 (1) 1923 Mad 554

—S. 17—Proviso—Applicability

The proviso to S. 17 Pro. Sm. C. C. Act does not apply to an order setting aside a dismissal for default, and matter costs nor security therefor need be deposited.

The words 'in pursuance of the judgment' must be read distributively and applied to words 'for a review of judgment' which precede (*Piggot, J.*) GIRDHARI LAL v. FIRM ACHAL SINGH TAKHAT SINGH 45 A. 569  
L. R. 4 A. 277 21 A. L. J. 522 74 I. C. 64  
1923 A. 605 (2)

—S. 17—Proviso—Ex parte decree—application to set aside—Draft security bond alone filed in time—If sufficient compliance. See (1922) DIG. COL. 946 T. C. BALAKRISHNA AYYAR v. RICHAMUTHU PILLAI, 70 I. C. 496

## PROVIN. SM. C. CS. ACT (IX OF 1887), S. 25

—S. 17—Restoration of case—Application for—Security furnished not valid—Effect,

Where an applicant under S. 17 of the Prov. Sm. C. C. Act filed an invalid security bond with his application but deposited cash after the expiry of 30 days, there is a failure to comply with the requirements of S. 17 of the Prov. Sm. C. C. act (*Daniels, J.*) BADLU SINGH v. PANTHU SINGH 21 A. L. J. 173 L. R. 4 A. 136  
90 & A. L. R. 433 71 I. C. 474 (1923) A. 270

—S. 23 and 25—Return of plaint when justified—Question of title not sacred in pleadings. See (1922) DIG. COL. 947. RAJAMMAL AIYAR v. KRISHNASAMI AIYANGAR 70 I. C. 153

—S. 24—Power of court Interference on behalf of parties not applying in revision

Where a decree is being reversed in revision as illegal the High Court has power to reverse it as regards those portions of the decree which is against parties who have not applied in revision (*Foster, J.*) MT. BIBI NASIBAN v. EKNAM NARAIN SINGH 4 Pat. L. T. 606 74 I. C. 938.

—S. 25—Application for leave to amend—Order refusing—Revision

An order refusing leave to amend all pleadings is not revisable under S. 25 of the Pro. Sm. C. C. Act (*Wazir Hasan, A. J. C.*) BALRI PRASAD v. MURDI DHAR 90 & A. L. R. 846

—S. 25—Correctness doubtful—If ground for revision.

Where the applicant has not shown that the view of the case as taken by the lower Court is wrong but has succeeded, at the utmost, in throwing some doubt on its correctness, the High Court will not interfere in revision (*Halifax, A. J. C.*) PITAMBAR DAS v. G. I. P. RY. Co. 1923 Nag. 309

—S. 25—Decision wrong in law—Finding of fact without any evidence—Ground not raised in lower court—Revision whether allowed. See (1922) DIG. COL. 948 CHIRANJI LAL v. KALI 70 I. C. 291

—S. 25—Finding of fact—Power of High Court to interfere in revision

Though it is with very great reluctance that the High Court interferes with the findings of a Small Cause Court yet there are occasions when it should do so (*Bucknill, J.*) PARSOTIM DAS v. FIRM OF JANGLI SAO 1 Pat. L. T. 199

—S. 25—Powers of interference under.

Small Cause Courts have been given very wide powers with regard to decision on questions of fact and in revision the High Court is always reluctant in questioning a decision on the facts. But where the findings are based on or involve assumptions or inferences which there is nothing in fact or probability to support or are not justified by sufficient evidence or where finding is opposed to the evidence on record or is based on meagre or little evidence or on flagrant misinterpretation disregard of evidence or if injustice would disregard otherwise be done, the High Court has power to interfere otherwise (*Prideaux, A. J. C.*) PADAMSI v. SHESHRAO, 10 N. L. R. 72  
73 I. C. 1055 1923 Nag. 292

## PROVIN SM C CS ACT (IX OF 1887,) S 25

## —S. 25—Revision—Interference—Substantial justice

The Court should only interfere to remedy injustice and where substantial justice has been done it will not interfere, though the Small Cause Court may technically have erred (*Duckworth, J.*) VALAB DAS v MAUNG BA THAN

1 Rang 372 2 Bur L J 154

## —S. 32 (2)—Small Cause Suit—Institution in Court having no Small cause jurisdiction—Trial by judge having such powers—Appeal

Where a Small Cause Suit was instituted in a court having no power to try Small cause suits but the suit was eventually tried by a judge who was invested with small cause powers Held that an appeal lay to the District Court The character of the suit was determined at the date it was instituted, (*Macleod, C. J. and Crump, J.*) VENKATRAMAN RAMA v. BABU RAYA VENKATESH

25 Bom. L R 516

73 I C 1020 1923 Bom 454

## —Sch I, Part 11—Suit for recovery of part of mortgage consideration—Maintainability,

A suit by a mortgagor for recovery of part of the consideration still remaining unpaid is not cognisable by a court of Small Causes (*Halmsey, J.*) SAMSAL HAQ v ABDUL KARIM

1923 Cal 567

## —Sch. II, Art 1, 3 and 19—President of, District Board—Suit of Small Cause nature—Suit for damages by toll gate contractor

A suit for damages by a toll gate contractor against the President of a District Board for loss to tolls consequent on an unauthorised order of the President exempting certain carts from payment of tolls is not exempted from the cognizance of a Small Cause Court under art 1, 3 and 19 of the Prov Sm C C Act Consequently no second appeal lies against a decree in such a suit (*Schwabe, C. J. and Odgers, J.*) PRESIDENT OF THE DIST. BOARD, SOUTH KANARA v GOPALA KRISHNA BHATTA

45 M L J 125 18 L W 82 74 I C 223

32 M L T 378 (HC) 1923 Mad 689

## —Sch II, Art. 8—Suit for rent

Suit for price of rent in kind is triable only by a Revenue Court, (*Ryves, J.*) RAJA NARENDRA BAHADUR PAL v BAFATI

45 A 7 1923 A 50

## —Art 8—Demand note for rent—Suit on the note—Jurisdiction of Small Cause Court

A demand note or a bond does not cease to be an ordinary demand note or bond just because a part or the whole of its consideration is made up of rent whether in arrears or in advance

The defendant took a lease of a field for Rs 150 for a year from the plaintiffs, and at the beginning of the year paid Rs. 75 in cash and executed a demand note for the remaining Rs 75 promising to pay interest on it The plaintiffs sued on the demand note in the Small Cause Court Held, that the suit was not one for rent and was therefore triable in that Court. (*Hallifax, A. J C.*) PURANDAL v CHERKUTYA MALI

73 I, C 7 1923 Nag 285.

## PROVIN SM C CS ACT (IX OF 1887,) ART. 35

## —Arts. 8 and 31—Suit in Small Cause Court for price of goods—Counter claim for rent—Power to try suit

In a suit for the price of goods sold and delivered the plaintiff in order to bring his claim within the period of limitation credited the rent due from him to the defendant in respect of the latter's shop The defendant pleaded that the rent had been grossly under estimated and that a much higher amount was due to him Held that the Court could try the whole suit and give a decree for the balance found due to the defendant and that the claim of the defendant was not barred by Art 8 or Art 31 of Prov Small Cause Courts (*Pillgot, J.*) FIRM BASDEO BUDHEN v NIAZ AHMAD KHAN

L R 4 A, 75 1923 A 202

## —Art 13—Cess Suit based on custom—Jurisdiction of Small Cause Court

Where a zemindar brings a suit for the recovery a certain customary dues irrespective of any contract to pay those due the suit is not cognizable by a Small Cause Court (*Stuart, J.*) MAHOMMED ASGHAR ALI KHAN v RAMMON,

71 I C 432 1923 A 378

## —Art 13—Right to collect weighment dues—Contract for—suit for recovery of money payable

A suit for the recovery of a sum of money due to the plaintiff from the defendant under a contract by which the latter was allowed to collect weighment dues on payment of a fixed amount to the plaintiff is cognisable by a Small Cause Court, The suit was not one to enforce payment of cesses or dues from persons by whom they were payable (*Daniels, J.*) COLLECTOR OF BUL ANDSHAHR v. RAM SARUP

L R 4 A 539.

73 I C 217 (1) 21 A L J 312 1923 A 420 (1)

## —Art 18—Scope—Suit for recovery of property entrusted to gold smith for work to be done

A suit for recovery of property entrusted by the owner to a gold smith, for work to be done on it, is not a suit relating to a trust within Art 18 (*Brown, A. J C.*) MA TIN v MA CHIT.

72 I C 212 (1923) Rang. 129

## —Art. 18—Suit for damages for breach of covenant for title See (1922) DIG COL 950 RAJAMMAL AIYAR v, KRISHNASWAMI AIYANGAR

70 I C 153

## —Art. 22—Jurisdiction of Small Cause Court—Suit for moveable property by their of deceased.

Where a heir of a deceased person brings a suit for the recovery of property left by the deceased as preferential heir to the defendant, the suit is not cognisable by the Small Cause Court, (*Richardson and B Ghose, JJ.*) PRIYANATH SARDAR v MOHENDRA NATH PARIK,

70 I, C 316

## —Art 35 (j)—Suit for damages for wrongful execution—Omission to certify payment

Where a decree holder omits to certify payments of a decree outside court and executes the decree and realises the decree amount, a suit by the judgment-debtor for damages is maintainable

## PRO SM C C ACT, ART 35.

in a small Cause Court (*Maung Kim, J.*) MAUNG MYO v MAUNG KHA

70 I. C 115 1923 Rang 88

—Art 35—*Suit by landlord for recovery of trees cut away by tenant—Jurisdiction of Small Cause Court—Interference in revision*

A Zemindar sued his tenant for a certain sum of money alleging that the latter had wrongfully cut and carried a tree belonging to him and the tenant pleaded the tree was his own. The Small Cause Court decreed the suit and the defendant applied for revision. *Held* that the case did not fall within Art. 35 Cl. (2) of the Prov. Small Cause Courts Act and that the High Court was not obliged to interfere even if the plea of the defendant was a good one (*Lindsay, J.*) KUNWAR PAL v. BAKSHI MADAN MOHAN 21 A. L. J. 213 L R 4 A. 172 71 I. C 645 1923 A 428

—Art. 35 (II)—*Misappropriation of rent paid.*

The plaintiff held certain land in an estate though he was not formally recorded as tenant.

The amount paid by him had not been credited by the defendant Zileadar of the state against the rent due from the plaintiff and must therefore have been misappropriated. *Held* a suit to recover back money paid to the defendant and misappropriated by him is a suit for compensation within the meaning of article 35 (ii) of sch. V of the Prov. Sm C C. Act 48 Cal 879 Foll (*Daniels, A. J. C.*) UTTAM PRASAD v KODAI, 26 O. C 200 9 O. & A L R 23 72 I. C 916 (1) 1923 Oudh 38 (1)

—Art 43 A—*Jurisdiction of Small Cause Court—Suit for value of coal wrongfully appropriated—Interest at 24 per cent—power to grant*

The plaintiff instituted a suit for the recovery of a sum of money due on a chit executed by defendant under the following circumstances. The defendant in collusion with some Railway servants took some coal belonging to the plff, and misappropriated it. Plaintiff and defendant had some discussion over it as a result of which the defendant executed a chit promising to pay a particular sum made up in a particular way. The plaintiff in summing on the chit alleged fraud misappropriation on the part of the defendant and of his executing a chit. The plaintiff claimed interest at 24 per cent which was awarded by the court below. *Held* in revision, that the suit was one upon the chit executed by defendant and was not one for damages either for theft of coal or for the conversion of the coal in any sense. Consequently the suit was maintainable in the Small Cause Court. Though 24 per cent was a high rate of interest it could not be said that the court had no jurisdiction to execute it (*Rankin, J.*) RAKHAL CHANDRA CHATTERJEE v ROHINE KUMAR CHATTERJEE. 27 C W N 549 37 C L J 389. 74 I. C. 601 1923 Cal. 650

—Art 35—*Suit for compensation for wrongful removal of trees—Not exempted from Cognizance of Small Cause Court*

A suit by the plaintiffs for the recovery of the price of certain trees alleged to have been wrongfully cut and misappropriated by the defendants

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## PRO. SM C C ACT, ART 42

from the lands of the plaintiff, is maintainable in the Small Cause Court (*Cuming and Panton, JJ.*) MIRZA DILBAR HOSSAIN v SADARUDDIN CHOWDHURY 27 C W N 469 1923 Cal 568

—Art. 35—*Suit for damages Obstruction to irrigation—Second Appeal*

A suit for damages sustained in consequence of the defendant having prevented the plaintiff from irrigating his fields from a certain well falls under Art 35 cl 2 of Sch. II to the Prov. Small Cause Courts Act (*Martineau, J.*) CHHAJU v QUTAB DIM 69 I C 330 5 Lah. L J 92 (1923) Lah 39

—Art 35—*Misappropriation—Offence—Penal Code, Ch XVIII*

The cutting down of trees belonging to other persons and misappropriating them is an offence against property punishable under Ch XVII of the Indian Penal Code and a claim for damages is not not maintainable in the Small Cause Court (*Rafiq, J.*) DUKHI v DHANNI MISIR 21 A. L. J 357 L R 4 A 215 73 I C 956 (1) 1923 A 543.

—Art. 35 (ii)—*Suit for compensation for trees wrongfully cut and removed—Limitation*

Where a vendee of trees intended to be cut and sold brings a suit for damages, it falls under Art. 35 (2) of the Second Schedule of the Provincial Small Cause Courts Act as amended by Act VI of 1917 and it is exclude from the cognizance of a Court of Small Causes, (*Le Rossignol, J.*) BIR SEN v RAJA RAM 73 I. C. 33

—Sch II, Art 35 (h)—*Suit for damages—Holder of monopoly*

A suit by the holder of a monopoly for a certain year against the previous year's holder for damages for infringing his monopoly does not fall within Sch. II Art 35 (h) of the Prov. Sm C C Act and is hence cognisable by a small Cause Court (*Martineau, J.*) RAMJI DAS v JAI GOPAL. 69 I C 431 1923 Lah 244

—See also CHAJJU v QUTAB DIN 69 I C 330 : 1923 Lah. 39.

—Sch II Art 39—(II)—*Obstructing irrigation—Suit for damages*

A suit for damages for loss sustained in consequence of the defendants having prevented the plaintiffs from irrigating their fields from certain wells falls within Sch. II Art 35 (ii) of the Provincial Sm Cause Courts as the acts would constitute the offence of mischief and is not cognizable by the Small Cause Court, Act

*Quære*, if Art. 35 (1) would apply (*Martineau, J.*) CHAJJU v MUHAMMADI 5 Lah L. J 91 69 I C 283 1923 Lah 38.

—Art. 42 — *Joint mortgagors—Meaning of—Liability.*

Where one of two executants of a mortgage had no interest in the mortgaged property and did not purport to transfer any interest still they constitute joint mortgagors and both of them

## PUBLIC DEMANDS RECOVERY ACT

would be personally liable (*Gokal Prasad, J*)  
**AMAR DEO PANDE v. GAYA PANDE.** 711 C 393  
 1923 A 408

PUBLIC DEMANDS RECOVERY ACT—*Suit for setting aside sale valuation*

A suit for setting aside a sale under the Bengal Public Demands Recovery Act should be valued for purpus of jurisdiction and court fees at the value of the whole property hold. (*Walmsley and Suhrawardy, JJ*) **PRAN KRISHNA GHARAI v NITYA GOPAL MAITI** 50 Cal 892

See also under GAMBLING ACT

PUBLIC GAMBLING ACT (3 OF 1867)—Ss 1 and 2—*Gaming in public place—Betting on price of cotton.*

The accused, numbering several persons collected together in a public market place and were betting on satta in cotton. A number of documents and telegrams were found in their possession but they could not be deciphered. *Held* that the documents and telegrams could not be regarded as implements of gaming within the meaning of the Act but that the accused were guilty of gaming in a public place within the meaning of the Act. (*Walsh and Ryves, JJ*) **SRI PAM v EMPEROR,** 21 A L J 318  
 L. R. 4 A 97 (Cr) 1923 A 386

Ss. 3, 4—*Search warrant—Legality—Magistrate signing warrant, if can try*

Where a Magistrate signing a search warrant under the Gambling Act omits to specify therein the place to be searched, the warrant is illegal. Magistrate issuing search warrant should not themselves try the accused, as the accused has the right of examining them as witnesses. (*Zafar Ali, J*) **RAJA RAM v EMPEROR** 5 Lah L J 429  
 73 I C 521 24 Cr. L J, 633

Ss 4, 5 and 6—*Common gaming house—House searched under warrant—Presumption—Keeping gaming house for profit*

The police made a raid on the houses of the accused with a warrant duly obtained. Gambling was going on and the accused were found present and instruments of gaming were found. *Held* that the warrant having been duly obtained the presumption contained in S 6 of the gambling Act applied. It was not necessary for the police to give direct evidence that the gambling was being carried on for the profit of the keeper of the house. 20 A L J 218 distinguished. (*Daniels J*) **EMPEROR v SITA RAM** 45 A 671

Ss 4, 5 and 8—*Forfeiture—Money found in possession of person in a gaming house*

Under S 8 of Act III of 1867 what is liable to forfeiture are those things which may be reasonably suspected to have been used or intended to be used for the purpose of gaming private property of an individual who is found gaming in a gaming house could not be seized and forfeited unless it was quite clear that there was attached to such property the taint that it was reasonable suspected to have been used or intended for the purposes of gaming. Even in regard to such

## PUNJ ALIEN OF LAND ACT (XIII OF 1900)

tainted things the Magistrate has a discretion to order their return in whole or in part to whom belonged. (*Bucknill, J*) **LACHMI NARAIN MARWARI v EMPEROR** 4 Pat L T 622  
 1923 Pat 220 1 Pat L R 229 (Cr)  
 1924 (P 42.)

S 5—*Powers of Superintendent Warrant for search of house—Omissions corrected by Sub Inspector—Legality of arrest*

Where in a warrant issued by a Superintendent of Police for the search of the house of a person suspected to be keeping a common gaming house, the caste of the person as well as the boundaries of the house or the name of the person to whom the warrant was addressed, were left unspecified and the Sub Inspector of Police to whom the warrant was handed over filled up the omission and proceeded to arrest the accused, *held* that the warrant as well as the search under it were both illegal. (*Kanhayya Lal, J*) **JAMNAPRASAD v EMPEROR,** 21 A L J 602 L R. 4 A 138 (Cr)  
 90 & A L R 611 73 I C 518  
 24 Cr L J, 630

S 6—*Instruments of gaming found in a house Presumption*

S 6 of the Gambling Act entitles a Court to presume where instruments of gaming are found in a house searched under a proper and legal warrant, that the house is being used as a common gaming house: i.e. a place where gaming is carried on for the profit of the owner or occupier. (*Daniels J.*) **NATHMAL v. EMPEROR.**  
 L R 4 All 235 (Cr)

PUNJAB ACT (II of 1913)—*Punjab Act (III of 1900), S 9 (2).*

Where the mortgagee was in possession of the land and had the revenue authorities not intervened, it would have been the business of the mortgagor to bring a suit for possession by redemption. *Held* the summary proceedings taken by the Revenue authorities cannot affect the rights of the parties and a suit for declaration of charge and for possession until payment of the charge money is thus virtually a defence against an order divesting the mortgagee of possession before payment of the full sum due. In such circumstances the question of limitation does not arise and the provisions of O. 2, rule 2 are inapplicable. (*Shadr C. and Lumsden J*) **RAM SARAN DAS v MULA.** 4 Lah 346 1923 Lah. 648.

PUNJAB ALIENATION OF LAND ACT (XIII OF 1900)—*Notification under—Kureshi tribe—Notification if retrospective*

A mortgage effected by a member of a Kureshi tribe prior to the date when the Kureshis were notified as agriculturists under the Punjab Alienation of Land Act (XIII of 1900) can be given effect to in a suit filed subsequent to the said notification No 44 dated 4th March, 1911, by which the Kureshis were included in the list of agricultural tribes. (27 P L R. 1906, 7 P. R. 1910 and 90 P R. 1904, F B., *Foll.*) (*Broadway, J*) **MIRAN BAKSH v MILKHI RAM** 1923 Lah. 673

## PUNJ COLONIZATION OF GOVT LANDS ACT

**PUNJAB COLONIZATION OF GOVT LANDS ACT (V OF 1912) S 19—Transfer of tenancy rights—What constitutes—Agreement to deliver produce of land**

Where a Government tenant agrees for value received to pay half the produce of certain land and in default a sum of money annually, the agreement is not a transfer of the tenancy rights of the tenant, the agreement does not create a charge on the land either, consequently it is not opposed to S 19 of Act XVI of 1908 (*Scott Smith and Brasher, JJ*) **WALLI v KHUDA BAKSH**  
5 Lah. L J 366 72 I C 480

**PUNJAB COURTS ACT (VI OF 1918), S 37—Scope of See (1922) DIG COL 100 VITHAL v GOPAL**  
69 I C 556

—S 39 (1) A and B —Mortgage Suit for redemption—Forum of appeal

In a redemption suit the value of the suit is the amount of the property. The value of the suit as stated in the plaint cannot be altered by the plea of the defendant, whether it be true or false. The jurisdiction for purposes of a suit as well as appeal is to be determined with reference to the claim made and not to the amount which is actually adjudged to be due (*Le Rossignol and Broadway, JJ*) **FATEH CHAND v MT. JOWAHAR DEI**  
5 Lah. L J. 143 72 I C 405 (2)  
1923 Lah 568

—S 41 (3)—Appeal without certificate—Question of custom

The question raised in appeal was about the existence of a custom which a jat can contract a valid marriage with a *Chumbi* woman whose first husband though alive, has repudiated her. Held the words "notwithstanding anything in sub-section (1) of this section" within which sub-section (3) of S 41 of the Punjab Courts Act commences precludes, a court of second appeal in the absence of a certificate from going into the question whether the first appellate Court has erred in law or procedure. (*Campbell, J*)  
**LEHNA SINGH v JAGAT RAM** 1923 Lah 377  
73 I C 924

—S 41 (3)—Certificate—grant of Discretion—Nature of

The grant of a certificate under S. 41 (3) of the Punjab Courts Act for the purpose of carrying the matter to a higher tribunal is entirely in the discretion of the lower appellate Court, but the court refusing such a certificate must indicate by its order that the requirements of the Statute have been borne in mind in coming to the conclusion it has arrived at (*Broadway, J*) **NUR MUHAMMAD v. MEHR CHAND.** 69 I. C 425.

—S 41 (3)—Custom—Right of respondent to question—Certificate

A certificate under S 41 (3) of the Punjab Courts Act is not necessary for a respondent to agitate a question of custom in second appeal (*Broadway and Moti Sagar, JJ.*) **IFTIKHAR ALI KHAN v RISALAT KHAN** 5 Lah L J 341

—S. 41, Cl 3—Custom—Well established custom—Second Appeal—Certificate—Necessity for

Where the question of custom arising in a case is well established and there is no dispute

## PUNJ COURTS ACT, S 70 (1) (a)

between the parties as to its existence no certificate is necessary in support of a second Appeal to the High Court (*Abdul Qadir, J.*) **MUSA v GUL MAHOMED** 69 I C 538

—S 41 (3)—No finding as to custom—Certificate—Necessity for,

Where it was clear from the judgment of the lower Appellate Court that the question as to existence of custom was not decided on the merits no certificate need be produced, as required by S 41 of the Punjab Courts Act (*Abdul Raoof and Lumsden, JJ*) **PARMESHRI DAS v PARAS RAM** 73 I C. 1.

—S 41 (3)—Question of Mahommadan Law or custom

When the question as to the respective rights of inheritance was in issue, the District Judge's finding that the parties are governed by Muhammadan Law and not by custom cannot be challenged in the absence of a certificate (*Marineau, J*) **RASUL KHAN v MT. HAWASI**  
75 I C 458 1923 Lah 284 (2).

—S 41 (3)—Second appeal—Custom. See (1921) DIG COL 837. **SUBA v. JALAL**  
69 I C. 392.

—S. 41 (3)—Second appeal—Custom—Certificate—Necessity for,

Although the District Judge's view was erroneous, nevertheless, inasmuch as it was a decision on custom no second appeal was competent with out the necessary certificate, (*Broadway and Moti Sagar, JJ*) **JITA v HAR CHAND**  
5 Lah L J 298 72 I C. 403 1923 Lah 589.

—S. 44—Case decided—Refusal to issue interrogatories.

The refusal to issue interrogatories for the examination of witnesses does not amount to the decision of a case "within S 44 and hence the order is not revisable (*Scott Smith, J*) **ROOP CHAND v THE CHURCH MISSIONARY TRUST ASSOCIATION** 69 I C 417 1923 Lah 282 (2)

—S. 44—Case, meaning of

The word case, does not necessarily mean the whole case, but it must at least mean a particular branch of a case for which an independent remedy or different procedure is provided by the Code. An order that the suit can be brought in its present form i.e., as a suit for administration and rendition of accounts is not open to revision (*Brasher, J.*) **ABDUL HAFIZ v. MT. RASHIDA KHATUM** 75 I C 662 1923 Lah, 288 (1).

—S 70—Prov S C Courts Act (IX of 1887) Art. 35 (II) Criminal intention necessary See (1922) DIG COL. 1100. **SHIV GIR v KHAZAN GIR** 69 I. C 275.

—S 70 (1) (a)—Revision—Appellate Court holding that trial Court had jurisdiction.

An appellate Judgment deciding, though erroneously, that the Court of first instance had jurisdiction to hear, a suit, is not open to revision by the Chief Court under S 70 of the Punjab Courts Act, the lower appellate Court having had

**PUNJ EXCISE ACT (I OF 1914).**

jurisdiction to entertain and decide the appeal  
49 P R 1911 foll (*Scott Smith, J*) *AJUB v*  
*KIRPAL SINGH* 71 I C 827

**PUNJAB EXCISE ACT (I OF 1914)—Possession of country liquor—Terms of the license.**

S 407 of the Excise Manual cannot and does not over ride the provisions of the Excise Act and that Section empowers a license holder to possess country liquor to any extent on the licensed premises but does not entitle him to possess more than the prescribed amount (one seer) elsewhere 16 P R 1917 referred to (*Broadway and Martineau, JJ*) *EMPEROR v PURAN SINGH*  
4 Lah 10 5 Lah L J 412 73 I C 699  
24 Cr. L J 607

—S 61 (1) (a) and 61 (2) (a)—Complaint by whom to be made See (1922) DIG COL 952  
*NIHAL SINGH v EMPEROR* 71 I C 699  
24 Cr L J 183

—S 61 (1) (a) and (2) (a)—Liquor—Possession and sale—Offence

The first accused was a licensee for sale of liquor at Gakhar and he brought 8 bottles of liquor to Gujranwala. The possession therefore, was his exclusively and the mere fact that he brought the liquor to the house of the second accused does not make the possession joint of himself and the 2nd accused. It cannot be held that the latter joined in the sale merely because he called to his son to bring 2 bottles and because the money was handed to him, (*Scott Smith, J*, *KISHEN SINGH v EMPEROR*)  
72 I C 381 (1) 24 Cr L J 381 (1).

—S. 78—Confiscation of articles—Offence justifying—Illegal order.

An order of forfeiture of the liquor and empty bottles, under S 78 of the Punjab Excise Act is illegal when the offence committed is merely a contravention of a rule as to the keeping of the registers framed under Ss 58 and 59 of the Act and not in respect of the liquor and of the empty bottles within the meaning of S 78 (*Scott Smith, J*) *SUNDAR DAS v CROWN*  
1923 Lah 14

**PUNJAB LAND ALIENATION ACT—Applicability.**

The Land Alienation Act does not apply to a case as where the service of notice of foreclosure is effected within one year before the Act came into operation. The proceedings for the enforcement of foreclosure or mortgage comprising a stipulation of conditional sale remain pending until the year of grace has expired (*Le Rossignol and Harrison, JJ*) *BAJRANG DAS v GHANI RAM*  
1923 Lah 299 (2)

—S 21 A—Alienation by widow—Subsequent decree of Court—Limitation

The widow of a Gaur-Brahman had sold her occupancy rights in land to some Rors, and after her death her reversioners sued for possession of the land. The suit resulted in a compromise, and the decree of the Civil Courts was passed in 1919. The Deputy Commissioner applied in revision on 12th April, 1922. Held the application is time

**PUNJ. LAND REV ACT, S. 141.**

barred. Moreover it fails on the merits, as, even if the alienation by the widow contravened the provisions of the Land Alienation Act, it is not explained in what way they are contravened by the subsequent decree of Court, (*Martineau, J.*)  
*RAM KALA v HIRA* (1923) Lah 218

—S 44—Record of rights—Entry in—Caste—Onus of proof

An entry in the Revenue records that a person is of a certain caste does not relieve him of the burden of proving affirmatively, if the fact is disputed by the opposite party—S 44 of the Punjab Land Revenue Act does not apply to the case, (*Martineau and Moti Sagar, JJ*) *SADIQ HUSSAIN, v ANUP SINGH*  
4 Lah 327.

**PUNJAB LAND REVENUE ACT (XVII OF 1887) S 70—Panchotra money—If within section**

Income of Panchotra is not covered by S. 70 of the Punjab Land Revenue Act (*Broadway, J*)  
*NAND SINGH v LACHHMI NARAIN SINGH*  
73 I C 1920

—S. 111—Partition—Rights of widow

A widow is a joint owner of lands though with limited rights of ownership, and as such is possessed of a statutory right to demand partition. Applying the ordinary rule of law of evidence the onus is then clearly upon the party who disputes her rights to obtain partition to prove a custom to the contrary (*Martineau and Moti Sagar, JJ*) *SANT SINGH v MUSSAMAT BASANT KAUR*  
71 I C 28 (2) 1923 Lah 81 (2).

—Ss 111 and 117—Partition—Question of title—Jurisdiction of Civil Court

S. 111 does not deal with questions of the title or with the questions relating to the right of a joint land-owner to obtain or compel partition which in fact is governed by sections 116 and 177 of the Act.

S 111 merely concedes to a widow a *locus standi* before a Revenue Officer for claiming, that is, for applying, for partition which she may or may not be entitled to obtain in virtue of her life estate, the proper Course for the Revenue Officer in such a case would be to proceed under S. 117 and to either stay the proceedings for the determination of the question of the widow's right to obtain partition by a competent Court or to determine the question himself as if he were a Civil Court.

The mere fact that the partition has taken place is no sufficient reason for holding that a civil suit subsequently instituted to decide the question of title which has not been disposed of during the partition proceedings, is barred (*Martineau and Moti Sagar, JJ*) *SANT SINGH v MT BASANTKAUR*  
1923 Lah 81 (2)  
71 I C. 28 (2)

—S 141—Trees—If land—Delivery of possession—How effected

Trees on land within the meaning of S 141 of the Punjab Land Revenue Act and delivery of possession can only be given by the Collector as provided by the section (*Moti Sagar, J*) *NIDHI RAM v. PARSARAM*, 74 I. C. 1, 1923 Lah. 693.

## PUNJ. LAND REV. ACT (XVII OF 1887), S. 145

—S 145—*Entry as owner in a summary settlement—Occupancy tenant in the subsequent regular settlement—Value of entry in the summary settlement.*

In deciding the question whether a particular person is an owner or occupancy tenant of certain land, the entries of the summary settlement of 1847 Punjab in regard to rights in land can not have the same force as those of the subsequent regular settlement at which a detailed record of rights was prepared after inquiry (*Campbell and Scott Smith, JJ*) MANGAL SINGH v RATTAN SINGH 1923 Lah 12

—S 158—*Jurisdiction—Civil Court—Limitation*

Where after a partition among the co sharers it was found out by one of them that certain lands were left out by mistake and also that the lands allotted to him were smaller in area than it was assumed a suit for a declaration of his rights would be cognisable by a Civil Court as it related to title and did not in any way seek to undo the prior partition in its entirety. Such a suit would be governed by Art 120 Lim Act (*Shadi Lal, C J. and Abdul Qadir, J*) SHER v PIARA RAM 69 I C 501

PUNJAB LIMITATION ACT (I OF 1900)—*Applicability*

Where the transactions were alienations of ancestral land by a male proprietor and as alienation whether they be regarded as mortgages or as sales, time begins to run from the date of the attestations. Even if Art 144 were held to apply the suits would still be barred as time would begin to run from the date when the alienees came into possession as owners and under S 9 of the Limitation Act would continue to run not only as against the original alienors but against all the world 18 P R 1919 Foll (*Broadway and Campbell, JJ*) SHEOLAL v MOTI 1923 Lah 133

PUNJAB LIMITATION (ANCESTRAL LAND ALIENATION) ACT, S 1—*Applicability*

The Punjab Limitation Act, I of 1900, does not affect any prescriptive right or title which had accrued or been acquired before the Act came into operation, limitation in such cases would be governed by the Indian Limitation Act. (*Scott Smith and Fforde, JJ*) SARUP SINGH v PAL SINGH 73 I C 357 1923 Lah 642

PUNJAB MUNICIPAL ACT (III OF 1911)—*Adverse possession by municipality*

The Municipal committee is not precluded from acquiring title by adverse possession under the Act (*Abdul Raoof, J*) MAHOMED RAMZAN v MUNICIPAL COMMITTEE, ADIPUR 1923 Lah, 534

—S 3 (18) (a)—“*Accessible to public*”—*Meaning of.*

“Accessible to the public” means open to all the public in fact whether by right or permission (*Shadi Lal, C J and Fforde, J*) ABDUL HASSAN KHAN v THE MUNICIPAL COMMITTEE, DELHI 73 I C 725 1923 Lahore 417

## PUNJ. MUN. ACT (III OF 1911), S 189 (3)

—Ss 3 (13) (b) and 56 (1) (g)—*Street—Vesting in Municipality—Right of Municipality over public street*

When a street is vested in a Municipal committee it has power only to the extent of exercising its rights over it in order to maintain it as a street. It cannot use the public street otherwise than a street and it cannot interfere with enjoyment of the right of way by the public by leasing portions of it to private individuals 25 M 635 foll (*Scott Smith, J*) THE MUNICIPAL COMMITTEE OF MULTAN v TAHLIA RAM 73 I C 292 5 L L J 26 1923 Lah. 272.

—Ss 3 Cl (13), 189 and 193—*Street—Meaning of—Permission to build—Condition sanction*

The expression “Street” is defined as meaning any road, foot way, square, Court, alley or passage accessible whether permanently or temporarily to the public whether a thoroughfare or not. As regards accessibility mere physical accesses apart from the right of access cannot be regarded as test 30 B 558, 6 Bom 686, 20 B 146, 60 P L R 1918 referred to. Where permission is asked for to erect a new building it is open to the Municipal Committee to grant a conditional sanction and insist on the demolition of a particular wall before the building is begun (*Broadway, J*) MUNICIPAL COMMITTEE DELHI v ABDUL HASSAN KHAN. 71 I C 775.

—Ss 33, 152, and 428—*Powers of Municipal committee—Delegation to President—Prosecution for offences under the Municipal Act*

It is not competent to the Municipal Committee to delegate to its President the powers conferred on it by S 152 of the Punjab Municipal Act. Prosecution for an offence against the Municipal Act can be initiated only by a duly authorised agent of the Municipality and the authority must be in writing and must give full particulars of the person to be prosecuted (*Abdul Raoof, J*) MT GULZAR JAN v EMPEROR 4 Lah 120 74 I C 433 24 Cr L J 769.

—S 61 (B) (b)—*Religious teacher—Offering made to—Tax*

The profession of a theologian or religious teacher is one of the learned professions or callings and hence any income derived from offerings from disciples will be taxable under S. 61 (B) (b) (*Shadi Lal, C J and Abdul Qadir, J*) MOTI SINGH v PRESIDENT OF THE NOTIFIED AREA COMMITTEE 1923 Lah. 127.

—S 175—*Notice of removal of projection—Tender of compensation*

The language of S 175 of the Punjab Municipal Act indicates that the requisition open to the Municipality is subject to the payment of compensation (i.e.,) the tender of compensation must accompany the notice (*Le Rossignol, J*) GHASITA v EMPEROR 4 Lah 158 73 I C 813 24 Cr L J. 701

—S. 189 (3) 193—*Building not abutting a road—No conditions enforceable*

The Municipal committee has no power to enforce conditions regulating the line of frontage unless the intended building abuts on a street.



## PUNJ MUN ACT (III OF 1911), S 219.

S 193 empowers the committee to refuse sanction to build or grant to sanction either absolutely or subject to such modification as it may deem fit in respect of all or any of the matters specified in sub S (23) of S. 183. That is to say the committee may refuse permission to build at all but if permission is granted it can only impose such conditions as are provided for in the sub section (Shadi Lal, C. J. and Fforde, J.) ABDUL HASAN KHAN v MUNICIPAL COMMITTEE, DELHI

73 I C 725 1923 Lah 417

## Ss 219, 172 and 195—Composition order

The accused erected certain projections over hanging a public street without the permission of the Municipal Committee. The committee issued a notice under Ss. 172 and 195 for their removal. The accused removed all the projections with the exception of one which was about 9 inches in width. The Committee thereupon prosecuted the accused under sections 172 and 219. The trial Magistrate ordered that the accused should pay a penalty of Rs 5 and that the projection should be allowed to remain intact. Held, that the order is without jurisdiction and cannot be sustained (Moti Sagar, J.) THE MUNICIPAL COMMITTEE, MULTAN v MOTI RAM

1923 Lah. 686

## S 242—Powers of Local Government—Imposition of taxes—Notified Areas

The Local Government has power under S. 242 (1-a) of the Punjab Municipal Act to improve on a notified area only those taxes detailed in S 61 (B). Those detailed in S 61 (A) can be imposed only with the sanction of the Governor-General in Council (Broadway, Harrison and Moti Sagar, JJ.) NOTIFIED AREA COMMITTEE, UNIA v, AMAR SINGH,

4 Lah 442 (F B)

## S 242 (a)—Notification under—Profession tax—Naib Tahsildar liable to pay

Where a Notification under S 242 (1 a) of the Punjab Municipal Act imposed a tax on persons exercising a profession, a Naib Tahsildar will not be liable thereunder as he can appropriately be said only to hold an office (Le Rossignol and Broadway, JJ.) PALA RAM v NOTIFIED AREA COMMITTEE, KOTADDU

4 Lah 256 73 I C 785

## PUNJAB PRE-EMPTION ACT (II OF 1905), S. 3 (2) and (3)—Town—Municipal limits—Inclusion of rural area

An administrative act including an area within the limits of a Municipality does not necessarily operate to destroy the pre-existing character of the area and such an administrative action is not in itself sufficient to make the area so included a sub division of a town for the purposes of pre-emption. At the same time the inclusion of an area in Municipal limits is strong evidence of the urban character of that area.

It is not the law that any portion of an agricultural village may lose its character as such and become, by the force of circumstances, a suburb of a town, and a suburb of this nature is to be regarded as a sub division of a town, (Pipon J C) SHEER ALI v. KALANDAR KHAN.

73 I C. 200

## (I OF 1919)—Right not existing at time of suit does not affect.

If the right to pre-empt exists at the time of sale it does not matter if it does not exist at the

## PUNJ PRE-EMPTION ACT (II OF 1905), S 5 (a)

time of suit. (Abdul Raoof, J.) AZIM KHAN v SEWA RAM, 73 I C 797 1923 Lah. 458 (2)

## Right of pre-emption.—Date of accrual—"Owner" meaning of

There is nothing in the Punjab Preemption Act which declares that a pre-emptor's title vests at the date of the sale or which modifies the explicit direction of Order 20, Rule 14 Code of Civil Procedure that Courts shall declare the title of the pre-emptor be deemed to accrue from the date of payment into court of the purchase money after decree. Nor has the Act qualified the term 'owner' so as to mean a person who is not in danger of losing his ownership right at the suit of a pre-emptor (Campbell, J.) HADAYAT ULLAH v GHULAM MAHAMMAD BEG

73 I C 444 1923 Lah 529

## What is a sale

Where the sale price was Rs 100 and the sale deed was unregistered, the fact does not render the transfer something other than a sale within the meaning of the Punjab Pre-emption Act 7 All 482 Foll (Chambpell, J.) GANDA SINGH v BHAN

73 I C 758 1923 Lah. 310

## S. 3 (3)—Urban immovable property—Test of

To determine whether any specified area is part of a town or part of a village, the test to be applied is whether such an area has retained any of its original characteristics which would be consistent with the organisation of a society to whom the principles of pre-emption in agricultural communities would apply or whether it is one to which the principles of town pre-emption apply (Pipon, J. C.) MAHOMED ALI KHAN v MAKHAN SINGH

73 I C 855

## S 3 (5) (a)—Sale by Guardian appointed by court with sanction of court—Presumption

S. 29 of the Guardians and Wards Act prohibits the sale by a guardian of the property of a ward without permission of the Court. The Court under this section makes no order for sale, but merely authorises a transaction which would otherwise not be binding upon the minor. The sale is in fact of a transaction *inter partes* approved of by the Court. The Court having approved of the contemplated sale has no further stay in the matter. Consequently such a sale is not exempt from the law of pre-emption and S 3 (5) (a) of the Pre-emption Act has no application to the case, (Shadi Lal C. J. and Fforde, J.) SALIG RAM v. BARKAT ALI

4 Lah 164 5 Lah L J 406

73 I C. 442 (2) 1924 Lah 48.

## S 4—Adalphi tenure—If a sale

The creation of an adalphi tenure in which no consideration passed does not amount to a sale and hence does not give rise to a right of pre-emption. (Scott Smith, J.) ALLAH RAKHAIYA KHAN v. AHMED

1923 Lah 70.

## S. 5 (a)—Building—Shop or residential house—Test of

The question whether a building in Lahore City is a shop or a residential house must be decided with the reference to the chief or most important

## PUNJ. PRE-EMPTION ACT (II OF 1905, S 5 (a).

purpose to which the building is devoted. Where the primary value of the building in question lay in certain shop the rest of the house being neglected and of comparatively insignificant value, no right of pre-emption exists in respect of the property (*Broadway and Campbell, JJ*) LAL CHAND v MT. BEGAM 3 Lah 433

5 L L J 193 71 I C 746 1923 Lah 262

—S 5 (a)—*Pre-emption—Shop—Building when deemed a shop.*

Where no goods are sold in a building, the building cannot be said to be a shop the word "Shop" denotes a building or an apartment which is primarily used for buying and selling goods (*Martineau, J*) WADHAWA MAL v LACHMAN DAS 72 I C 591

—Ss. 7 and 19—*Custom of pre-emption—Lahore City—Sale of site—Right of owner of adjacent building*

If there is one thing which is clearly established in Pre-emption Law it is that if in a definite mohalla or sub-division of a town the custom of pre-emption exists, it must be treated as existing throughout the whole of sub-division 44 P R 1903 122 P R 1888, 52 P R 1903 referred to. Where the owner of a site has sold it, the owner of the adjoining building has a right of pre-emption so long as the building subsists. (*Harrison and Martineau, JJ*) ALLAH DIN v SHANKAR SHAN 71 I C 893

—S 12 (a)—*Persons entitled to pre-empt, N W F—Provinces.*

The law of pre-emption in N W F Provinces deprives a person claiming to succeed by will or other form of artificially regulated succession from putting forward claims under S 12 (a) of the Punjab Pre-emption Act, but it includes all cases where the pre-emptor would be entitled to succeed to the property by right of blood relationship, whether such relationship is with the vendor or his heirs. (*Pipon, J C*) HABIB GUL v SHAHDAD KHAN 73 I C 594

—Ss 15 and 21—*Right of pre-emption—Sale of occupancy rights—Sue by a Landlord*

Where an occupancy tenancy is sold to a person having a right of pre-emption under S 15 (a) or (b) of the Punjab Pre-emption Act, the landlord is not entitled to sue under S 21 for pre-emption (*Campbell, J*) AHMED KHAN v JANGBAZ KHAN 72 I C 316

—S. 15 (a)—*House—Reversioner and owner of land.*

Reversioners have a better claim to pre-empt a standing house than owner of the land. (*Martineau, J*) SARDAR DIN v, MT. AJAH BIBI 1923 Lah 394 (2)

—S 15 (b)—*Widow—If can pre-empt—Co sharer—Shamilat land*

The widow of a vendor of land, not being his heir, is not entitled to claim pre-emption. Where the plaintiff in a pre-emption suit is found to be a co-sharer in the proprietary land, the mere fact that a portion of the Shamilat land only has been sold cannot deprive plff. of the right to maintain

## PUNJ PRE-EMPTION ACT (II OF 1905), S. 22 (4)

the suit as a co-sharer (*Abdul Raouf and Abdul Oadir, JJ*) MT. AMIR NISHAN v KANSHI RAM 69 I C 191

—S 16—*Premption—Cosharers—Plaintiff cosharer acquiring portion under decree for preemption—Subsequent Suit.*

The right to pre-empt is a right to be substituted for the vendee. A successful pre-emptor is vested with the rights of the vendee whom he dislodges not from the date of the sale but from the date on which he enforces his right (*vide*) from the date on which he satisfies the condition of his decree and brings it into operation. No doubt, he is substituted for the vendee in all the rights that were transferred by the sale, but it is unreasonable to conclude that the process of substitution takes place on any date prior to the satisfaction by the pre-emption of the conditions on which his decree has been granted to him. Any other conclusion will really increase the difficulties of persons desiring to dispose of their property by sale for they would have to enquire regarding the existence not only of ostensible potential pre-emptors but would also have to enquire into the history of contiguous estates (*Le Rossignol and Harrison, JJ*) MAHOMED AKBAR KHAN v MAHOMED AZIM KHAN 4 Lah 137 73 I C 318 1923 Lah 451

—S 16—*Suit for pre-emption—Existence of common party Wall.*

Plaintiff the owner of a shop adjoining a house which was sold has a right of pre-emption over the house sold on the ground that the rafters and beams of the house and the shop rest on a common wall (*Broadway and Wilberforce, JJ*) CHELA RAM v, MEHR CHAND 5 Lah L J 53 70 I C 901

—S. 16 (2)—*Scope of—Building or structure—What is—Owner's right of pre-emption.*

The owner of "building or other structures" on a site is like a co-owner in the property sold and his right of pre-emption is inferior only to a co-sharer therein. The word "building" or "structure" is not defined but it may be stated every building is a structure though every structure is not a building (*Broadway and Zafar Ali, JJ.*) MAHOMED UMAR v FAYAZ UD-DIN 73 I C, 911

—S. 22—*Preliminary deposit—Production of security bond—Efficient security.*

Where the plaintiff in a pre-emption suit was directed to furnish security for the full amount of the sale price or pay into court a fifth of the amount and after the expiry of the time prescribed by the Court for during the aforesaid acts the plaintiff filed a security bond for less than the required amount and after the expiry of the time fixed. Held that the suit was rightly dismissed for non-compliance with the order of the court, (*Abdul Raouf, J*) SULTAN v, SHERA 1923 Lah, 257 (1)

—S 22 (4)—*'Shall be rejected—Meaning of*

The phrase "his plaint shall be 'rejected'" read with the provision as to an extension of time

## PUNJ PRE EMPTION ACT (II OF 1905), S 29

means that the plaint shall be rejected if the Court should not deem it proper to allow further time and though the Court may not extend time *suo motu* it should not all the same, act with such celerity in rejecting the plaint as not to allow the plaintiff even a moment for reflection or action (*Martineau and Zafar Ali, JJ*) RAM RATTAN *v* RAJARAM 1923 Lah. 643.

—S. 29—Suit for pre-emption—Limitation—Starting point See (1922) DIG. COL 957 TOLA RAM *v* LORINDA RAM 69 I C 715

—S. 30—Eviction of tenants—Physical possession

In the case of land in the possession of tenants, it is capable of physical possession and a suit for, pre-emption brought more than a year after the eviction of the tenants is barred. (*Le Rossignol, J*) TULSI RAM *v* GANWA 69 I C 418

—S. 30—Joint undivided holding—Physical possession—Limitation

A share in an undivided *mahal* is not susceptible of physical possession within the meaning of S 30 citing *Ellis Law of Pre-emption*, 4th Edn., p. 40. (*Broadway, J*) MD ATA ULLAH KHAN *v* GOPAL MAL 1923 Lah. 74 (2)

—S. 30—Physical possession—What is—Possession of tenants

"Physical possession" in S 30 of the Punjab Pre-emption Act means personal and immediate possession. When the land is in the possession of tenants at-will, it is not capable of physical possession for the purposes of the section. (*Scott, Smith, J.*) HAIDER ALI SHAH *v* BHAIKHE SHAH, 1923 Lah. 94

—S. 30—Pre-emption—Sale of property in physical possession of vendee—Limitation

Where prior to the sale the vendee was already in physical possession of the property sold as a tenant, and no physical possession could be given to him, the period of limitation for a suit for pre-emption starts from the date where mutation was attested (*Brasher, J*) MISRI KHAN *v* SHAHJI 71 I C 823

—S. 30—Sale of undivided share—Physical possession—Limitation, when begins

If the assignee from a co sharer of joint undivided property gets possession of any portion of the property, time begins to run under S 30 (2) of the Pre-emption Act from the time of such assumption of possession (*Le Rossignol, J*) SARDAR ALI *v* FAZIL 1923 Lah. 75

PUNJAB TENANCY ACT (XVII OF 1887), S 4,—  
"Land" meaning of

The manufacture of saltpetre is not an agricultural purpose or a purpose subservient to agriculture and property is not land within the meaning of S 4, (1) of the Punjab Tenancy Act unless it is occupied or has been left for agricultural purposes or for purposes subservient to agriculture or for pasture. What has to be considered is the character and use of the property at the time immediately before the cause of action arose and the nature of the suit will not

## PUNJ TENANCY ACT (XVII OF 1887), S 77

be affected in other ways. (*Martineau, J*) SETH KARORI MAL *v* WASAWA 1923 Lah. 462 (1)

—S. 4 (5)—Position of Muqarridar—Tenant or inferior proprietor

A Muqarridar is a tenant and not an inferior proprietor. A tenant is a person who holds land under another person, and but for a special contract would be liable to pay rent for that land to that other person. Muqarridar holds the land which is subject to his right under the proprietor to whom he pays a fixed rent (*Harrison, J*) KANSHI RAM *v* SHAH NAVA 71 I C 811 1923 Lah. 295 (2)

—Ss 53 and 76 (1)—Occupancy tenant—Issue of notice of sale to the landlord—Withdrawal from proceedings—Jurisdiction

In answer to a suit for possession brought by the plaintiffs the defendant appellant set up a sale to him under the provision of S 53 of the Tenancy Act

It was not the intention of the legislature to render the action of a tenant irrevocable once he had made an application under clause (2) of S 53 and that a tenant has as much right to refuse to carry on the proceedings as the landlord has to refuse to accept the valuation of the right of occupancy by the Revenue Officer. It will be seen that under sub S (5) of S 53 the Revenue Officer after having decided on the value has to fix a date by which the landlord has to pay the ascertained price, but that the landlord is not compelled to pay that price and may resile from the position taken up by him under sub-clause (3). Similarly a proper construction of this section enables the tenant to withdraw his offer up to such time as the landlord makes the payment contemplated by sub-clause (5) (*Broadway and Moti Sagar, JJ*) GHULAM QUTAB UD-DIN *v* SARDARA 73 I C 209 4 Lah. 173 5 Lah. L. J. 338 1923 Lah. 521

—S. 59—Partition of occupancy tenancy—Survivorship—Claim by landlord

Joint tenancy according to the Punjab custom is not the same as the estate known as joint tenancy in English Law. As regards the landlord, joint tenants of a holding, even though it was not held by their common ancestor, are to be regarded as single tenant and as long as any of them or the descendants of any of them survive, the landlord cannot claim the share of any tenant when the line has died out. Where a holding is divided for purposes of cultivation or in order to raise money, it does not amount to a partition (*Le Rossignol and Zafar Ali, JJ*) AMIR KHAN *v* MINH MAL. 5 Lah. L. J. 381 73 I C 370.

—S. 77—Jurisdiction—Claiming a share in occupancy holding—Civil Court, jurisdiction of

Where the plaintiffs claim a share in the occupancy holding and not as tenants under defendants the suit is tenable by Civil Courts. (*Le Rossignol and Martineau, J.*) SANTA SINGH *v* VIR SINGH 4 Lah. 195 75 I C 545: 1923 Lah. 500

**PUNJAB TENANCY ACT, (XVII OF 1887), S 77**

—S 77 (3)—*Declaratory suit for rents not reliable Civil Court*

A suit for a declaration that the plaintiffs are entitled to receive rent in kind and not in cash, is not liable by the Civil Courts and is covered by S 77 (3) (1). But even if the contention that the suit is one for the correction of a revenue entry be sound it would be triable by a revenue court alone, and that the jurisdiction of the Civil Courts would be barred under S 158 (2) (vi) of the Land Revenue Act. (*Scott Smith and Moti Sagar, JJ*)  
DASONDHI v BADAR BAKHASH  
4 Lah 127 5 Lah L J 335 73 I C 673  
1923 Lah 405

—S 77 (3)—Prov 1—*Scope of Sec*  
(1922) DIG, COL 959 NURID HUSSAIN v FAZAL ILLAHI,  
49 I C 645 (2)

—S 77 (3) (b) (1)—*Jurisdiction*

Where the plaintiff in substance wanted to go behind a decree of Revenue Court commuting rent from cash to kind held the civil Court had no jurisdiction, though plaintiffs asserted that defendants acted fraudulently in obtaining the decree of the revenue court (*Campbell J*)  
DALIPA v BARKET ALI 1923 Lah 412

—S 77 (3) (p)—*Jurisdiction—Civil or Revenue Court—Declaration of right to recover dues.*

A suit for a declaration of a right to recover dues in kind is one arising out of the conditions of a tenancy and is cognizable only by a Revenue Court, (*Pisbon, J C*) PUNNU LAL v BHOJA RAM,  
73 I C 760

—S 98—*Civil Court if gets jurisdiction by reference*

When a Revenue Court refers parties to a civil suit under S. 98 of the Punjab Tenancy Act, the Civil Court does not thereby acquire jurisdiction to hear a suit which it would otherwise be incompetent to entertain under all other provisions of law (*Pisbon, J. C*) PUNNU LAL v BHOJA RAM  
73 I C 760

—S 100—*Civil Decree—Registration as revenue court decree—Memo of appeal sent to Revenue Court.*

Under S 100 of the Punjab Tenancy Act High court has the power to order that a decree passed by a civil Court be registered as a decree of a revenue court. Therefore the memo of appeal was directed to be sent to Revenue Appellate Court after the registration of the decree of that Court as decree of a Revenue Court (*Scott Smith and Moti Sagar, JJ*) DASONDHI v BADAR BAKSH  
5 Lah L J, 335 73 I C 673  
4 Lah, 127 (1923) Lah 405.

**PURDANASHIN LADY—Compromise—Proof of—Knowledge of the merits of the case—Evidence as to**

Where persons claim under transactions with a pardanashin lady the burden is upon them to prove by the strongest and a most satisfactory evidence that the transaction were real and bona fide ones and fully understood by the lady 21 W R. 340 23 C. 949 referred to. A compromise of a

**RAILWAY**

litigation by a pardanashin lady is sufficiently proved by showing that the general result of the compromise apart from its details and legal technicalities were explained to her by disinterested and competent persons fully conversant with the whole matter and that she understood the subject. Where the question is whether a compromise was consented to by a pardanashin lady, that the affirmative of the proposition is not established by showing that the evidence of witnesses who deposed to a contradictory negative proposition is not reliable. The fact that an appellant draws out money deposited in court in pursuance of the decree of the lower Court does not preclude him from questioning the correctness of the decree on appeal (*Lord Atkinson*). SRIMATI SARAT KUMARI DAS v AMULYADHAN KUNDU  
17 L W 481 32 M L T (P C) 137  
37 C L J 501 25 Bom L R 548  
(1923) M W N 392 72 I C 632  
(1923) P C 13 (P C)

**PURDANASHIN**—Desposition—Court's duty  
(1922) DIG COL, 959. HARICHAND OF DELHI v JUGUL KISHORE OF DELHI 5 Lah L J 55

—*Transaction by—Validity—Jurisdiction of Courts*

The jurisdiction of courts of law to afford protection to pardanashin ladies rests on a presumption of imperfect knowledge of the world and exposure to undue influence. A person taking a document from such a lady is bound to show affirmatively that she understood the nature of the transaction and the effect of it. The duty of the Court in such cases is laid down by Mukerjee J. in 34 C L J 563 (*Das and Kulwant Sahay, JJ*) RAO BAHADUR MAN SINGH v MAHARANI NAWALKHATI.  
2 Pat 607 4 Pat. L. T 335  
73 I C 822 1923 P 492

—*Transferee from—Burden of proof—Knowledge of transaction*

Where the terms of a sale deed entered into by a pardanashin lady are not explained to her, it is not binding on, them where the transferee sues to enforce the deed, the onus is on him to show fair dealing and independent advice to the lady. But when she alleged fraud land comes into court, she must make a *prima facie* case before the transferee is called upon to prove fair dealing and independent advice (*Abdul Raoof and Fforde, JJ.*) MUHAMMAD SHAFI v KALSUM BI.  
4 Lah. 487

**RAILWAY—Carriage of goods—Contract as to freight—Parties if bound**

Where there is an original contract to carry goods according to the maund rate, the Railway Coy is not entitled to alter that agreement. But if there was no such contract at all and the Company, had originally charged at the wagon rate but there was a miscalculation on the amount charged, the company can recover the balance. (*Sulaman, J*) B B AND C I RY Co, v FIRM OF BUDH SEN PUSP CHAND 21 A L J 830 L R. 4 A 570  
90 & A L R 1074.

—*Contract to carry goods—Goods carried at owner's risk under Risk Note Form—Loss of goods—Wilful neglect—Inference from conduct—Onus of proof* See (1922) DIG COL 960 CENTRAL

## RAILWAY.

INDIA SPINNING AND WEAVING Co v G. I. P RAILWAY. 47 Bom 155

—Risk-note B—Damages for unreasonable delay

In a case of despatch of goods by railway under Risk note B if it is proved that the party suffered damage on account of unreasonable delay in conveying them and not an account of loss or deterioration, the company is not protected from liability by the clauses of the Risk note (*Daniels, J*) EAST INDIAN RAILWAY COMPANY v. GOPI KRISHNA KASHI PRASAD 45 A, 534. 21 A. L. J. 448 L. R. 4 A. 242 1924 A. 8

—Risk-notes H or B—Liability of railways See (1922) DIG COL. 960 THE BENGAL NORTH WESTERN RAILWAY COMPANY v. ABDUL KARIM 70 I C 747

—Risk rates and ordinary rates—Description of goods—Liability—Burden of proof

Where goods were carried at owner's risk rate over part of the journey and at the ordinary rate over the rest and were destroyed during the latter part of the journey, the Railway Company are in the position of bailees and have to prove affirmatively that they took the same degree of care as a prudent man would take over his own property (*Mears, C. J. and Piggott, J.*) MESSRS GADODIA AND Co v G. I. P. RY CO L. R. 4 All 619 22 A. L. J. 1

RAILWAYS ACT, (1890), Ss. 3 (8), 77 and 140—Loss of consignment—Notice of claim for compensation—On whom notice should be served

A plaintiff claiming damages for loss of a consignment of goods sent by a Railway must serve notice of the claim on the Agent and not upon the general Traffic Manager 28 A 552, 31 B 534, 35 C 194, 36 M 65 Ref (*Le Rossignol and Zafar Ali, JJ*) AGENT B B AND C I RAILWAY v FIRM OF MANOHAR LAL 5 Lah. L. J. 3 71 I C 459,

—S. 42 (2)—Reserved accommodation for a class

The railway is entitled to reserve accommodation for a particular class of persons without showing undue preference. The onus of proving undue preference is on the person who asserts it. It is a question of fact whether there has been undue preference.

*Per Shah, A. C. J.*—A penal provision ought to be strictly construed and it is for the prosecution to make out that the compartment could be legally reserved in the manner it was reserved on the occasion. A reservation of this kind is apt to involve a transgression of the limitation laid down in S. 42 (2) (*Shah, A. C. J. Crump and Marten, JJ*) EMPEROR v NARAYAN KRISHNA GOGTE 47 Bom 465 25 Bom L. R. 26 72 I C 25 24 Cr L. J. 297 (1923) B. 1.

—Ss. 56 and 80—Carriage of goods by rail—Delivery to consignee—Damage to goods—Demand for clean receipt—Refusal—Sale of goods? See (1922) DIG COL. 962 SRI GANGAJI COTTON MILLS CO LTD v EAST INDIA RAILWAY 44 A. 763

## RAILWAYS ACT (1890), S. 72

—S. 72—Burden of proof

Where a risk note is proved to be valid and the company has proved loss, the burden is on the other party to establish that the loss was due to wilful neglect of the Ry. administration or to theft by or due to the wilful neglect of its servants (*Macpherson, J.*) EAST INDIAN RY CO v MESSRS GOPIRAM GOURISHANKAR, 73 I C 642 (2)

—Ss. 72, 76—Consignment of goods—Risk note—Suit for compensation for loss—Onus

Where goods consigned to a Railway Company under the special terms of a risk note are lost and a suit is filed for damages, the plaintiff has to prove how the loss occurred, (*Oldfield and Deva doss, JJ*) NARAYANA AIYAR v S. I. RY COMPANY LTD 18 L. W. 322 75 I C 260.

—Ss. 72 and 151—Delivery and acceptance

The making over of the goods to and the receipt of them by the Station master following upon the letter of instructions by D. T. S. was delivery for carriage within the meaning of S. 72. Loss or damage by fire having been committed it is for the defendant company to prove that they had taken the care described in S. 151, and that there was no negligence on their part (*Kotwal and Pradeaux, A. J. C.*) C. P. RAILWAY CO v WHITTLE & Co 1923 Nag 174.

—S. 72—Liability for loss—Amount of care required

Under S. 72, Railways Act, the responsibility of a Railway Administration for the loss of goods to be carried by railway is that of a bailee under Ss. 151, 152 and 162 of the Contract Act i.e. that of a prudent man in his own affairs. Where in the course of the transit, they send goods in a boat with many leakages and thereby loss ensues, they will be liable, (*Chatterjee and Cuming, JJ*) LAKSHMI NARAIN BAIJINATH v SECRETARY OF STATE FOR INDIA, 27 C. W. N. 1017 1924 Cal 92

—Ss. 72 and 77—Loss of goods—Liability of railway company—Risk note—Effect of

It is not the law that in the case of non-delivery loss ought to be presumed and the plaintiff's suit dismissed on the ground that he failed to prove that the same was due to the wilful neglect of the Company or of its servants. In such cases the Railway Company must give proof of the actual loss of the goods that it is not sufficient that they have not been delivered. After the loss is proved it is for the claimant to prove the exceptional circumstances mentioned in the Risk note making the Railway Company liable for damages as wilful neglect on the part of the Railway servants or theft by them. There is no authority for the contention that "loss," in a Risk note includes loss by non delivery or conversion, (*Moti Sagar, J.*) G. I. P. RY CO v FIRM OF PANNA LAL GOPALJI 72 I C 779 1923 Lah. 609.

—Ss. 72 and 80—Loss of goods—Misdelivery—Responsibility of Railway Company—Burden of Proof—Neglect of Railway servant.

Under Ss. 72 and 80 of the Railway Act, loss of goods includes loss suffered by the consignor

## RAILWAYS ACT (1890), S 72

or the owner whether such loss occurred by reason of misdelivery or non delivery 41 M 871, 43 M 617, 43 B 886 followed Where a Contract, as for instance a risknote, contains an exception and a proviso, the party who desires to take the benefit of the exception must not only plead it but prove it, and if that is done, the other party who desires to take the benefit of the proviso must prove that the subject matter is not within the exception In the case of a risk-note in form B the onus is in the first instance upon the Railway Administration to prove that there was loss of the description for which the Railway is entitled to claim exemption from responsibility and when that is done, the onus shifts to the consignor to prove that the loss was due to the wilful neglect of the administration or their servants within the meaning of the proviso 45 Bom 1201, 44 I C 395 distinguished (*Mullick and Bucknill, JJ*) THE G I P RY. Co. v JITAN RAM NIRMAL RAM

2 Pat 442 1923 Pat 82 4 Pat L T 173

1 Pat L R 169 72 I C 440 1923 P 285,

—S 72—Loss of goods—Suit for damages—Risk note Form B—Onus of proof.

In a suit for damages for goods consigned to a Railway under Risk note from B the onus is initially on the plaintiff consignor to show wilful neglect or theft apart from mere loss of goods. Wilful neglect is mostly to be inferred from the circumstances Where the sealed waggon containing the goods is kept at a jungle side railway yard for 2 days with no protection against thieves and the seals are found broken the court can infer the loss is due to wilful default (*Sulasman, J*) EAST INDIAN RAILWAY COMPANY v SRI RAM MAHADEO 21 A L J 886 L R 4 A 612

—S 72—Non delivery of goods—Loss—Suit for damages—Negligence—Burden of proof, See (1922) DIG COL 964. DAUDBHAI v G I P RY Co 69 I. C 750

—S 72—Railway—Consignment of goods—Risk note Form B—Protection under when available to Railway Company—Liability of consignor—Ratification

Where a plaintiff who consigned his goods for carriage by the defendant railway Co under a risk-note in Form B brought a suit for compensation for non-delivery of the goods, the defendant company cannot escape liability by having recourse to the Risk-note unless they have pleaded loss or destruction in their written statement In such a case the plaintiff may rest his claim on the presumption that the goods were still in the possession of the Railway Company, a presumption which may be raised under S, 114 Illn (d) of the Evidence Act. The reason why it is so necessary to lay stress on the pleadings in such a case is this—that the plaintiff has already a very heavy burden indeed and that it would not be just to increase the burden by excusing the defendant from the necessity of pleading loss or 'destruction' It may be loss in the ordinary sense of the word or it may be destruction by fire or water or vermin but the plaintiff should at least have some knowledge that the

## RAILWAYS ACT (1890), S 72

goods are no longer in the company's possession Where a broker signs a Risk-note B on behalf of a buyer of goods, the latter may ratify the contract including the contract of carriage with the Railway under the Risk note B (*Foster, J*) EAST INDIAN RY Co AND G I P RY Co v FIRM SUKHEDEO DAS 4 Pat L T 443 -

74 I C 431 1924 P 25

—S 72—Railway—Consignment of goods—Risk-note Form B—Theft from running train—Burden of proof

The plaintiff sued the defendant Railway Company for damages in respect of short delivery of goods The plaintiffs had signed the risk note B, and in order to recover the plaintiff had to prove that the loss was due to theft by or to the wilful neglect of the company's servants, transport agent, or carriers employed by them before during and after transit over the said railway or other railway lines working in connection therewith, etc, provided that the term "wilful neglect" could not be held to include fire robbery from a running train or other unforeseen accident Held that although in equity the railway company ought to give such information to their customers as is in their possession with regard to the loss of goods delivered to them under the law it was not incumbent upon them to do so and they were not obliged to go out of their way to assist the plaintiff in proving wilful neglect In this country it may be adopted as a safe rule that the railway should produce before the Court for examination those of their servants who were in a position to be acquainted with the facts relating to the disappearance of their customer's goods *Smith, Ltd v G W, Ry Co* (1922) 1 A C 178 Ref (*Macleod, C. J., and Crump, J.*) G I P RAILWAY v HIMATIAL JAGJIVANDAS

25 Bom L R, 350

73 I C 606 1923 Bom 389

—S 72—Railway—Risk note Form B—Loss of goods—Meaning of

Risk note B gives the railway absolute protection in respect of damage to the goods but it does not protect them against loss if the loss was due to the wilful neglect of their servant Loss of goods means loss of the goods by the Railway Company and not loss to the plaintiff 21 A L J 220 foll. Where a person brings a suit for damages for short delivery of goods consigned, the railway company must give some evidence that the goods delivered had been lost before they could claim the benefit of the Risk note (*Daniels, J*) EAST INDIAN RY Co v FIRM OF KISHEN LAL TIRKHAMAL 45 A. 530

21 A L J, 438 L R. 4 A 249

90 &amp; A. L R 531, 73 I C. 986: 1924 A 7.

—S. 72—Railway—Risk note Form H—Compensation for non-delivery—Refusal to reweigh

The plaintiff consigned a certain quantity of coal for carriage by the defendant railway and gave a Risk-note in Form H. During the course of the traffic, there was some trouble with the waggon which carried the coal and the coal was then taken out and put into another truck which reached its destination some 5 months after the proper time

## RAILWAYS ACT (1890), S 72

The plaintiff suspected a considerable shortage in the coal and agreed to take delivery if the Railway Company would weigh or measure the amount of coal so delivered. To this the Railway agreed but subsequently refused to do so. In a suit by the plaintiff for compensation for non-delivery, *Held* that the Railway having made a special contract to reweigh, could not back out of it and that the plaintiff was entitled to a decree. (*Foster J*) *THE EAST INDIAN RAILWAY Co v THE NADIA COAL Co*

1 Pat L R 336 1924 P 39

—S 72—Risk-note—Consignment—Deterioration of goods—Cause of action

Certain quantity of wheat flour was despatched by railway under the terms of a risk-note which held the Railway Company concerned liable only in case of loss of one or more packages forming part of the consignment. Owing to a mistake on the part of the Railway the bags were sent to a wrong station, during the course of the transit the goods deteriorated. *Held*, that the consignor had no cause of action against the Railway. (*Stuart and Gokul Prasad, JJ*) *RAM KISHUN RAM v NORTH WESTERN RAILWAY*

L R 4 A 20 1923 A 122 (2)

—S 72—Risk-note—Loss of goods—Liability if railway

If the article in respect of which a risk note in Form X was given was not one of the excepted articles, the mere giving of the risk note X would take away the liability of the Railway Company. (*Rafiq, J*) *KIDAR NATH RAJNARAIN v. EAST INDIAN RY*

21 A L J 351  
L R 4 A. 204,

—S. 72—Risk-note—Package—Meaning of

*Held*, following 41 C 576 and 21 C W N 815 that the word "package" means both that which is packed and that in which it is packed its covering or receptacle. (*Das and Adami, JJ*) *BHAGWAN DAS v THE EAST INDIAN RY, Co,*

4 Pat L T. 392 72 I C 133 1923 P 487.

—S 72—Risk-note—Signature by agent—Consignor if bound

Under S 72, if a person who delivers the goods to the company signs the Risk note, the consignor is bound and he cannot impugn the authority to sign. (*Macpherson, J*) *EAST INDIAN RY COY. v MESSRS GOPIRAM GOURISHANKAR* 73 I C 642 (2)

—S 72—Risk-notes A and B—Onus on Railways

In case of short delivery of a consignment booked under Risk-notes in forms A and B the initial onus of establishing loss, destruction or deterioration of or damage to the said consignment, lies on the Railway Administration concerned, and the onus of proving that it was due to the neglect of the Railway Administration or to theft by, or to the wilful neglect of, its servants etc., should not be thrown on the person claiming compensation for it. A Railway company seeking shelter under a risk note for the non-delivery of the whole or a part of a consignment must show that it was lost. (*Zafar*

## RAILWAYS ACT (1890), S 72

*Ali, J*) *EAST INDIAN RAILWAY Co LTDF v IRM OF MOHAN LAL PANNAMAI* 73 I C 447 (2)  
1923 Lah 432

—S 72—Risk note, Form B Deterioration of goods—Damages—Liability of Railway—Loss—Meaning of.

The plaintiff made over to the defendant railway several parcels of mangoes for transit from Sabaranpor to Lahore. At the time of sending the goods the plaintiff executed a Risk-note in Form B. The goods were delayed in transit and did not reach Lahore till a fortnight after and by that time the fruits had become rotten. Delivery was offered to the consignee but was refused by him and the goods were then destroyed by the railway. In a suit by the plaintiff to recover the value of consignment, the Railway Company claimed the protection of the Risk-note Form B, pleading that as there was no loss of the goods by them, the plaintiff could not recover. The Court below found that the delay in the transit of the goods and the resulting deterioration of the fruit was due to gross negligence on the part of the railway servants. *Held* that though the deterioration was due to the neglect of the Railway servant, the contract of indemnity contained in the Risk note excluded the defendant's liability. The word "loss" in the risk-note meant loss by the Railway administration and could not mean loss to owner in the sense of injury to him arising out of his being deprived of his goods. 1897 P R 23 referred to. (*Lindraj J.*) *SECRETARY OF STATE v. JIWAN* 45 L 380 21 A L J 220 71 I C 609.  
1923 A 426

—S 72—Risk-note Form B—Loss of goods—Theft—Want of care—Burden of proof.

The right of a Railway Company to limit its liability in consideration of a reduction of the freight by special agreement has been recognised. The burden of proving wilful neglect on the part of the Railway Administration or its servants lies on the plaintiff. Wilful neglect may be inferred from the fact that the steps taken to secure the goods against loss by theft were inadequate. A theft is not the same thing as robbery from a running train because the latter imports the idea of the use of force. (*Kanhaya, Lal, J, C*) *ROHIL-KHAND AND JUMADN RY Co LTD v BRIJ RAJ,*

10 O L J 58 72 I C 428  
9 O & A L R 421 1923 Oudh 212.

—S 72—Risk note Form B—Suit for damages for non-delivery of goods consigned by Railway

In a suit by a consignor for damages for non-delivery of goods consigned under Risk note in Form B if the railway fails to prove that the circumstance in which the risk note is intended to operate and exempt them from liability have occurred, this is to say, that the goods in the particular case have actually been lost or destroyed, the Railway Company will be liable in damages. (*Batten, J C*) *DAUDBHAI v G I P RAILWAY.*

6 Nag L J 97. 73 I C 375

—S. 72—Short delivery—Liability for—Risk-note B

In a suit for damages for short delivery of goods consigned to a Railway company, Risk note

## RAILWAYS ACT (1890), S 72.

B does not protect the company, and the plaintiff is entitled to succeed in the absence of evidence of loss (*Daniels, J*) EAST INDIAN RAILWAY CO v FIRM KISHIN LAL TIRKHA MAL.

45 A 530 21 A L J 438 90 & A L R 531  
73 I C 986 L R 4 A 249 1924 A 7

—S 72—Station master retaining goods—  
Liability of railway

Where the station-master never definitely directed the plaintiff to remove the goods, and never definitely told the plaintiff in unmistakable terms that the goods were being kept on the railway premises at his own risk and also never definitely accepted the goods at railway risk *Held*, his conduct in retaining the goods in the railway shed affords evidence that he accepted the bailment of the goods on behalf of the railway company and S 72 of the Railways Act came into operation and the Railway Company was responsible for their safe custody (*Stuart and Sulaiman, JJ*) MUNNA LAL v EAST INDIAN RAILWAY Co 1923 A 71,

—S 72 (1)—Loss of goods—Responsibility  
of Railway Co—Risk note—Burden of proof

The plaintiff sued the defendant Railway Co for damages for failure to deliver a bale of cotton which he had consigned at Nagpur for delivery to himself at Ahmedabad. The plaintiff had executed Risk Note in Form B *Held* that to lay a foundation for the company's liability the plaintiff would have to prove non-delivery, loss destruction, or deterioration of the goods bailed but the responsibility under S 72 (1) might be limited by special contract as provided in S 72 (2) Risk Note Form B is one form of such contract. Where the Railway Company admit non-delivery but set up in defence the Risk note, it is for them to plead and prove the circumstances in which the Risk Note is intended to operate and exempt them from liability or in other words, the goods have been lost or destroyed. Neither a mere allegation or loss by the Company nor an admission of non-delivery by the plaintiff is proof of such loss. If the Railway Company prove the loss, which they may do, they are exempted from liability by the risk note unless the plaintiff prove that his cases come within the exception mentioned therein, it may be that the loss alleged by the Railway Company is admitted by the plaintiff. In such a case the Company need not adduce evidence to prove the loss. 14 N L R 122 dist (*Hallifax, A J C*) HANUMANT RAM v, G I P RAILWAY Co 19 N L R 56 72 I C 333 1923 Nag. 223,

—S 72 (2)—Carriage of goods by railway  
—Risk-note Form B—Theft of goods in transit—  
Robbery—Liability for loss

"Robbery" in risknote form B means the same thing as theft and not in the sense as defined by the Indian Penal Code. Where goods consigned under risk note form B were stolen during transit the Railway is not responsible for the loss under the terms of Risk note Form B, (*Ryves, J*) G I, P RAILWAY Co v, FIRM OF BHOLA NATH DEBI DAS, 45 A 56: 70 I C 854. 1923 A 79. (1)

## RAILWAYS ACT (1890), S 77

—S 72 (2)—Risk-note Form B—Con-  
signment of goods—Loss—Neglect of Railway  
servant—Burden of proof

Where a consignor has agreed with a Railway Company to limit his liability by executing a risk-note in Form B the onus is upon the consignor or consignee to prove that the loss was due to wilful neglect or theft by the Railway Administration or its servants (*Adams, J*) BADRI DAS v EAST INDIA RY BO 4 Pat L T 185. 1923 P 325

—S 72 (3)—Liability of Railway Company  
—Consignment of goods—Property if passes—  
Consignee alone can sue See CONTRACT ACT,  
S 91 73 I C 537.

—S, 72 and Sch II (m)—Shawls—Meaning  
of—Cheap cloth See (1922) DIG COL, 965 THE  
EAST INDIAN RAILWAY COMPANY v DAYABHAJ  
VANMALIDAS 47 Bom 18

—S 76—Consignment—Shortage—Burden  
of proof—Risk note Form A,

A person consigned goods under a Risk note Form a which stated that the consignment was in bad condition and was liable to damage, leakage and wastage as the cases in which the goods were contained were old, torn and wet. Further the consignor agreed to hold the railway free from responsibility for the condition in which the goods may be delivered to the consignee at destination and for any loss arising therefrom. In an action by plff (consignor) for damages for short delivery that the onus lay on the consignor to prove that under S 76 of the Railways Act the shortage was due to pilferage by the railway servants and the Risk-note Form A properly protected the railway (*Ryves, J*) FIRM OF PARBHOO LAL RAM KATAN v THE BENGAL NORTH WESTERN RAILWAY CO 1923 A 234 (2)

—S 77—Applicability—Claim for non-  
delivery—Notice—To whom to be given

S 77, Railways Act will apply to all claims for compensation whether due to loss, destruction and deterioration or non-delivery or misdelivery. In every case notice must be given in strict accordance with the section.

A letter addressed to the Manager or the Agent in the alternative, unless it is proved that the Agent actually receives such letters as a matter of motive is not a valid notice (*Baker, J. C*) JIWANDAS v THE AGENT, E I RY COY 19 N L R 139 73 I C 1033 1923 Nag 314

—S 77—Damages—Short delivery—  
Liability

In a suit for damages for short delivery, the company cannot plead a Risk Note in defence unless it is shown that the loss was due to theft from a running train or some such cause (*Gokul Prasad, J.*) EAST INDIAN RAILWAY v MAKHAN LAL BINDESI PRASAD 45 A 575 21 A L J 515 L R 4 A 280 74 I C 814 1923 A 605 (1).

—Ss 77 and 140—Damages for short deli-  
very—Notice of suit—Notice to subordinate  
official and not to the agent—Sufficiency of



## RAILWAYS ACT (1890), S 77

Plaintiff delivered certain bales to the defendant Railway for despatch from Cawnpore to Bombay. The Railway delivered the consignment at Bombay with shortage of one bale. The plaintiff sent a notice to the Deputy Traffic Manager of the defendant Railway Company who had been appointed by the Agent of the said Railway for disposing of claims for damages. The plaintiff however made no direct communication to the Agent of the defendant Railways within 6 months of the date on which the goods were delivered for transit. In a suit by plaintiff for damages held that the suit must fail for want of a proper notice under S 140 of the Railway Act. The notice of suit sent to a subordinate official of the Railway who had been appointed to dispose of claims was not a sufficient notice within the meaning of S 77 of the Railways Act. 28 A 552, 33 A 544 followed (*Lindsay and Daniels, JJ.*) CAWNPORE COTTON MILLS CO LTD v G I P RY 45 A 353  
L R 4 A 371 21 A L J 223 71 I C 614  
1923 A, 301

## S 77—Loss of consignment—Notice.

When there is a loss of consignment, notice of loss to the Railway Company under S 77 is necessary (*Le Rossignol, J.*) THE EAST INDIA COMPANY v. RAHI BUKSH 69 I, C 548  
1923 Lah. 72

## S 77—Loss—Non delivery—Meaning

A claim for compensation for non delivery includes the case of the loss of the goods just as much as the case of the detention of the goods. Where detention is not pleaded or put in issue a claim simpliciter for compensation for non delivery must be understood as including or involving a claim for the loss of the goods within the meaning of S 77. The word 'loss' used in S. 77 is wide enough to include all cases where the goods are not forthcoming and therefore included a case of non delivery (*Richardson, and Ghose, JJ.*) THE ASSAM BENGAL RAILWAY CO., LTD v RADHIKA MOHAN NATH 72 I C 714 1923 Cal 397

## S 77—Notice—Proof.

Where there was evidence of the plaintiff's son that notices were sent by registered post to the Agents of all three Railways, and there was on record the registered receipt of the Agent of the B N Railway, and plaintiff swore that the receipt was for the notice sent and there were letters on the record from the B and N W Railway actually making an admission that they were prepared to pay a small sum in full satisfaction of the plaintiff's claim held it was impossible to hold that notice was not sent within the meaning of S 77 of the Railways Act (*Ryves, J.*) DUKHI RAM BARAI v B N W RAILWAY 73 I C 440 1923 All 145

## S 77—Notice received by a subordinate to agent.

S. 77 of the Railways Act insists that notice shall be given in writing to the agent of the Railway Company in India and notice to a subordinate of the Agent is not notice contemplated by the section (*Le Rossignol, and Jafar Ali, JJ.*) B. B. AND C. I. RY v. THE FIRM MANOHAR LAL. 4 Lah. 46 1923 Lah. 84

## RANGOON MUNICIPAL ACT (VI OF 1922), S 80

## S 77—Notice—Suit for compensation for non delivery

In a case where compensation is claimed against a Railway Company for non-delivery of goods, S 77 applies and a notice of the claim in writing must be sent within the time fixed—(*Macpherson, J.*) EAST INDIAN RAILWAY COMPANY v MESSRS GOPIRAM GOURISHANKAR 73 I C. 642 (2)

## S 77—What notice should contain—Money value of claim—Intention to sue

S 77 of the Railways Act merely requires that a demand for compensation shall be made. It nowhere prescribes that the money value of the claim should be stated or that the claimant should notify his intention to bring an action (*Mullick and Bucknill, JJ.*) DURGA PRASAD v. G. I. P. RAILWAY (1923) Pat. 284 74 I C 993.

## S 80—Goods sent over several Rys—Loss on particular line not proved—Liability

Where goods were handed over to B N Ry and travelled over E. I Ry O R. Ry, and B N W R Ry, also but it was not proved that the loss was caused while passing over the latter, held the B. N Ry are liable for the damage caused to the goods (*Ryves, J.*) DUKHI RAM BARAI v B. N W RAILWAY. 73 I C 440  
1923 All 145

## S 120—Travelling without ticket—If justifies removal

Travelling without a ticket is not one of the circumstances mentioned in S 120 of the Railways Act as justifying removal from a Railway by a Railway servant (*Campbell, J.*) RADHA KISHEN v EMPEROR 1923 Lah. 71 (1).

## S 140—Service of notice—Proof

Where a claimant addressed his notice of claim to the Agent of the Railway Company, but the letter was opened by the General Traffic Manager, he is entitled to prove that notice was in fact delivered to the agent and that there was service under S 140 (a) (*Mullick and Bucknill, J.*) DURGA PRASAD v G I P RAILWAY (1923) Pat 284  
74 I, C 993

## S. 151—Loss or damage by fire—Onus of proof of case and negligence See RAILWAYS ACT ss 72 AND 151 1923 Nag 174

## Sch II, cl K—Liability for loss of wax pearl—Risk note

If an article in respect which a risk note is given is not one of the excepted articles under Sch II, the mere giving of the risk note will not take away the liability of the Railway Company. Wax pearls with a thin covering of glass are not articles made of glass within Sch. II, cl k of the Railways Act (*Rafiq J.*) FIRM KEDAR NATH RAJ NARAIN v THE EAST INDIAN RAILWAY COMPANY 45 A 453 I B 4 All 204  
74 I C. 300 1923 A 538 (2)

## RANGOON MUNICIPAL ACT (VI of 1922), S 80

(2)—Annual value—Meaning of—Taxation of lands and buildings—Basis of assessment—Standard rent—Rangoon Rent Act, 1920—Sub-tenants—Rents paid by

**RANGOON MUNICIPAL ACT (VI OF 1922), S. 91.**

The corporation must in the absence of special circumstances take as its basis the standard rent in these cases on which the standard rent has been fixed by the Rent controller. In other cases it must fix the rateable value on a consideration of all the surrounding facts circumstances including the effect that the Rangoon Rent Act has or may have, on the matter. It cannot be said in every instance that the amount that a tenant is able to obtain from his sub-tenants is always to be taken as the rateable value, but that amount may be taken into consideration with all the other facts governing the question. In other words in arriving at a decision as to the amount for which the premises may reasonably be expected to let the Assessor will consider the rent a tenant can extract from his sub-tenants, but this will not be the only matter to be considered in arriving at a decision (*Robinson, C J, May Oung and Po Han, JJ*) **THE MUNICIPAL CORPORATION OF THE CITY OF RANGOON v THE SWATI BARA BAZAR COMPANY, LTD**

1 Rang 668

—S. 91 (2)—*Notice—Orders reserved—Failure of Commissioner to inform complainant the date of final disposal—Date from which fourteen days period begins*

Before advantage could be taken of the requirement of notice within fourteen days of any particular date the requirements of the Act with reference to that date must be fully and properly complied with. When orders are reserved, the complaint is not disposed of, and will not be disposed of, within the meaning of the Act until the order is delivered. Where nothing remains but for the order to be written and delivered, the date on which it is disposed of will be the date of the delivery of the order, and notice of that date, the Commissioner is, by the Act, bound to give to the complainant. But where no such notice of the final disposal is given, but notice is served on the complainant, with a copy of the Commissioner's order, the date of receipt of that notice and copy of the order constitutes a sufficient compliance with the requirements of the Act as to notice of the date for final disposal. And if notice of an intention to appeal is served on the Corporation within fourteen days of the date on which the appellants received a copy of the Commissioner's order, the Court would have jurisdiction to entertain the appeal. (*Robinson, C J and May Oung, J*) **DAWOODJEE AND SONS v THE MUNICIPAL CORPORATION OF THE CITY OF RANGOON**

1 Rang, 220 1923 Rang 193

**RANGOON RENT ACT (II of 1920)—Stipulation for payment of premium—Favourable lease—Enforcement**

A stipulation by the landlord for payment of a premium of salami in addition to the rent in consideration of his granting a lease on specially favourable terms is void as being repugnant to S 9 Cl. 1 of the Rangoon Rent Act (*Maung Kim, J*) **ISMAIL YACOOBJEE DOODHA v ABDOOLLA HAJEE ABBA CO** 1 Bur L J 143

1923 Rang 80 74 I C 13

—S. 2—*Requirements of business—Landlord's motive—Materiality of—Determination of tenancy.*

**RANGOON RENT ACT (II OF 1920), S. 14 (A)**

What the Act requires is that the plaintiff (landlord) should satisfy the Court that he *bona fide* and reasonably required the premises for occupation by himself.

Whatever the landlord's original motive may have been, the only requirement of the Act is that he should honestly and reasonably require these premises for his own use. If he does so require them, even though he is actuated by a desire to ruin the defendants, he is entitled to a decree (*Robinson, C J. and May Oung J*) **MAHOMED MOOSA v. GOOLAM RASSOOL** 2 Bur L J 161

—S. 10—*Ejectment—Sufficient cause—Erection of a substantial building*

The Rent Act was a piece of emergency legislation passed with the object of temporarily restricting the increase of rents in the city of Rangoon. It was not the object of the Act to interfere with the legal use of private property lost, it was aimed to protect tenants from ejectment where they are unable or unwilling to pay an enhanced rent. It is no doubt necessary that the landlord should show that he is acting *bona fide* that it is his real intention to pull down and eject and that he has means to carry out his intention for no landlord could be permitted to eject his tenant on such a plea if he had no real intention of carrying out his purpose. Where a person purchased premises with the object of pulling down a one storied building which was then standing and erecting on the site a large and commodious building that would afford residence to many people, he is entitled to eject the tenants for carrying out his object (*Robinson, C J and Macgregor, J*) **THE PUNJAB MOTOR CO v, SHAIK JUMAN** 70 I C 834

1923 Rang 13

—S. 10—*Requiring property for purposes of supervision—If sufficient,*

Where the landlord requires the building for the use of his servant to enable him to supervise the construction of a building close by, the provisions of S 10 are not complied with and a suit in ejectment cannot be maintained (*Heald, J*) **ISAACS v MAMSA BROTHERS** 1 Rang 634

2 Bur. L J 252

—S. 13—*Over payment of rent—Standardisation for 6 months—Right to deduction*

The right to deduct over-payment of rent given by S 13 of the Rangoon Rent Act must be exercised within 6 months after the date of the last over payment and in default the right is barred (*Duckworth, J*) **JAISHANKAR v JIVANRAM SANTHAL** 11 L B R 427

70 I C. 112 1923 Rang 46,

—S. 14 (A)—*Excess rent taken by tenant from sub-tenant—Application by landlord to recover—Maintainability—Certificate*

An application by a landlord under S 14 A of the Rangoon Rent Act to recover the excess of rent levied by his tenant from the sub-tenant will not in the absence of a certificate of the controller fixing the standard rent (*May Oung, J*) **BAHADUR v JADAWJEE MEHTA**

1 Rang 687 2 Bur. L J 235

## RANGOON RENT ACT (II OF 1920), S 18

—S 18—C P C, S 115 *First Judge, Court of Small Causes, Rangoon, whether Court Subordinate to High Court*

The 1st Judge of the Court of Small Causes when disposing of a reference under the Rangoon Rent Act, is a Court Subordinate to the High Court within the meaning of Section 115 of C P C

He decides questions of civil rights in the same manner as a Court exercising civil jurisdiction would do and he must be regarded as a Civil Court and as a Court subordinate to High Court. Section 18 provides that his decision shall be final, but there is nothing to show that this expression is used in any other meaning than its ordinary legal meaning *viz*, that his order shall not be appealable. (*Robinson, C J Pratt and Macgregor JJ*) MOHAMED EBRAHIM MOOLA *v* S R, JANDASS 1 Bur L J 138 70 I C 144

(1923) Rang 49

—(II of 1920 as amended by I of 1922), S 10—*Guardian of minor—If can sue in ejectment*

Under S 10 of the amended Rangoon Rent Act, a person who has been appointed by court the guardian of the person and property of certain minors cannot bring a suit for ejectment on the basis of the premises being required for the use of the minors, as he is not a landlord within the meaning of the section (*Carr, J*) MAUNG PE THEIN *v* S BOON KYAN

2 Bur L J 280

RANGOON SMALL CAUSE COURTS ACT (1920), S 14 (s)—*Declaration one of the reliefs—Real relief, one of damages—Effect*

Merely asking for a declaration in a suit in which the real cause of action is one of tort does not necessarily make it a suit for a declaratory decree within the meaning of S. 14 (s) of the Rangoon Small Cause Courts Act, 1920. This applies to suits where only a declaration is asked for (*Rutledge, J*) TAKIR RAM KALWAR *v* SWAMI NAIDU 1 Rang 283 1923 Rang 215

RECEIVER — *Appointment of—Execution against property—Leave of Court—Necessity for—Omission to obtain leave.*

The rule that possession of a receiver may not be disturbed without leave, does not apply so far as third parties are concerned, until a receiver has been actually appointed and is in actual possession. Even where a receiver is in possession, a sale of property in his hands at the instance of a stranger to the suit without leave of court is not void but only voidable. It can only be set aside by appropriate proceedings and if the persons interested do not impeach the sale, it is not open to others to do so (*Chatterjee and Pearson, JJ*) RAJA JAGADISH CHANDRA DEO DHABAL DED *v* BHUBANESWAR MITRA 37 C L J 265 1923 Cal 121,

—*Compromise—Sanction of court—Practice.*

Where a Receiver is appointed by a judge in a particular action, it is for that judge to say what action should be brought on behalf of the estate, what defended and what compromised. It is not for the court which tries an action between the estate and some third party to grant the necessary

## RECEIVER

permission Reason for the rule explained (*Marien, J*) BAPUJI SORABJI PATEL *v* LAKHMI-DAS RAVJI TERSI 25 Bom L R 1180

—*Decree in favour of—Attachment without leave of Court—Assignment by receiver—Right of assignee*

An act done without the Court's sanction to proceed against a Receiver could subsequently be validated on obtaining leave 43 M 793 42 M L J 339 16f

Where however a decree obtained by a receiver was attached without the leave of the Court that appointed him and the receiver subsequently transferred the decree to a third person who took the assignment in good faith and without knowledge of the attachment, held that the attachment was irregular and did not affect the title of the assignee of the decree (*Spencer and Venkatasubba Rao, JJ*) KALYANA SUNDARAM IYER *v* NARASIMHA IYENGAR 44 M L J 427

18 L W. 280 73 I C 456  
1923 Mad 567

—*Leave to sue—Want of objection if fatal to the suit. See (1923) DIG COL 969. JAGNA SANYASIAH v M P. ATCHANNA NAIDU.*

70 I C 759

—*Mortgage Suit—Final decree—Subsequent appointment of receiver of the properties of the mortgagors—Receiver proper party to execution proceedings—Refusal to add—Revision—C P Code, S 115*

Where after the final decree on a simple mortgage is passed in a mortgage suit and before the sale, a receiver is appointed of the properties of the mortgagor in a partition suit between then and the Receiver applies to be made a party to the execution proceedings, he ought to be made a party. The mere fact that there is a mortgage on the property in the hands of the Receiver would not take the case out of the general rule that no process can be permitted in respect of the properties in the hands of a receiver without the sanction of the court which appointed him.

Property in the possession of a receiver is in the custody of the law and cannot be seized under a writ of attachment or execution. It is in the discretion of the court to refuse to permit a sale of the property its possession under a judgment though the levy was made before the Receiver was appointed 26 C 127 doubted.

The Receiver in such a case is not a new party under O 1, R 10 C. P Code and that rule does not stand in the way of the Receiver being made a party.

The refusal to make the Receiver party to the execution proceedings is a material irregularity in the exercise of the jurisdiction of the lower court justifying the interference of the High Court under S 115, C P Code (*Devadas, J*) FRASER AND ROSS *v*, KRISHNASWAMI IYER

71 I C, 293 1923 M 144

—*Remuneration of—Insolvency—Official Receiver.*

Where any part of the insolvent's property is subject to a mortgage the value of the insolvent's right to redeem that property can only be his assets available for distribution. If the receiver

## RECITALS

sells the property free from the mortgage and realise the purchase money the whole of it is not assets available for distribution but only such part as remains in his hands after paying off the mortgage. He is not entitled to a percentage on the whole of the purchase money. Notification 35 B-XIX dated 19th April 1920 fixes the remuneration of the receiver East to Berar, Amravathi at 5 per cent on the assets realised and available for distribution (*Kotwal, A J C*) GOVINDA v ABDUL KADIR 71 I C 558 1923 Nag 150

## RECITALS—Effect of—Pre-emption

Recitals in deeds are evidence only against the parties to the deeds and persons claiming through them. A pre-emptor does not claim through the vendor or vendee and he is not bound by a recital of delivery of possession in the sale deed (*Martineau, J*) DHARAM SINGH v. KRIPA SINGH 69 I C 409 1923 Lah 31 (2)

## RECORD OF RIGHTS—Entry in—Burden of proof

Where it is contended that an entry in the Records of Right is wrong, it lies on the party so contending to prove that it is wrong and not on the opposite party to prove that it is right (*Mr Amer Ali*) RAJA SRINATH RAY MAHARAJA PRAIAP UDAI NATH SAAAL DEO,

33 M L T (P C) 408 28 C W N 145  
(1923) M W N. 702 1923 P C. 217 (F C)

## Entry in—Occupancy right—Proof of

There is no authority for the proposition that although the record of rights is in favour of the tenant it is still necessary for him to establish by clear evidence that the entry to the effect that he has occupancy right of the holding is correct 49 I A, 339 dist (*Das and Kulwant Sahai, JJ*) STONEWIGG v KAMESWAR NARAYAN SINGH (1923) Pat 122 1923 P 340 71 I C. 1022

Right to sue after a conditional order of discharge—Effect of decree passed—Duty to disclose fact to Court (1922) DIG Col 970 BIPIN BEHARI BOSE v BANNERJEE

70 I C 104

Right to sue for rent accruing due prior to appointment See (1922) DIG Col. 970 BALKI LAL v SURENDRA NATH ROY 69 I C 358

## Wrong entry subsequently corrected—Effect

Where the plaintiff in a suit for profits was a recorded co-sharer at the date of the institution of the suit, his right to a decree will not be taken away by an order subsequently passed by the Revenue Court removing his name from the *Kherwat* even though the decree is based on a finding that the original entry was wrong. 43 All 177. *Foll. (Daniels, J)* DHIRJA v MITHAN LAL 74 I. C. 914 1923 A 562

## REFORMATORY SCHOOLS ACT. S. 4—Applicability.

Under S. 4 of the Reformatory Schools Act a boy ceases to be technically a youthful offender at the age of 15. (*Heald, J*) HAMID v EMPEROR, 2 Bur L J. 98 75 I C 294 1923 Rang 16

REGISTRATION—Title—Whether intention of parties can be looked to. See (1922) DIG Col. 971, RAM SINGH v. GANGA RAM. 70 I C. 202

## REGISTRATION ACT (XVI OF 1908), S. 17.

## REGISTRATION ACT (XVI OF 1908)—Unsigned memorandum—Registration

Unsigned memorandum reciting the names of the parties to it and the amount of the charge, the period for the mortgage and the names of witnesses is not a mortgage and does not require any statement. Before a document can be registered it must be shown that it has been signed by the executor (*Harrison, J*) TIRKHA v. SOHLU 5 Lah L J 75 71 I C. 739 (1923) Lah 242

## Ss 2 (7) and 17 (2)—Agreement to lease What constitutes—Necessity for registration

The distinction between agreements to lease which are covered by S 2 (7) of the Registration Act and those which are not, lies in the fact of the lease itself being intended to begin at once or at some time in the future. Every promise to grant a lease must in its nature create or assign some interest in the property to be leased, but unless the promise is to grant an immediate lease which is to come into existence even before any other document has been executed, it is an agreement to lease outside the class of such agreement of which alone S 2 (11) of the Registration Act speaks. A document styled a receipt and stamped as such was executed by the defendants in favour of the plaintiffs. The gist of the document was as follows: "We have this day given you a lease for 12 years of a half share in the lac parasadi of our malguzari jungle for Rs 7,000. We have received Rs. 6,000 of this to-day and you will pay us the remaining Rs 1,000 at the time of execution and registration of the lease deed. As no 8 anna stamp is available at this time we have passed this receipt." Within two months we will execute the deed of agreement and the deed of lease and get them registered. If we fail to do this we will pay you twice six thousand, that is, twelve thousand. From this day you may look after the jungle and propagate lac in it or you may sell the right in it to another person. You are to take all the crops for twelve years, that is twenty-three crops, twelve hari and eleven unhari. The plaintiff took possession of the property mentioned in the document and filed a suit for compelling the defendants to execute a lease. Held that the document in question was an agreement to lease and as such inadmissible in evidence without registration (*Hallifax, A J C*) SONOO v BHADARIA 19 N L E 186 6 N L J 151 71 I C 466 1923 Nag 171

## S. 3—Registration is no notice

Even in countries where registration is compulsory, registration is not necessarily notice (*Kennedy, J C and Raymond, A J. C.*) BEGRAJ v ALISHER 1923 Sind 50

## S 17—Agreement to give land when successful—If requires registration

Where defendant agreed to give half of the land to plaintiff to help him in recovering, the land held the agreement did not require to be registered as it was to be followed by a registered deed when the gift was actually made (*Pri-denaux, A. J C*) SHRIRAM v. BABAJI 71 I C 40 1923 Nag 47.

## REGISTRATION ACT (XVI OF 1908), S. 17

—Ss 17 and 49—*Agreement to lease—Correspondence—Registration—Necessity for—Oral and written lease Distinction*

A letter written by plff, to deft was as follows "The period will commence from the 1st of December, 1918, and before that date a proper lease will be executed and registered, This letter, a copy whereof signed by you has been kept by me, will be binding upon both of us so far as the main conditions are concerned, Full details will be given in the coming lease" The parties had in fact written to each other identical letters Held this letter in terms stated that the letter really embodies the terms and conditions agreed upon, and that it was the letter which was to be the binding formal unalterable record of the conditions Held that S 17 of the Regn Act applied and that as it had not been registered it was inadmissible in evidence, and once that the document was cut out from the case, nothing was left for the plaintiff to rely upon (*Mears C. J and Banerji, J*) *NURMAHOMED v NATWAR LAL* 45 A 220 71 I C 452 1923 A. 112

—S 17—*Agreement to reconvey after sale—if registrable*

An agreement to reconvey property contemporaneous with a deed of sale is not compulsorily registrable and is admissible in evidence even if unregistered (*Heald, J.*) *MAUNG PAUNG v MA ON* 2 Bur L J 89 1923 Rang 242

—S 17—*Agreement to re-purchase—If registrable*

Where after an outright sale, the vendor agrees in writing to re-purchase the land, the agreement does not require registration (*May Oung and Duckworth, JJ*) *MAUNG WALA v MG SHWE GUN*, 1 Rang 472 2 Bur L J. 188.

—Ss 17 and 49—*Application in mutation proceedings—Admission of title—Registration*

Where in an application in mutation proceedings, there is an admission of title, the same cannot be said to be a document of title and as such is not compulsorily registrable (*Daniels, J*) *RAM KISHEN RAI v. SHEO SAGAR PANDEY* 73 I C 462

—Ss 17 and 49—*Assignment of decree—Assignment of property included in decree—Difference*

There is as regards the necessity for registration a difference between an assignment of a decree and the assignment of a property included in a decree The former does not require registration, but the latter does (*Subbanna and Ramaswami Iyengar, JJ*) *RAGHAVENDRA RAO v NANJAPPA-CHARI*, 1 Mys L J 65

—S 17—*Bahis—Entry as to family settlement*

An entry in Bahi reciting that a settlement and the purpose of which was plainly to serve a title deed, which was clearly a declaration of will creating a definite charge of legal relation to the property, and the intention of the executants undoubtedly was to constitute the document and its counterpart the sole repository and the

## REGISTRATION ACT (XVI OF 1908), S 17

appropriate evidence of the partition, Held the document required registration and was inadmissible without registration (*Campbell, J*) *NARSINGH DAS v UTTAM CHAND* 1923 Lah 392

—S 17—*Compromise—Family settlement*

A document which purports or operates to create or extinguish any right or interest in immoveable property with Rs. 100 even though it records a family settlement is compulsorily registrable (*Sulaiman, J*) *CHHAJU v GOKUL*, 75 I C 593 1923 All 338

—Ss 17 and 49—*Document purporting to be sale deed—Parties contemplating separate sale deed—Registration*

Where parties execute what purports to be a sale deed and possession is conveyed, and a major portion of the consideration paid, but there is a clause to the effect that on payment of the balance a registered sale deed would be executed, the document is a sale deed and when the consideration is more than Rs 100 is compulsorily registrable In the absence of registration, it cannot be put in evidence as an agreement to sell (*Chandrasekhara Aiyar, C J and Ramaswami Iyengar, J*) *EREGOWDA v MARAPPA* 1 Mys L J 84

—S 17—*Entry in bahis—Signature*

An entry in a bahis which is not signed by either of the parties is not an instrument creating any rights and is not compulsorily registrable (*Shadi Lal, C. J and Martinson J*) *TIRKHA v SOLHU*, 73 I C. 642 (1).

—Ss. 17—*Equitable mortgage in writing*

If a memorandum is of such a nature that it could be treated as the contract for the mortgage which the parties considered to be the only repository and appropriate evidence of their agreement it would be the instrument by which the equitable mortgage was created, and would come within S 17 of the Regn Act

Where title deeds are handed over with nothing except that they are to be security the law supposes that the scope of the security is the scope of the title. Where however title deeds are handed over accompanied by a bargain, the bargain must rule. Lastly, when the bargains is a written bargain it alone must determine what is the scope and extent of security. Although it is a well established rule of equity that deposit of a document of title without more, without writing, or without word of mouth, will create in equity a charge upon the property referred, to that general rule will not apply when there is a deposit accompanied by an actual written charge. In that case the terms of the written document must be referred to and any implication that must be raised supposing that there was no document is put out of the case and reduced to silence by the documents by which alone the case has to be governed (*Lord Carson*). *SUBRAMANIAN v. M. L. R. M. LUTCHMAN*, 44 M L J. 602 50 Cal. 338

32 M L T (P.C.) 184. 2 Bur L J 25 38 C L J. 41 18 L W 446 (1923) M W N 762

28 C W N 1. 1 Rang. 66:

25 Bom L R 582. 71 I. C. 850: 50 I. A 77 (1923) P. C 50 (P. C.)

## REGISTRATION ACT (XVI OF 1908), S 17

—Ss 17 & 49 (e)—*Kabuliyat*—Registration

A *Kabuliyat* which does not create etc. any right or title in the property does not require registration and is admissible in evidence (*Ashworth, J. C.*) *AJODHYA SINGH v KAIWAN BABU NAWAB KHUSRU BEGAM* 90 & A L R 321 74 I C 582

—S 17—Registration—Invalidity—Mortgage deed—Inclusion of item merely to give jurisdiction to registering officer—Registration obtained by—Effect—Personal Covenant to repay in deed—Claim to enforce—Limitation—Limitation Act—Art 116—Applicability—Registration of deed as regards Covenant not invalid—Registration Act—S 29

Where it was found that a portion of the property included in a mortgage deed did not belong to the mortgagors, was not really intended to be mortgaged, and was included in the deed merely to give jurisdiction to the registrar who registered the mortgage deed, held that there was a fraud on the registration law, and that the registration of the deed obtained by means thereof was invalid.

The mortgage in the case contained a personal covenant to repay and a question arose as to the period of limitation applicable to a claim to enforce that covenant, that is whether the covenant was a registered covenant within the meaning of Article 116 of the Limitation Act.

Held, that, as, under S 29 of the Registration Act, a deed containing only such a covenant could be registered at any place, the registration of the deed in regard to the covenant, was valid, the covenant was a registered covenant and a claim to enforce the same was governed by the 6 years, period provided for by Art. 116 (*Phillips and Devadoss, JJ*); *DRONAMARAJU RAMA RAO v K VEDAYYA*, 44 M L J 373

46 Mad 435 (1923) M W N 166  
32 M L T (H C.) 222 17 L W, 695  
—73 I C 188 1923 Mad 447

—Ss 17 and 49—Unregistered—Partition deed—Admissibility in evidence to prove division in status—Transaction affecting immoveable property—Meaning of.

An unregistered document of partition dividing the properties by metes and bounds which is inadmissible for want of registration to prove that partition is admissible in evidence, to prove a unilateral declaration of an intention to divide thereby, effecting a division in status 23 M L T 504, 19 M L J 228, 30 M L J 404 foll 30 M L J 62; 30 M L J 404 doubted.

*Per Spencer, J.*—S. 46 of the Regn. Act has to be read on the light of S. 17 of the same Act and S. 91 of the Evidence Act. If this is done, the word "affecting" will be seen to be only a compendious term expressing "purporting or operating to create, declare, assign limit or extinguish, whether in present or future, any right, title or interest whether vested or contingent, (*Spencer and Venkatasubba Rao, JJ.*) *ATLURU SARASWATAMMA v. ATLURU PADDAYYA*,

44 M. L. J. 45 46 Mad 349. 18 L W 418  
71 I C. 274 (1923) Mad 297

—Ss. 17 and 49—Unregistered partition—Inadmissible in evidence—Oral evidence—Admissibility of.

## REGISTRATION ACT (XVI OF 1908), S 17

An unregistered deed of partition is admissible in evidence for the purpose of proving a division between the sharers. Oral evidence of the partition is also not out of S 91 of the Evidence Act in cases where the contract between the parties has been reduced to writing (*Abdul Raof, J.*) *CHANDU LAL v DAULAT RAM* 69 I C 859.

—Ss 17 and 49—Usufructuary mortgage for over Rs 100—Absence of registration—Nature of possession

In a suit on an unregistered usufructuary mortgage for more than Rs 100 it can be received in evidence for proving that the defendant was in possession as mortgagee and as such that he prescribed for the limited interest of usufructuary mortgagee.

*Per Venkatasubba Rao J.*—It can be looked at for ascertaining the quantum of interest which the adverse possessor has been prescribing for.

*Per Spencer, J.*—In a suit for redemption on such a document, the terms of the document have to be proved and that cannot be proved by any other evidence (*Ramesam, J.*, on a difference between *Spencer and Venkatasubba Rao JJ*) *NADEPENA APPAMMA v. SARIPALLI CHINNAVADU* 45 M L J 667.

(1923) M W. N 825 33 M L T. 146 (H C.).

—S 17, Cl. 1—Declaration of rights—Statement in partition—Registration—Necessity for

A document allotting shares among the several Co owners is none the less a partition deed because it says at the end that as no stamped sheet was available at the time of its execution a stamped sheet would be purchased and a document executed. Where a document after reciting a division and describing the properties allotted proceeded to state that the brothers had no connection thereafter held that it is inadmissible without registration. (*Katwal, A J C.*) *MT. KASHI v PANDURANG*, 69 I. C. 612. 1923 Nag. 75.

—S 17 (1)—Will—writing off amount in lieu of transfer of Share—If requires registration

Where in a will it was stated a sum of money was written off in consideration of a share in immoveable property, the document assigns and extinguishes right in immoveable property and if the consideration set off is more than Rs. 1001 the document requires registration (*Piggott and Walsh, JJ*) *FAKIR CHAND v NAUNG RAM* 74 I C 721.

—S. 17 (1) (b)—Agreement creating right of pre-emption—Registration.

An agreement creating a right of pre-emption is not compulsorily registrable under S 17 of the Regn Act 24 M 449 foll. 42 A. 206 diss. (*Shah A. C J. and Crump, J.*) *TRIBHUVAN v BAI KHUSAL*, 47 Bom 283 25 Bom L. R 79

73 I C. 666 1923 Bom 226.

—S 17 (1) (b)—Agreement to give produce of the land—Registration—Necessity

An agreement in consideration of money paid to deliver half the future produce of certain land is not one affecting immoveable property, and

## REGISTRATION ACT (XVI OF 1908), S 17

Does not require registration (*Scott-Smith and Brasher, JJ*) WALLI v KHUDA BAKHSI  
5 Lah L J 366 72 I C 480

—S. 17 (1) (b)—Agreement to sell—Registration

Held that the general sense of the document was that it was an agreement to sell and it did not create or declare any rights in immoveable property. Consequently it was not compulsorily registrable (*Broadway and Harrison, JJ*) INDER SINGH v DYAL SINGH 72 I C 1032

—S. 17 (1) b and (2)—Compromise of suit, —Document not registered—Decree—Effect

If a suit adjusted under O 23, R 3, C P C and the terms of the compromise reduced to writing the document should be registered. But if the decree that is passed records the terms and conditions, the document though unregistered is admissible in evidence 46 I A 240 ref (*Scott Smith and Fford, JJ*) GHULAM MUS TAFI KHAN v. GHULAM NABI 4 Lah 263 75 I C 461 1923 Lah, 581

—Ss 17 (1) (b) and 49—Conveyance of property—Agreement for redemption—Registration, necessity for

Where there is an outright sale of property executed and registered a subsequent agreement providing for redemption upon payment of the price is in essence a mortgage and it cannot be enforced unless registered (*Maung Kin, J*) CHAING KYWAN v MA DO. 72 I. C. 34 1923 Rang 52

—S 17 (1) Cl (B) and 49—Declaration of right in immoveable property—Statement of existing rights—Registration—Necessity for

Where the document in question does not purport to declare or create any right in immoveable property but merely states an existing fact, directly or indirectly does not require registration. 5 B 232, 43 M 244 followed (*Coutts Trotter and Ramchand, JJ*) RANGANAYAKI AMMAL v VIRUPAKSHER RAO NAIDU 45 M L J 100 32 M L T (H C) 312 17 L W 588 72 I C 456 1923 Mad 621

—Ss. 17 (1) (b) and 49—Document creating interest—Agreement by mortgagor to pay cost of improvement at redemption—Unregistered—Admissibility—Collateral purpose.

Where there is an agreement by a mortgagor to pay at the time of redemption all sums expended by the mortgagee on the repair or improvement of the mortgaged property, the document neither declares nor creates any right to add those sums to the price of redemption. That right is created and declared by S 63 of the T P Act. The assent of which the section speaks may be oral or even tacit. In any case, even if the document was compulsorily registrable it could be used for the collateral purpose of proving the mortgagor's assent. (*Halifax, A J C*) RAMBILAS v LAXMI NARAYAN 45 A 140, 71 I C 684 24 Cr L J 220 1923 A 84.

—S. 17 (1) (b)—Document declaring heir but not affecting any title.

## REGISTRATION ACT (XVI OF 1908), S 17

Where the document merely declares B to be an heir of S it does not fall within the purview of S 17 (1) (b) (*Broadway and Moti Sagar, JJ*) BAJ SINGH v PARTAP SINGH 1923 Lah 497 (2)

—S 17 (b) Document to remain in possession in lieu of interest and till payment—If registrable.

Where a creditor executes a document whereby he is to remain in possession of certain properties in lieu of interest due under some prior transactions and till the principal is paid off, it falls under S 17 (b) and is compulsorily registrable (*Chandrasekhara Aiyar, C, J and Subbanna, J*) VENKATARAMANIYA v APPAIYA 1 Mys LJ 79

—S 17 (1) (b)—Endorsement—Receipt of payment—Necessity for registration

Endorsements or receipts of payments passed by mortgagees to mortgagors do not fall within S 17, and unless where they are so framed and worded as to purport expressly to limit or extinguish an interest in immoveable property, they do not come within the section and do not require registration (*Mookerjee and Rankin, JJ*) JOGENDRA NATH SUKUL v, SAHUDDIN SHEIKH 72 I C 454

—S 17 (b)—Kaccha deed of partition

*Crumph, J*—Where the whole tenor of a deed shows that the intention was that the parties should be the owners of their separate share as from the date of the document, it is impossible to escape from the bar created by S 17, clause (b) of the Registration Act. The mere fact that parties had in contemplation of the execution of a formal document in the future, does not suffice to take it out of the scope of that section (*Macleod, C J. and Crump, JJ*) KASTURIBAI MANIBAI v, BAI MAHALAKSHMI 1923 Bom 464.

—S 17 (1) (b, c) 2 (v.) — Agreement to re-convey—If compulsorily registrable

An agreement to re-convey property when demanded does not require registration and hence is admissible in evidence (*Shah, A C J. and Crump, J*, SANGAWA GURUBASAPPA v HUCHANGOWDA GOWDER 25 Bom L R 1207

—S. 17 (1) (c)—Lease—Agreement for lease—Record of oral lease—Agricultural land—Registration—Necessity for

A solenamah which was for all intents and purposes a mere record of certain agreement which the parties had come to out of court for the settlement of their differences existing at that time and whereby the plaintiffs agreed to accept the defendant as tenant with certain rights and a certain rate of rent and to give effect to which a formal document in the shape of a kabuliya would in future be executed by the defendants, is not a lease or agreement to lease and is not compulsorily registrable 39 C 663 Ref. The document was in effect merely a record of an oral agreement between the parties which was reduced to the form of writing only by way of a memorandum (*Sukrawarthy and Cuming, JJ*) ALAM MULLA v SURENDARA KUMAR. 1923 Cal 432.

## REGISTRATION ACT (XVI OF 1908), S 17

—S 17 (1) D—*Agreement to lease—Necessity for registration*

The plaintiff sued on the strength of a document which alleged that the defendant had acknowledged the receipt of Rs 25 as earnest money and agreed to lease to plaintiff two bighas and odd of land for five years on an annual rental of Rs 180. The plaintiff asked for specific performance or for damages in the alternative. Held that the document on which the plaintiff's claim was based was not merely a receipt for earnest money but was an agreement to lease, that it was inadmissible in evidence to prove the contract without registration and that consequently no oral evidence in support of the contract was admissible. The plaintiff's suit therefore was unsustainable. (*Le Rossignol and Zafar Ali, JJ*)

NANAK CHAND v. MAHOMED ZAHUR-UD-DIN

4 Lah 44 5 Lah L J, 257 73 I C 927  
1924 Lah 27

—S 17 (1) (d) and 49—*Agreement to lease*

—Unregistered—Delivery of possession to lessee—Effect of—Doctrine of part performance—Estoppel against statute. See (1922) DIG COL 974, SANJIB CHANDRA SANYAL v. SANTOSH KUMAR LAHIRI 69 I C 877

—Ss 17 (1) (d) and 49—*Agreement to lease—Unstamped and unregistered—Suit for specific performance*

A suit for specific performance lies when the lease essential for the completion of the contract has not been executed, and if there is a valid enforceable contract, either party is entitled to call upon the other to complete the transaction by the execution and registration of the document of title. This is so even if the correspondence between the parties is inadmissible in evidence without registration. 42 C 801, 39 M 509, 19 C L J 213 referred to 22 C I. J 42 distinguished (*Mukerji and Chotzner, JJ*) BEJOY CHANDRA SINHA v. HOWRAH AMTA LIGHT RAILWAY CO LTD 72 I C 98

—S 17 (d)—*Lease—Registration*

In considering whether a lease is compulsorily registrable or not, the test to be applied is whether there was a present demise for a year only or for a period of more than one year. Where a lease was for one year but gave the lessee option to continue in possession, the existence of the option does not create a lease for a term exceeding one year, and as such the document is not compulsorily registrable (*Mookerjee and Chotzner, JJ*) FAJUDDIN v. ASRAB ALI

37 C L J 475 70 I C 570  
1923 Cal 670.

—Ss 17 (1) (6) and 49—*Agreement embodying a completed contract and entitling a person to a right to come into existence in future—Registration if necessary* RAM DAS v. NADIR SHAH 69 I C 608.

—Ss 17 (2) and 49—*Partition—Share list—Necessity for registration—Oral agreement for execution of a formal document.*

It is open to a party to a partition to prove that a "share list" of properties is not the final partition

## REGISTRATION ACT (XVI OF 1908), S 17

but that if it was orally agreed between them that a formal partition deed should be executed later on. If such agreement is proved the share list would be admissible without registration (*Krishnan and Venkatasubba Rao, JJ*) GUNDAPANENI GOPPAYA v. GUNDAPANENI KRISHNAYYA

69 I C 562 1923 Mad 160 (1)

—S 17 (2)—*Partition—Unstamped and unregistered—Compromise—Admissibility*

Where a compromise of certain proceedings for partition in a revenue Court has been acted upon by the parties it is not open to one of them to resile from the compromise on the ground that it is unregistered. Even an oral agreement of partition acted upon by the parties and admitted by them will be binding. 28 A 78, 43 A 1, 31 A 412 referred to (*Gokul Prasad, J*) SITA RAM v. HARSAHAI

1923 A 438 71 I C 619

—S 17 (2)—*Registration—Necessity for—Mortgage—Discharge—Receipt*

A receipt for payment of any part of the sum due on a mortgage is not a document which either operates or purports to extinguish the mortgage, even if the payment is last payment and the document recites that nothing further is due. The mortgage is extinguished by the payment, not by the document, and the latter is merely evidence of the fact of the payment which could be proved by oral evidence if no receipt had passed or by any other documentary evidence that might be available (*Hallifax, A J C*) PANDURANG v. NARAYAN 6 N L J 78

—Ss 17 (2) and (v) and 42—*Partition—Severance in Status—Provision for execution of separate deed in the future as regards properties to be allotted to the members—Registration—Necessity for* See (1922) DIG COL 975 RAJANGAM AYYAR v. RAJANGAM AYYAR

44 M. L. J. 745 46 Mad 373 27 C W N 561  
21 A. L. J. 460 37 C L J 435  
50 I A 134 (P C)

—S 17 (2) (v)—*Receipt for earnest money—If requires registration.*

A receipt for earnest money in respect of a contract of sale for more than Rs 100 which expressly recites that another document was to be executed as a document of title, does not itself create, assign, limit or extinguish any right and is not compulsorily registrable, (*Molt Sagar, J*) GENDA RAM v. RAM CHANDER 73 I C 1013

—S 17, Cl. 11 (5)—*Agreement to mortgage—Registration—Necessity for*

An agreement by a borrower to create a mortgage on his property is admissible in evidence without registration where the agreement does not by itself create a mortgage or charge on the property. 10 C 315 followed (*Shah, J*) TIRTHDAS GHANSHAMDAS v. SADHU SINGH

25 Bom L R 313 73 I C 296  
1923 Bom 281 (1)

—S. 17, Sub S. (2) (vi)—*Petition of compromise—Decree—Registration—Agreement to lease—Part performance*

Where a compromise agreement operated as a demise it should have been registered. No



## REGISTRATION ACT (XVI OF 1908), S. 17

having been registered it is *prima facie* inadmissible in evidence as a lease. If the agreement in question is inadmissible as a lease, it is still inadmissible in evidence so far as it contains an express admission by the defendant in the suit of 1905 of the title of the plaintiffs in that suit as *patnidars*. In respect of such admission, the agreement, if it comes at all within S. 17 of the Registration Act, would fall within Cl. (b) or Cl. (c) and the exception in sub-S. (2) (vi) would apply to it. Where the courts below found that the rent at the rate now claimed was paid for a number of years to the plaintiffs in the suit by the present defendant or his father, and that defendant was in possession before the suit and he continued in possession after the suit, but he attorned to the plaintiffs, *Held* that the relationship of landlord and tenant between the parties was established and that the rent due was that which the defendant had been paying (*Richardson and Suhrwardy, JJ.*) SARAT CHANDARA DAS v. SARAJINI RUDRAJA 27 C W N, 897

—S. 17 (4)—Lease for life—Registration—Necessity for *See* (1922) Dig. Col. 977. JASODA NANDAN v. MT. RAM KUAR 90. & A L R 41

—Ss. 21 and 22—Description of property—Sufficiency of—Registration

Where a compromise agreement between the parties recited that "all the immoveable properties pertaining to the family of the executants mentioned in Sch. A described herein below shall be divided into four equal shares" and the division was to take place six months after the execution of the document, *held*, that the description as family property was sufficient for the identification of the property for purposes of registration. 10 M L J, 104, 13 M L J, 303 *Ref.* (*Phillips and Devadoss, JJ.*) APPALA CHARYULU v. RAMACHANDRA CHARYULU 1923 Mad 81

—S. 23—Presentation of document for registration—Extension of by agreement of parties

No agreement for the postponement of the registration of an executed document beyond the time allowed by the Registration Act for the purpose can be enforced. Registration of an executed document can only be enforced by proper proceedings under the Registration Act, followed if necessary, by a suit under S. 77 of the Registration Act, but not by a suit of any other kind. 16 M, 347, 6 M L J 263, 42 M 822 followed (*Hakifan, A J C.*) CHAGAN LAL v. KASHI RAM 71 I C 33 1923 Nag 76

—S. 32—Authority to sign

Where it was urged that the father had no authority to sign on behalf of the son but the want of authority did not appear on the endorsement of the Sub-Registrar.

*Held* whether a man signs expressly as agent or whether he is expressed to sign on some other person's behalf, that makes no substantial difference. In each case he signs *prima facie* as agent (*Marten and Pratt, JJ.*) SHRIDHAR LAYMAN v. BANARHDAS 72 I C 998 1923 Bom 37

## REGISTRATION ACT (XVI OF 1908), S. 35

—S. 32—Presentation by Agent—Endorsement as to presentation—Presumption

Where the endorsement showed that the document was presented by an agent who produced his power of attorney which was duly authenticated by the Sub-Registrar and there was no evidence that it did not contain the usual power

*Held* that the mortgage was duly registered (*Robinson, C J and May Oung, J.*) DAWSON'S BANK LTD v. C R V CHETTY FIRM 1 Rang 121 1923 Rang 254

—Ss. 32, 34 and 35—Registration of document—Admission of execution by some of the executants—Validity of registration

Ss. 32 to 35 of the Registration Act have been very carefully designed to prevent forgeries and the procurement of deeds by fraud or undue influence. It is necessary to insist on strict compliance with them. Where only one of the executants of a deed appeared before the Registrar and admitted execution and the others did not the deed has no legal operation as a deed executed and registered by other executants. A document duly presented for registration can be registered only in respect of the executants who appear personally or by a representative and admit execution. If the document is registered upon the appearance and admission of one of the executants only, there is no effective registration as regards the other executants who neither appear nor admit execution (*Mookerjee and Chotzner, JJ.*) J D EZEKIEL v. ANNADA CHARAN SEN 50 Cal 180 70 I C 794 1923 Cal 35

—S. 32—Representative, 'meaning of, *See* (1922) Dig. Col. 978 MA SHWE MYA v. MAUNG HO HNAUNG 44 M L J 732 50 Cal. 166: 37 C L J 343 27 C W N 533 17 L W 213 2 Bur L J 264 70 I C 937 (2) (P, C)

—S. 32 (b)—Security bond executed to Dt. Court—Presentation for registration by clerk—Validity of registration *See* (1922) Dig. Col. 1101 MA SHWE MYA v. MAUNG HO HNAUNG 44 M L J 732 50 Cal. 166: 37 C L J 343 27 C W N 533 17 L W 213 2 Bur L J 264 70 I C 937 (2) (P, C)

—S. 33—Execution of document by person having power of attorney—Presentation for registration

Where a person having a power of attorney executes a document he is entitled to present it for registration as the executant under S. 32 (a). S. 33 applies only where the person presenting is the General attorney of the person executing. (*Daniels, J.*) MT. AISHA BIBI v. CPRAJJI MAL 74 I C 776

—S. 35—Defect in procedure

No act in good faith will invalidate registration merely because of defect in procedure (*Lord Dunedin*) KANHAIYALAL v. NATIONAL BANK OF INDIA LTD, 4 Lah 284 45 M L J 497: 33 M L T (P C) 349 25 Bom L R 1248 75 I C 7: 50 I, A, 162 1923 P C 114

## REGISTRATION ACT (XVI OF 1908), S 35

## —Ss 35, 58 and 87—Registration—Irregularity in procedure—Effect on validity of registration

The executants of a document refused to present it for registration and the grantee under the document presented it for compulsory registration. Summonses were issued to the executants who duly appeared and objected to registration. Thereupon registration was refused. On appeal to the District Registrar and after a remand by him the document was registered under S 58 (2) of the Registration Act. *Held* that any irregularity or error in the procedure of the Registrar subsequent to the presentation of the document did not vitiate the registration, and that it was cured under S. 87 of the Registration Act. 15 B L R 288 4 I A 166, 23 A 233, 26 A 57 Ref (*Robinson, C J and May Oung, J*) 9 M A R CHETTY FIRM v KO THAKI 1 Rang 22 2 Bur L J 69 74 I C 82, 1923 Rang 176

## —S 49—Effect of—Collateral purpose

Though S 49 of the Registration Act debars the admissibility of an unregistered document affecting immovable property it can treat it as evidence and may still be admissible for a collateral purpose such as the question as to the date on which possession was taken (*Piggott and Walsh, JJ*) ABDULLAH KHAN v MAHAMMAD MAQBUL HUSAIN 45 A 565 L R 4 A 260

21 A L J 538 74 I C 822 1923 A 603 (2).

## —S. 49—Ejectment suit—Compromise—Terms outside scope of suit—Non-registration—Effect

An ejectment suit was compromised on the basis that an enhanced rent should be paid and the defendant was to become an occupancy tenant. If a decree was passed in terms thereof but not registered. *Held*, the portion relating to increase in rent did not relate to the subject matter of suit and as such was inadmissible without registration but the agreement can be proved by 4 evidences *alunde* (*Fremantle, S M.*) GOMTI BIBI v BAIJ NATH SINGH L R 4 All 421 (Rev)

## —S 49—Memorandum.

Where both the writing and the oral evidence in a case indicated that the writing constituted the bargain between the parties and was not merely the record of an already completed transaction

*Held*, the memorandum in question was the bargain between the parties, and that without its production in evidence the plaintiff could establish no claim and as it was unregistered it must be rejected. (*Lord Carson*) M. SUBRAMANIAN v M. L. R M LUTCHMAN

50 Cal 338 1 Rang 66  
44 M. L. J. 602 2 Bur L J. 25  
32 M. L. T. (P. C.) 184 25 Bom. L. R. 582  
38 C L J 41 18 L W 446  
(1923) M. W. N. 762 28 C W N 1.  
71 I. C 650. 50 I A. 77 (1923) P. C. 50

## —S. 49—Scope.

So far as a document of family settlement declares what the shares of the parties are to be hereafter its registrations is compulsory and in order to

## REGISTRATION ACT (XVI OF 1908), S 60

show what those shares are to be it is in admissible in evidence but it is admissible for the purpose of showing what the original shares were (*Scott Smith and Mohi Sagar, JJ*) KARAM CHAND v MT. HAR KOUR 1923 Lah 371

## —S 49—Unregistered deed admissible to prove agreement.

Unregistered lease could be accepted as evidence that the parties had come to an agreement that a lease was to be given (*Hallifax, A J C.*) MT. MAKTUMBI v ANANT RAM. 1923 Nag 73

## —S 49—Unregistered document—Admissibility in evidence—Affecting immovable property—Meaning of

An unregistered document of partition dividing the properties by metes and bounds which is inadmissible for want of registration to prove that partition is admissible in evidence to prove a unilateral declaration of an intention to divide thereby 23 M L T, 307 19 M L J 228 30 M. L. J 404 101 30 M L J 62 30 M L J 404 doubted

*Per Spencer, J* S 49 of the Registration Act has to be read in the light of S 17 of the same Act and S 91 of the Evidence Act. If this is done the word affecting will be seen to be only a compendious term expressing "purporting or operating to create, declare, assign limit or extinguish whether in present or in future, any right, title, or interest whether vested or contingent." (*Spencer and Venkatasubba Rao, JJ*) ATLURU SARASWATAMMA v ATLURU PADDAYYA.

44 M L J 45 18 L W 418  
46 Mad 349 71 I C 274 (1923) Mad 297.

—S 49—Unregistered partition deed—Admissibility—Oral evidence *See* EVIDENCE ACT S 91

4 Pat L T 657

## —Ss 58 and 60—Certificate of registration—Admission of execution—Proof of.

There is nothing in S 58 of the Registration Act requiring a registering officer to endorse an admission of execution. Consequently a certificate of registrations is not evidence of such admission even though the admission is in fact specified in the endorsement. 19 O C 23 38 : 1 17 C, 903 followed, 20 O C 18, 25 W R dissented (*Martineau, J*) MUHAMAD HASSAN v, SAHORA 71 I. C 805.

## —S 60—Sole deed, proof of certificate of registering officer of admission of execution whether sufficient—Evidence of executant attesting witness or writer—Necessity

Where in a suit on a sale deed the plff relied simply on the certificate of the Registering officer without examining the executant or any of the attesting witnesses or writer of the deed *held*, that the certificate only showed that the person purporting to sign the deed admitted his signature and in the absence of any further evidence that would not be evidence if the necessary link in the chain that the person who admitted execution was the person who could give title to plff (*MacLeod C J and Crump, J*) MARUTI BALAJI POSTIL v. DATTO. 25 Bom. L R, 192

72 I C, 304 : 1923 Bom 253.

## REGISTRATION ACT (XVI OF 1908), S 71

—Ss 71, 72, 76 and 77—Document not registered owing to non-appearance of executants in time—Suit to compel registration

Where a sub registrar refused to register a document presented in time owing to the non appearance of the executants to admit execution in time and on appeal, the District Registrar also confirmed the order a suit to compel registration under S 47 of the Regn Act is maintainable. The order passed by the Registrar was one under S. 72 of the Act. Scope of Ss 34 and 71 to 77 Registration Act considered (*Shah, A C J and Crump, J.*) *FATTECHAND ANANDRAM v UMAJI*

47 Bom 290 25 Bom L R. 45  
72 I C 118 1923 Bom, 187

—Ss 72, 76 and 77—Refusal to register—Refusal to admit to registration or accept for registration—Distinction—Remedy by suit

There are three different expressions used in the Act, refusal to register, refusal to admit for registration and refusal to accept for registration S 72, where it says, that 'An appeal shall lie against an order of the Sub-Registrar refusing to admit a document for registration,' refers to or case when registration has been refused rather than to cases where a Sub-Registrar has declined to accept a document at all at the first stage of his proceedings, in other words, refusal to admit to registration and refusal to register are the same thing. The Act, however, evidently intended some distinction between refusal to accept for registration and refusal to register S 19 of the Act lays down that the registering officer shall refuse to register a document which is in a language which he does not understand S 20, lays down that a registering officer may in his discretion refuse to accept for registration a deed in which an interlineation, erasure, etc., occurs. S 21 again uses the expression 'accept for registration' in prescribing the conditions necessary for the proper description of property to which a document relates. Where a sub Registrar refused to register a document mainly on the ground that the document was vague, that it was not executed in counter-part, and that execution was denied, there is a clear and unmistakeable refusal to register and one which was made not at the preliminary hearing but after a regular proceeding to which both the parties had been summoned (*Pipon, J. C.*) *MT BIBI AIMNA v. MAHOMED RUKAN ALAM*

73 I C 182.

—Ss. 73, 82 and 83—District Registrar—Refusal to sanction prosecution—Power of High Court to interfere

Where a District Registrar in reversal of the order of a Sub-Registrar, refuses to sanction the prosecution of the executant of a sale deed under S 73 of the Registration Act, there is no jurisdiction in the High Court to interfere as the District Registrar had acted not as a Civil Court. The remedy of the aggrieved party was by a petition to the Board of Revenue (*Adams, J.*) *HARI BUX RAM v. CHEDDI PANDE* 1923 F 155

—Ss 73, 77—Suit for compulsory registration—Maintainability

## REGULATION (XVII OF 1806), S 7

Where on a deed being presented for registration the sub-Registrar summoned the executant and on his failure to appear refused to register the same, and thereupon the Registrar was moved by an application purporting to be under Ss 72 and 73 of the Registration Act but without the verification required by the latter section and that too was dismissed. *Held*, a suit lay under S 77 to enforce compulsory registration. The mere absence of verification as required by S 73 (2) did not make the application one not in conformity to the provisions of that section, as the defect is merely one of form and not of substance (*Abdul Raoof and Moti Sagar, JJ.*) *UTTAM SINGH v. MT RUTTAN DEVI* 5 Lah L J 217.

74 I C. 688 1924 Lah 23.

—Ss. 75 (2) (3) and 77—Decree directing registration—Limitation for application to register *See* (1922) DIG COL. 980 *MAHOMED ISMAIL BEG v SRICHARAN DAS* 69 I C 198

—S. 77—Suit under—Conditions precedent

For a suit to lie under S 77, the following requisites are necessary—

- 1 The presentation by a person authorized to present the document to the Sub-Registrar
- 2 A refusal to register by the Sub-Registrar
- 3 An appeal within time to the Registrar
- 4 A refusal by the Registrar, and
- 5 The institution of the suit within time (*Pipon, J. C.*) *MT BIBI AIMNA v MAHOMED RUKAN ALAM* 73 I C 182.

—S 82—Offence under—Sanction if necessary.

No sanction is necessary for a prosecution under S 82 Registration Act (*Pratt, J.*) *MAUNG SAING v EMREROR* 1 Rang 299

—Ss 82, 83 and 75—Presentation for registration—Duly authenticated—Power of attorney—Acceptance for registration—Presumption—Refusal of Registrar to register—Appeal—Order for registration—Effect of—Subsequent presentation if necessary *See* (1922) DIG COL 977, *RAI BAHADUR CHHOTY LAL v. THE COLLECTOR OF MORADABAD* 27 C W N 437 21 A L J 361

37 C. L J. 377

25 Bom L R 655 18 L W 124

90 & A L R 450 (1923) M W N 873. (P C)

—S 90 (d)—Lease by Secretary of State—Registration—Not necessary—Proprietary right to the structure but not in the soil

A lease granted by the Secretary of State does not require registration in view of the provisions of S 90 (d) of the Registration Act read with Ss 4 and 107 of the Transfer of Property Act. A grant of a proprietary right in the structure but not in the soil is a right that runs with the land (*Wazir Hasan, A J C.*) *RAGHO PRASAD v. SECRETARY OF STATE* 90 L J 629 74 I C 369

(1923) Oudh 114.

REGULATION XVII OF 1806 (BENGAL), Ss. 7 and 8—Notice—Defect in—Effect

Where the mortgagee sent a notice to the mortgagor warning him that if the money was not paid within one year, and the land redeemed in the

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manner provided by S 7 of the Regulation, held, the notice was defective as it provided neither for tender nor deposit in Court—The defect is not cured merely by adding in the manner provided by S 7. (*Chevis, J*) *ZORA v CHANDU*

1923 Lah 71 (2)

## RELEASE—Effect of—Not a conveyance

The deed of relinquishment does not confer a title and title to land cannot pass by admission when the statute requires a deed 33 C 967, 16 C L J 437 Ref (*Ross, J.*) *MUNSHI GOVIND PRASAD v LALA JAGDAP SAHAI*, 1 Pat L R, 316 See also, Under Mahomedan Law and Hindu Law

## RELIGIOUS ENDOWMENTS—Alienation by managers

A gift by the manager of Temple property in the form of a Sanad purporting to make an allowance of Rs 235 yearly from generation to generation out of the Sevasthan funds, cannot be given effect to even as against the temple estate beyond the life time of the grantor (*Macleod C J, and Crump, J*) *RAMACHANDARA MAHADEO v NARAYANRAO*

1923 Bom 296 (2)

## —Alienation—Necessity—Proof of

Alienation to be valid against the reversioners is required to be supported by proof *alunde* that they were made for valid and legal necessity The same rule applies in the case of *Shebait*s and other persons who have no authority to alienate property except for preservation of the estate which they represent

Unavoidable necessity must be established in order to justify absolute alienation or grants of perpetual leases of endowed property (*Spencer and Venkatasubba Rao, JJ*) *MEECHALE CHALIL PARKUM T. KELUKURUP v K P P RAMAN NAIR*

73 I C 275

## —Cypres doctrine—Applicability of—Charity to be done at a particular place—Impossibility of performance—Effect of

Where a settlor with a view to perpetuate his name and good works by means of a *chatram* providing shelter and resting place for travellers of all castes and also a place for the celebration of marriages, selected a place for the above objects and endowed properties Held his object was quite possible of attainment even if the institution has to be shifted elsewhere There was a clear expression of a general charitable intention, not restricted to one particular object only which forms one of the requisites for the application of doctrine of *cypres*

The fact then that the *chatram* and the cart stand in their original situation have been destroyed as the result of the land acquisition proceedings by the Govt is no bar to the Court remodelling the charity as nearly as possible according to the original purpose of the founder (*Chandarasekhara Aiyer, C J and Subbanna, J*) *KRISHNAYYA SETTY v CHINNIAS SETTY*

1 Mys L J 11,

—Debts—Necessity—Borrowing trustee—Decree against temple funds See (1922) DIG, COL 981 *SUNDARESAN CHETTY v VISVANATHA PANDA RASANNADHI AVARGAL*,

72 I C 103.

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## —Debutter property—Family trust—Right of beneficiaries to put an end to the trust.

Where there is a private family debutter the shebait's cannot by their dealing give the property a different turn It is the members of the family interested who by their consent may convert the debutter property into secular property are the members of the whole family, male and female, interested in the worship of which the shebait's are merely managers (*Woodroffe and Suhrawardy, JJ*) *MONMOHAN GHOSH v SIDHESWAR DUBEY*

27 C W N 218

1923 Cal 177

## —Debutter—Religious purpose.

Planting of holy trees is a dedication for a religious purpose, it is done on a spot consecrated for that purpose The mere fact it is called debutter does not conclusively show its true nature (*Mookerjee, and Rankin, JJ*) *CHANDRA, MOHAN GANGULI v JNANENDRA NATH BANNERJEE*

27 C W N 1033

## —Dedication—What constitutes—Founder who is—Erecting temple on Land granted by another—Devolution of the trusteeship—Shebait—Pujari—Position of

When the worship of an idol has been founded the shebaitship is vested in the founder and his heirs unless he has disposed of it otherwise or there has been some usage or course of dealing which points to a different mode of devolution 17 C 3, 32 C 129, 35 A 283, 11 C L J 2, 40 C 251, 29 A 663, 22 C L J 404, 36 A 161 Rel In the application of this rule it may not always be easy to determine who are the founders One person may provide the site of the temple another may build the temple and establish the idol, while a third may dedicate property for the performance of the daily services of the idol Where the owner of the site relinquishes his right in the land, he may not be a founder unless he indicates at the time expressly or impliedly, that he will associate himself with others in carrying out the objects of the foundation *Prima facie* all the persons who establish the worship are entitled to take part in the management If a number of persons provide the original endowment, they together constitute the founder But persons who subsequent to the foundation furnish additional contributions do not thereby become joint founders; their benefaction is regarded as nothing beyond an accretion to an existing foundation 24 M 219, 7 M 499, 17 C 3 Ref

The shebaitship is vested in the founder and his heirs unless he has disposed of it otherwise equally in the case of private and public endowments No distinction between the two classes of cases has been drawn in this respect in the judicial decisions 18 A 227, 11 C L J 2, 40 C 251, 5 C, 228, 40 M 612 Rel.

Consequently whether a foundation is public or private the three fold principle is applicable namely, (1) the devolution of the trust on the death or default of each trustee, depends upon the terms on which it was created, of the usage of the particular institution where no express trust deed exists, (ii) the worship of the idol is vested in the

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founder and his heirs, in default of evidence to show that he has disposed of it otherwise, (iii) and where a shebait appointed by the founder fails to nominate a successor in accordance with the conditions or usage of the endowment, the management reverts to the founder and his representatives even though the endowment has assumed a public character

The indicia of a public temple discussed. 18 B 721, 11 A 18, 18 M L T 543, 4 L W 228, 4 L W 444, 27 M L T 11 Rel

The pujari or archaka is not the shebait of the temple, he is appointed by the shebait as the purohit to conduct the worship but that does not transfer the rights and obligations of the shebait to the purohit and he is not entitled to be continued as a matter of right in his office as pujari

16 W. R 99, 25 C W N 201, 15 M 183, 42 M, 618, 35 M 631 Rel (*Mookerjee and Chotzner, JJ*) ANANDA CHANDRA CHAKRABARTI v BROJA LAL SINGHA 50 Cal 292 74 I C 793 1923 Cal 142

—Founder—Right of to appoint trustees and provide for management and administration—Usage of the institution—Participation in offerings

Where the worship of an idol has been founded the shebaitship of the idol is vested in the founder and his heirs unless he has disposed of it otherwise or there has been some usage or course of dealing which points to a different mode of devolution 17 C. 3, 32 C. 129, 35 A 213, 20 C. W N 314 Rel The founder is competent to provide for the government and administration of the trust and can give directions for its management not inconsistent with its character as a religious or charitable trust The test in each case is whether the direction of the founder is inconsistent with the nature of the endowment as a religious or charitable trust The proof of the intention of the founder becomes almost conclusive, when the usage is immemorial The intention may be presumed from a number of instances extending over a limited period, if they are made out by clear and unambiguous evidence Where the founder of an endowment prescribed the line of succession the shebaitship in the descendants of his sons and also directed that the descendants of his daughters would be entitled to participate in the bhog offerings dedicated to the idols established by him. Held that it was competent to him to do so (*Mookerjee and Chotzner, JJ*) RAMBHAHA CHATTERJEE v KEDAR NATH

72 I C 1026 1923 Cal. 60

—Founder — Right of, to provide for management—Trusteeship See (1923) DIG COL 984, PUTTULAL v DAYA NAND 44 A 721

—Founder—Who is—Right to shebaitship—Rights of pujari or priest

Where the worship of an idol has been established by the ancestors of a lady she is not the original founder, nor can she be regarded as a founder because of her subsequent benefaction which has nothing beyond an accretion or addition to the existing foundation. 7 M, 499; 24 M, 219 Ref. When the worship of an idol is founded, the shebaitship is vested in the founder and his

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heirs unless he has disposed of it otherwise or there has been some usage or course of dealing which points to a different mode of devolution 17 C. 3, 32 C 129, 35 A 283 Rel The shebait appoints the purohit to conduct worship but that does not transfer the management of debutter estate from the eshebait to the purohit 16 W. R 99, 25 C W N 201 Ref (*Mookerjee and Rankin JJ*) KALI KRISHNA RAY v MAKHAN LAL

27 C W N 411 1923 Cal 160 50 Cal 233 72 I C 686.

—Hindu temple—Right of worshipper to remove idol and substitute another

It is not competent to an individual worshipper of a village temple, not being its trustee or a manager, to remove an idol alleged to be cracked and substitute therefor a new idol made by himself (*Oldfield and Devadoss, JJ*) GOLLA CHAKRAPANI v KATNENI LAKSHMAPERUMALLU

44 M L J 90 17 L W 62 72 I C 328 1923 Mad 369 (1),

—Idol — If can be gifted away

Per Richardson J —It is difficult to understand how an image considered as a legal or spiritual entity can properly be said to be the subject of gift (*Sanderson, C J. and Richardson, J*) PRADYUMNA KUMAR MULLIK v PRAMATHA NATH MULLICK 27 C W N 685 1923 Cal 708

—Idol—Rights to sue on behalf of—Person interested

In suits to recover property dedicated to an idol the real plaintiff is the idol and the person suing on behalf of the idol is not personally interested in the suit any more than is the next friend or guardian of a minor A manager of the property of an idol has a sufficient interest to sue for the recovery of its properties from a trespasser 38 A 735 Ref (*Ryves and Daniels, JJ*) SHEORAMJI v SRI RIDHNATH 45 A 319 21 A L J 148 L R 4 A 128 71 I C 480 (1923) A 160

—Manager—Suit by in his capacity as manager for recovery of money due to temple—Temple owing money to the manager—Effect of.

Piff sued as manager of a Hindu temple alleging himself to be hereditary trustee thereof, for the recovery of certain moneys due to the temple In the course of the plaint the plaintiff stated that he had spent moneys out of his pocket for the temple and that he was entitled to be reimbursed in respect of those moneys The trial court took an undertaking from the piff that he was recovering the money only on behalf of the temple and passed a decree in his favour as manager The appellate court without going into the merits of the case dismissed the suit holding that the plaintiff claimed adversely to the temple as he was in effect trying to appropriate the moneys himself Held that the decree of the trial court was correct as the plaintiff was suing in terms as the manager of the temple (*Shah, A J C and Crump, J*) VINAYAK SHIV RAO v, ATMARAM RAYAJI

1923 Bom. 170.

—Mutt—Debts borrowed by head—Binding nature—Creditor's rights

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The head of a mutt cannot alienate the mutt properties unless constrained to do so by unavoidable necessity. It is not sufficient to show the debt is shown to have been incurred for mutt purposes and not for the head's private purposes in order to make it binding on the properties. Except for unavoidable necessity, the head of a mutt cannot create any interest in the mutt property to endure beyond his life-time.

Properties in the hands of a madathipathi will not be liable for the debts of his predecessor if the borrowing was not for a justifiable purpose or he had enough funds in his hands at the time of the loan (*Krishnan and Ramesam, JJ*) *LAKSHMINDRATHIRTHA SWAMIAR v VIBHUDA-PRITHA ITHIRTHASWAMIAR* 44 M L J 187

17 L W 274 72 I C 709 1923 Mad, 288

—Mutt—Head of—Mahant—Marriage—Forfeiture of office

In the case of Sitarmarthi Asthal the mahant does not forfeit his office by marrying. The fact that there has been no instance of a marriage on the part of a mahant is strong evidence of a custom against marriage (*Das and Bucknill, JJ*) *MAHANT RAGHUNATH DAS v SHEOKUMAR MISSIR* 1923 P 309

—Mutt—Head of, Position of—Trustee—Scheme—Power of courts to frame See C P Code, S 92 25 Bom L R 747

—Mutt—Head of—Powers of alienation—Legal Necessity.

The Mahant of an endowment is the proprietor of the property although he holds these properties in trust. He has very large administrative powers over the affairs of the asthal and undoubtedly has power to sell or mortgage the property in case of need or for the benefit of the asthal. That being so, it is impossible to maintain that he has no saleable interest in the properties of the asthal. Where therefore a mahant in order to defend his title as against a rival claimant borrowed large sums of money and the creditors in execution of decrees on these debts sold in execution the properties of the asthal, *held* that the purchasers at the execution sale had acquired a valid title to the property in question the debts having been contracted for necessary purposes (*Das and Bucknill, JJ*) *KEDAR NATH GOENKA v MAHANTH JAGAR NATH DAS* 1 Pat L R 73 74 I C 134

—Mutt—Succession—Asthan—Mourasi Mutt—Devolution of office—Custom of mahants

A mourasi asthan is one in which the office or mahant is hereditary and apart from custom devolves upon the chief disciple of the existing mahant. By the rules of the Satlakha Asthan in mouzo satlakha in the Muzaffarpore District the senior bairagi chela on the death of the mahant is entitled to succeed to the mahantship. The principal chela or pupil is entitled to succeed on the death of the presiding mahant of a mourasi or hereditary mutt. If the principal pupil be personally unfit to succeed or be disqualified by one of the grounds of disqualification specified in the shastras, then the presiding mahant should in his life-time select a properly qualified pupil to succeed him.

## RELIGIOUS ENDOWMENTS

6 S D A Beng 262 foll

Different customs prevail in different mutts and where such are proved to exist they must govern, the order of succession. The mere fact that a mahant has professed to appoint a successor does not prove the existence of such a power (*Miller, C J and Jwala Prasad, J.*) *MAHANTH JAGERNATH DAS v JANG BAHADUR RAI*

(1923) Pat 33 4 Pat L T 285 71 I C 887

1923 P 218 (2)

—Shebait—Establishment of thakur for worship—Removal by succeeding shebait—Validity of

Where the worship of a Thakur was founded by M and properties were also dedicated for its worship but no condition as to the location of the Thakur was imposed by M it is not open to any subsequent shebait to impose restrictions which would fetter these who subsequently as heirs of the founder become shebait. It is competent to one of the heirs of the founder to remove the Thakur from the Thakurbait during his turn of worship. 17 C 3 Ref, (*Graves, J*) *PROMATHA NATH MULLICK v PRADYUMNA KUMAR MULLICK* 1923 Cal 99

—Shebait—Idol—Appointment of shebait—What constitutes

Where a person was appointed manager of the worship of an idol in pursuance of an agreement settling differences between members of the family, the person so appointed does not become shebait and he could not recover any out of pocket expenses made by him (*Maclean C J. Harrington and Fletcher, JJ*) *TRIGUNA SUNDARI DASI v. RADHARANI DASI* 37 C. L J 20

—Shebait—Order of succession—Deed—Construction

Unless the donor makes a reservation to alter the order of the devolution of the office of the shebait laid down in the deed, he has no right to do so and the shebait appointed contrary to the order laid down has no right to sue for arrears of rents of the debutter property (*Woodroffe and Cumming, JJ*) *GOURI KUMARI DASI v INDRA KUMAR MUKHOPADHYA*

50 Cal 197 70 I C, 175 (1923) Cal 30

—Shebait—Restrictions on successors—Validity

The son of the founder of an endowment by a deed of trust dedicated a piece of land for locating the deity and declared that the deity should not be removed therefrom till a similar or better habitation was found. *Held*, the condition was for the benefit of the deity and as such was quite valid. If however circumstances should change, the Court on a proper application can pass orders as it thinks fit. (*Sanderson, C J. and Richardson, J.*) *PRADYUMNA KUMAR MULLICK v, PRAMATHA NATH MULLICK* 27 C. W. N 685. 1923 Cal 708

—Shebait—Successor Power of founder to alter the line of succession

In the absence of an express reservation in the deed of gift it is not competent to the founder of a debutter or his heirs to make a change in the

## RELIGIOUS ENDOWMENTS

order of succession of shebait (*Woodroffe and Cuming, JJ.*) GOURIKUMARI DASAI v INDRA KUMAR MUKHOPADHYA 50 Cal 197  
70 I C 175 1923 Cal 30

———*Succession to Guru—Presumption as to dedication*

The property of a Sadhu cannot necessarily be presumed to be devoted to religious purposes for the reason that it descended from *Guru* to *Chela*. A secular property, even if acquired by a *Sadhu*, does not change its character unless dedicated for a special purpose, religious, charitable etc (*Broadway and Zafar Ali, JJ.*) KISHAN DAS v LACHHMAN SINGH 5 Lah L J 351  
75 I C 94 1923 Lah 544

———*Temple—Dharmakart a — Position and powers of—Conversion if trust property—Falsification of accounts—Removal* See (1922) DIG COL 989 SRINIVSACHARIAR v EVALAPAA MUDALIAR 27 C W N 317  
21 A L J 250 (P C)

———*Temple—Right of trusteeship—usage*

Where the site on which a temple is built was purchased in the name of one member of a Hindu family that by itself does not show he was the sole founder and hence trusteeship is not solely vested in his family. Where even before the new temple was built the family worshipped an idol which was later on installed in the new temple the old foundation which was vested in the family still remains intact. In the absence of evidence to show the rules of succession the usages of the institution and conduct of parties should be looked to, (*Krishnan and Ramesam, JJ.*) NARAYANAN CHETTY v ELAYAPERUMAL 73 I C 381

———*Trustees—Act of majority—When binding on trust—Omission to consult some trustees—Effect of* See (1922) DIG COL 989 MATA MULLA MANIKOTH PATTAM CHANDU v KUTTIVIL RAYRU 32 M L T, (H C) 25

———*Trustee—Acts of predecessor when binding on successor—Commutation of rent*

Succeeding trustees of a charity are not estopped from reverting to the *waram* rate in repudiation of an arrangement for commutation into a fixed money rent entered into with the tenants by the preceding trustees, 37 M L 698 Ref, (*Ayling and Ramesam, JJ.*) SUNDARARAJA CHARIAR v ALI MAHOMED ETHIBAR KHAN SAHEB 44 M L J 649 72 I C 690 1923 Mad 661

———*Trust—Bequest to charity to—Spread of Hindu religion—Sanskrit language*

*Per Spencer J.* A trust for the spread of Hindu religion is vague and indefinite. A trust for the spread of Sanskrit language is definite but a trust for the spread of Hindu religion for Sanskrit learning as the trustees might deem fit is vague and unenforceable.

*Per Devadoss, J.*—A bequest for the spread of Hindu religion as well as that for the spread of Sanskrit language is vague and unenforceable, Authorities on the point reviewed (*Spencer and*

## RELIGIOUS OFFICE

*Devadoss, JJ.* SRI GADICHERLA VENKATANARASIMHA RAO GARU v NAYAPATHY SUBBA RAO 46 Mad 300 32 M L T (H C) 47  
(1923) M, W, N 111 17 L W 31 73 I C 991  
1923 Mad 376.

———*Village temple—Right to management—Trustee—Worshippers—Suit for possession of property*

As regards property bequeathed to an idol or shrine, though it notionally vests in the idol or shrine the right to possess the property is in some human being or beings viz the trustee or manager and if there is none such, in the worshippers. In the absence of a trustee or manager it is open to the worshippers with the permission of the Court under O. 1, h 8 C P C to sue for recovery of possession of the properties belonging to the religious charity from a trespasser 37 M L J 554 Ref 27 M L J 270 dist

Where persons claiming to be the lawful trustees of a village charity are proved to have acted as trustees without any dispute for a number of years, it is a legitimate inference that they had been lawfully appointed or that their self appointment had been ratified and adopted by the beneficiaries (*Schwabe, C J and Wallace, J.*) RANGASWAMI NAIDU v KRISHNASWAMI IYER 44 M L J 116 32 M L T (H C) 133  
71 I C 463. 17 L W. 147 1923 Mad 276 (2)

RELIGIOUS ENDOWMENTS ACT (1863)—Ss 3 and 4—*Kattalai—Jurisdiction of Temple Committee over*

Though a temple may be subject to the control and superintendence of a Temple Committee, that fact does not give the Committee any right of supervision over the Kattalai which is an independent trust (*Phillips and Ramesam, JJ.*) KANDASAMI IYER v SIVACHIDAMBARAM CHETTIAR 70 I C 598 1923 Mad 209

———S 14—Trustee—Breach of trust—Association of strangers management See (1923) DIG COL 990 KOTASSERI E V SANKARAN NAMBI v DEWAKI ANTHEERJENAM 73 I C 491.

RELIGIOUS OFFICE—Surrender—Rights of the other members of the family—Right to transfer office

Hereditary offices, whether religious or secular are treated by the texts as indivisible. But modern custom has sanctioned such partition as can be had of such property by means of the performance of the duties of the office and the enjoyment of the emoluments by the different co-parceners in rotation. The office remains in the family and the transfer by one member of his share to another member of the family could not be considered in any way objectionable. It would only reduce the number of members who are entitled to the office and a share in the emoluments. If all the members of the family agree to give up the duties of performance of worship and receiving emoluments, there could be no objection to their doing so. But there is a great difference between the whole group of members surrendering their rights to the grantor and one member purporting to give up his right to the grantor which would cause an interference with the rights of the other members of the family. The

**RENT SALE**

duties of the office and the emoluments appertaining thereto remain with the family of the original grantee and those members of the family, who wish to retain the office and share the emoluments, are entitled to do so, and if one of the members of the family, wishes to get rid of his duties as well as his rights he could only do so in favour of the remaining members of the family, and he cannot evade the ordinary rule as to alienations by purporting to surrender his share to the original grantor or put in other words, the alienation of a share by one member of the family is invalid whether it is made in favour of an outsider altogether or whether it is made in favour of the original grantor of the office (*Macleod, C J and Crump, J*) **RAGHUNATH VITHAL BHAT v PURNANAND** 47 Bom 529 25 Bom L R. 207 72 I C 314 1923 Bom 358

**RENT SALE—Validity of—Fraud of purchaser—Annulment of incumbrances**

It is an abuse of statutory provisions for sale of tenures in execution of decrees for rent to bring about designedly a sale under such circumstances so that the right of under tenure holders might be destroyed, an unencumbered title conveyed to the purchaser and the maximum of benefit conferred upon the defaulter. In such a case the transaction is a *priva e sale*. Though the purchaser joined in the fraud after the default had been made he cannot by reason of his entering into the agreement before the sale which was the machinery by which the fraud to be carried out and with knowledge thereof, be permitted to enjoy to the detriment of others the benefits which result to a purchaser at a sale for arrears of rent or revenue 10 M I A 540, 12 C L J 336, 18 W R 240 Ref (*Chatterjee and Pantun, JJ*) **LEJENDRA CHANDRA DHAR v DURGADAS DUTT**, 1923 Cal 324

**—What passes under—Execution sale—Money decree—Rights of a purchaser**

Both in a sale in execution of money-decrees and in a sale in execution of rent-decrees the right, title and interest only of the *jagirdar* in the tenure passes and consequently one who purchases first prevails against subsequent purchasers (*Jwala Prasad and Ross, JJ*) **BINANAND SAWATI v THURGO MAHTO**, (1923) Pat 249 4 Pat L T. 659 1923 P 592

**RESTITUTION OF CONJUGAL RIGHTS—Delay—Discretion—Marriage with minor girl**

Plaintiff was married to the defendant in 1902 when she was 12 years of age. In 1918 the plaintiff sued for restitution of conjugal rights. Held that though there was considerable delay in the institution of the suit it was satisfactorily explained and that the plaintiff was entitled to a decree for restitution of conjugal rights (*Shadi Lal and Broadway, JJ*) **MT. DAULAN v ABDUL HAG** 5 Lah L J 95

**—Refusal—Grounds for**

A decree for restitution or conjugal rights can be refused only on grounds which would justify the wife in refusing to return and live with her husband, as for example habitual physical cruelty (*Haltifax, A J C.*) **DAMODHAR GANESH v. PARBATI** 69 I C 498

**REVENUE SALE****—Suit by husband—Defence to the suit Cruelty—What is—English Law—Applicability of**

Cruelty in the legal sense need not necessarily be physical cruelty. A course of conduct which, if persisted in, would undermine the health of the wife is a sufficient justification for refusing to the husband a decree for restitution of conjugal rights.

Wherein a suit by a husband for restitution of conjugal rights it was found that he had falsely charged his wife with having attempted to poison him, that he had addressed her using the vilest epithets on several occasions that he had generally treated her with loathing and disgust, that he threatened to push her by a low-caste man if she came back to his house. Held that the husband was not entitled to a decree for restitution of conjugal rights.

Great care should be exercised in importing wholesale into India the strict principles of the Ecclesiastical Law of England embodied in the decisions of English Courts (*Phillips and Devadoss, JJ*) **KONDAL RAYAL REDDIAR v RANGANAYAKI AMMAL** 46 Mad 791 45 M L J 186 18 L W. 465 (1923) M W N 499 74 I. C 166 1924 Mad, 49

**—Suit for validity of marriage disputed—Finding as to what are necessary rites and ceremonies necessary**

When in a suit for restitution of conjugal rights, the validity of the marriage itself is disputed, it is not enough to find that the marriage took place leaving it to be presumed that the rites and ceremonies necessary to constitute a legal marriage in the particular case were performed, the Court must find specifically what these rites and ceremonies are and whether they were performed (*Maccoll, J*) **RAMPIAYAR v DEVA RAMA** 1 Rang 129 1923 Rang 202

**REVENUE SALE—Default in payment of revenue—Sale for arrears—What is sold—Rights of purchaser**

On the failure of an owner to pay the Government assessment his estate or interest in the land is forfeited or rather determined and under a sale for arrears of revenue what is sold is not the interest of the defaulting owner but the interest of the Crown subject to the payment of the government assessment. A person in adverse possession who occupies the land without payment of rent to the defaulting proprietor, is bound to surrender possession of that land to the revenue sale purchaser when the sale is confirmed, and if the land is not so surrendered he renders himself liable for mesne profits, as he unlawfully keeps the purchaser out of possession (*Mookerjee and Chozner, JJ*) **JOBEDA KATUN v TULSI CHARAN DAS** 1923 Cal 82

**—What passes under.**

What passes to a purchaser at a revenue sale is only the right, title and interest of the defaulting profits (*Jwalprasad and Ross, JJ*) **RAMNANDAN SAHAY v JAIGOBIND PANDAY** 2 Pat 639



## RIGHT OF SUIT.

**RIGHT OF SUIT**—Money had and received—Basis of action—Principles underlying *See* BROKER 25 Bom L R 1014

—*Suit on decree—Declaratory decree of Judgment*

Where the relief claimed in the suit has already been granted by the decree in a prior suit and could be obtained in execution, it is not open to the plaintiff to institute a fresh suit for the same relief. A merely declaratory decree declaring the rights of the parties merely is incapable of execution. In such a case a separate suit will lie (*Mookerjee and Cheotzner, JJ*) SYAMA CHARAN DAS v SATYA PRASAD CHAUDHURI 70 I. C. 427 1923 Cal. 252

—*Trust for creditors—Person not a party to the contract—Right to sue*

Although a person who is not a party to a contract and with whom there is no privity, cannot gain any advantage by it, yet a contract can be so framed as to secure a benefit to a third party as a *cestui que trust* in which case the latter may sue in his own name to enforce the contract.

Where a person constituted himself a trustee to discharge the debts due to the creditors of his vendor by taking a sale of his properties burdened with that liability, he is liable to be sued by the creditors.

A trust for the benefit of creditors is revocable by the author of the trust unless the fact of its execution is communicated to them (*Subbanna J*) GOUSE BEE v MAHOMED HUSSAIN SAIT 1 Mys L J 21

**RIPARIAN OWNERS**—Rights of—Bed of navigable river—Accretion—Property in whom vests *See* ALLUVION AND DILUVION (1923) P C 1

**RIWAJI-I-AM**—Entry opposed to custom—Not evidence

A statement in a *riwaj-i am* opposed to general custom and unsupported by instances possesses very little evidentiary value (*Scott Smith and Zafar Ali, JJ*) BUDHA v MT FATIMA BIBI 1923 Lah 401 4 Lah 99

—*Entries in—Evidentiary value*

An entry in a *riwaj-i am* is strong piece of evidence in support of the custom it propounds and where it is opposed to the general customary law may be taken as sufficient to set up a custom at variance with the general law and to shift the burden of proof (*Broadway and Abdul Raoof, JJ*) NANDOO SINGH v. BALJIT SINGH 5 L L J 203 69 I C 490

—*Evidentiary value of—Custom*

*Riwaj-i am* is a strong piece of evidence in support of the custom therein declared (*Broadway and Moh Sagar, JJ*) SAMAIL v AHMADA 4 Lah 189 73 I. C. 452 1923 Lah 517

**SALT ACT (XII OF 1882), S 27—Rules under—Importation—When an offence**

There is nothing in S 27 to bear out the contention that importation into a part of the territories mentioned in S. 1 is to be taken as meaning only importation from outside those territories and not importation from one part of the territories into another part. Meaning of "importation" considered, (*Marineau, J*) SITA RAM v EMPEROR 69 I C 460 23 Cr L J 732.

## SIR

**SANTHAL PARGANAS REGN. (III of 1872) Ss. 5 and 6**—Applicability and scope of—Settlement—Completion of—Power of ordinary Civil Courts—Interest—Maximum allowable *See* (1922) DIG COL 994 HARI PRASAD SINGH v SOWRENDRA MOHAN SINHA 1 Pat 506

**SEA CUSTOMS ACT (VIII OF 1878) S 20—Customs duty—Railway Company—Property vested in Government—Importation of stores from England**

The property of the Great Indian Peninsular Railway consisting of the railways, works, etc. having been transferred the and vested in the Secretary of State, no customs duty is leviable under S 10 of the Sea Customs Act, 1878, on stores purchased abroad and imported into India by the Great Indian Peninsular Ry Co for the use of their undertaking (*Macleod, C J and Crump, J*) SECRETARY OF STATE FOR INDIA v G I P RAILWAY, 25 Bom L R. 470 73 I C 468 1923 Bom 423

**SHAMILAT LAND**—No accessory to Khevat holdings

The *Shamilat* lands are not accessories to the Khevat holdings (*Broadway and Zafar Ali, JJ*) ZAIDA v RAJA 1923 Lah 350

**SHIPPING**—Claim for necessities supplied—Suit in *rem* and in *personam*—Jurisdiction *See* ADMIRALTY COURTS ACT, Ss 5 ETC 1923 Bang 163

—*Prize Court—Condemnation of ship—Owner having commercial domicile in enemy country—Naturalized neutral*

On the declaration of war between Great Britain and Turkey a ship belonging to the applicant was condemned as enemy property. The applicant though a naturalized neutral had a commercial domicile in Turkey till the outbreak of war. He claimed the ship as owner. Held that he could succeed only on proof of an intention to divest himself of his status as enemy subject (*Lord Sumner, J*) THE KARA DENIZ 25 Bom L R. 116 70 I C 156 (P. C.)

—*Wages of mariner—Liability of master—Suit for jurisdiction*

Mariners have a three-fold security for their wages: they may proceed against the owner, secondly they may proceed against the vessel and thirdly may sue the captain of the ship. Consequently even though a mariner has been appointed by the owner of the estate he is entitled to recover his wages against the master of the ship. Consequently the master of the ship can sue for the recovery of his wages and messing charges together with the wages and messing charges of the chief engineer and other mariners in the ship (*C C Ghose, J*) MORRIER v LAL RAGHUMULL 50 Cal 28.

74 I C 287 1923 Cal 439

**SIR**—*Mortgage before the—Agra Tenancy Act—Sale of equity of redemption—Effect*

Mortgagees of sir land mortgaged before the Agra tenancy Act, are entitled to remain in possession until the mortgage is redeemed and if the mortgagor sells his equity of redemption, the

**SIR.**

exproprietary rights which arise in his favour lie dormant till the mortgage is redeemed the mortgagee can remain in possession till he is redeemed and so long as the land is *sir* occupancy rights cannot grow up in it (*Fremantle, S M*)  
**GOPU v. SHAH NAZIR HUSAIN**

**L R 4 A 378 (Rev)**

— — — Rights in—If could be transferred See  
**LAND TENURES—SIR**

**L R 4 All 416 (Rev)**

**SOLDIERS LITIGATION ACT (IX OF 1918) S 11—**  
*Plaintiff ceasing to be soldier at the date of suit.*

S 11 embraces only those cases in which the plaintiff is an Indian soldier at the time of institution of the suit, and the mere fact that he was a soldier for some time during the period of limitation prescribed for the suit does not benefit him if he has ceased to be a soldier on the date of the institution of the suit (*Shadi Lal, C J and Le Rossignol, J*) **PIARA SINGH v MULA MAL**

**4 Lah 323 1923 Lah 655**

**SPECIFIC PERFORMANCE—Contract by letters**  
**—Registration**

A suit for specific performance lies when the lease essential for the completion of the contract has not been executed and if there is a valid enforceable contract either party is entitled to call upon the other to complete the transaction by the execution and the registration of the document of title (*Mookerjee and Chotzner, JJ*) **BIJOY CHANDRA SINGH v. HOWRAH AMTA LIGHT RV. CO**

**38 C L J 177 1923 Cal 524**

— — — Decree for—Form of—Contract for sale  
 —Decree fixing time for payment by vendee and directing execution of registered conveyance on such payment—Property of—Default by either party—Extension of time—Powers of original and appellate Court

A decree for specific performance of a contract for sale provided (a) that upon, payment by the plaintiffs, of a sum named with in 2 months from the date of the decree, the first defendant do execute and register a proper deed of conveyance of the properties in the schedule and (b) that upon payment the first defendant do put the plaintiffs in possession of the said properties together with all the title deeds Held that the decree was in the nature of a preliminary decree, the original Court keeping control over the action and having full power to make any just and necessary orders therein including in appropriate cases, extension of the time fixed for payment of the amount fixed by the decree Equally has the appellate Court in an appeal from the decree power to extend the time

Observations on the appropriate form of decree in a suit for specific performance of a contract for sale, and upon the rights of and remedies open to the vendor or vendee in case of default by the opposite party (*Schwabe, C J. and Wallace, J.*) **ABDUL SHAKER SAHIB v ABDUL RAHIMAN SAHIB**

**46 Mad. 148 44 M L J 107**

**17 L W 216 (1923) M W. N 1.**

**72 I C 868 1923 Mad 284**

— — — Delay no bar unless defendant proceeds

**SPECIFIC RELIEF ACT, S. 9**

In the absence of anything to show an abandonment of a sleeping over of rights to the detriment of third parties, delay short of the period of limitation does not matter in suits for specific performance To operate as a bar to relief, delay must be of such a character as either to prejudice the defendant or lead him to the belief that plaintiff has waived his rights (*Kennedy J C and Raymond, A. J C*) **BEGRAJ v ALISHER**

**1923 Sind 50**

— — — Minor—Benefit—Complete contract

A court will not decree specific performance of a contract against a minor unless it is shown to be beneficial to him Where there is no consensus as to the terms of a contract, a suit for specific performance of such a contract will not lie (*Abdul Raouf and Lumsden, JJ.*) **BAHADUR CHAND v MUHAMMAD ISMAIL**

**4 Lah 408**

— — — Suit for—Laches—Effect

Mere delay, which is short by the period prescribed by the Limitation Act and which is not of such a character as to give rise to an inference of abandonment of right, is no bar to a suit for specific performance unless it is shown to have prejudiced the defendant (1922 Lah 461, Foll) (*Moti Sagar, J*) **GOPALI RAM v CHAUDHRI DEWAK RAM**

**1923 Lah 694**

— — — Time—If essence of Contract

In a contract for the sale of land even where a time is fixed for the performance of the contract, the substance of the agreement should be looked to, in order to find out the intention of the parties as to whether time was to be of the essence of the contract (*Martineau and Moti Sagar, JJ*) **SADIQ HUSAIN v ARUP SINGH**

**4 Lah 327**

— — — Time when essence of the contract

Where under the terms of an agreement to sell, the vendor was to submit the title deeds within certain time and the vendee to give a final reply within another fixed period of time, while the purchase itself was to be completed within a certain time, and delay was caused by the vendor himself, Held in a suit for specific performance that time was not of the essence of the contract (*Ghose and Panton, JJ*) **KRISHNA CHANDRA DEY v. GRAHAM,**

**50 Cal 700 75 I C 421**

**27 C W N 693 1923 Cal, 694**

**SPECIFIC RELIEF ACT (I OF 1877), S. 9—Decree under—Execution—Order if appealable.**

An order passed in execution of a decree under S 9 Specific Relief Act is not appealable (*Scott Smith, J*) **WARIS v FATEH DIN**

**1923 Lah 105**

— — — S 9—Possession—Suit on invalid title  
 —Mortgage of occupancy holding

A person who has taken a usufructuary mortgage over an occupancy holding, on contravention of the provisions of the law, will not receive the assistance of the courts in a suit for recovery of possession based on title, such title being *ex hypothesi* invalid The mortgagee could however sue to be put back into possession under S. 9 of the Sp Rl Act without pleading her title at all (*Piggot and Walsh, JJ.*) **SHEO ZOORKOERI v MT KAVSILLA.**

**1923 A. 81 (1)**

## SPECIFIC RELIEF ACT, S. 9

—§ 9—Scope of *See* (1922) DIG COL 1102, NABA KISHORE TILAK DAS v PARO BEWA 50 Cal 23 74 I C 283

—§ 9—Suit for possession—Occupancy right.

In a suit on possessory title the court decrees the suit only when it finds the plff in peaceful possession before dispossession, the plff's previous possession being in law sufficient proof of title. In a suit under S 9 of the Sp Rl Act, the court is empowered to go only into the question of dispossession within 6 months before and not into the deft's title. 20 C 834, 26 M 314 foll (*Pratt, J*) MA SAW v. MAUNG SHWE GAN 70 I C 99 1923 Bang 54

—§s 12 and 19—Agreement to give land

Where a defendant agreed to give land to plaintiff who was to help him in recovering it, held, the agreement should be specifically enforced because the breach of it could not be adequately compensated for, by money (*Prideaux, A J C*) SHRIRAM v BABAJI 71 I C 40 1923 Nag 47

—§ 14—Agreement to sell immovable property—Property charged before sale—Rights of purchaser

In a suit for specific performance of a contract to sell even if the plff knows that there was a claim against the defendant for maintenance, there would be nothing in that fact to put the plff, on notice that there was an incumbrance on the suit property, and even if the defendant sold the property he would still be liable to provide maintenance out of the sale proceeds which would in spite of the sale retain the character of the ancestral property. The case comes within S 14 of the Specific Relief Act and the plaintiff is entitled to compensation for the burden which is imposed upon the property he contracted to buy owing to the decree passed for maintenance (*Macleod, C J. and Crump, J*) CHHOTABHAI HIRACHAND v MAGANABHAI NAGINBHAI 1923 Bom 271

—§s 14, 17 and 21—Minor—Contract to sell property by defacto guardian—Specific performance—Transferee for value—Right of pre-emption if a defence to suit for specific performance

Where a *de facto* guardian has entered into a contract with a third party for the sale of a minor's property, to direct the contract to be carried into effect as against the minors without the sanction of the Court is to sanction a plain breach of trust on the part of the *de facto* guardian, and this the Court will not do.

No distinction can be drawn between a contract for purchase and a contract for sale. The decision of the Judicial Committee in 39 C 232 (P. C.) rests on the broader ground that it is quite impossible for the Court to decree specific performance against a minor.

The operation of S 27 (b) of the Specific Relief Act is confined to cases where the contracts are in the first instance enforceable as against the parties to the contract. The liability of a person claiming under a party to the contract rests upon

## SPECIFIC RELIEF ACT, S. 22

the antecedent liability of a party to the contract, and arises by reason of the fact that as such transferee he takes the subject to the transferor's pre existing contractual obligation, and where there is no pre-existing contractual obligation, it seems that the case entirely fails as against the transferee. It is quite clear that you cannot enforce a contract as against a transferee unless the transferee has notice of the original contract. Notice of the original contract must mean notice of an existing obligation under the contract, and where the contract is itself unenforceable it seems that it is impossible to maintain the view that the contract can be enforced as against a subsequent transferee. As a rule the Court will not compel specific performance of a contract unless it can execute the whole contract. Where, however, the contract is in substance divisible, there is nothing to prevent the court from carrying into effect that part of it which is capable of being carried into effect. Where the subsequent purchaser of property is one who has a right of pre-emption the Court will not decree specific performance against him (*Das and Foster, JJ*) SHEIKH ABDUL HUQ v MD YEHA KHAN, 4 Pat L. T 553

—§ 16—Contract if divisible—Specific performance as to part

Where after an agreement to sell two plots of lands, it was discovered that one of them belonged to the vendor's wife, the vendee can under S 16 Specific Relief Act claim performance of so much of the contract as related to the vendee's own plot with a proportionate abatement in the price settled upon.

The question whether a contract is divisible or not is one of construction depending on the facts of each case (*Ghose and Pantan, JJ*) KRISHNA CHANDRA DEY v GRAHAM 50 Cal 700 27 C W N 693 75 I. C 421 1923 Cal, 694

—§ 20—Agreement to pay damages—Breach of contract—Specific performance if claimable.

In a contract to sell, parties agreed that in case of breach of contract, the earnest money was to be returned and damages paid. Held, this does not preclude a suit for specific performance being instituted by the vendee (*Martineau and Moti, Sagar, JJ*) SADIQ HUSAIN v ANUP SINGH, 4 Lah 327

—§ 22—Delay in completing sale—Right to make time essence of contract—Earnest money—Return of

In a contract to purchase land, the defendant on receipt of earnest money agreed to complete the sale in two months. This was not done and after a waiting of 6 months, plaintiff called upon defendant to complete the sale within 3 months, failing which he brought his suit for return of earnest money etc. Held, he was entitled to make time the essence of the contract at that stage and was not bound to wait till deft could place himself in a legal position to do his part of the contract. Also, the defendant could not after the suit was filed demand specific performance, but was liable to return the earnest money with interest (*Shah A C J and Crump, J*) KARSANDAS PURSHOTTAMDAS v GOPALDAS 25 Bom L. R. 1444.

## SPECIFIC RELIEF ACT, S 22.

## —S 22—Discretion of court

Courts have an absolute discretion to decree specific performance or not and where a decree would be a source of constant trouble and friction between the parties and might even become nugatory, courts ought not to grant it (*Moti Sagar, J*) *GENDA RAM v RAM CHANDER*.

73 I. C. 1013

## —S 22—Discretion of court—Abandonment of claim for specific performance—If allowed—Time if essential

On failure to comply with the terms of an agreement to sell, plaintiff filed a suit for specific performance and in the alternative for return of deposit money and damages. During the course of the suit he gave up the first claim. On account of depreciation of value, the vendor who had throughout refused to convey and thus committed a breach of contract, expressed his willingness to execute the conveyance. Held under the circumstances, the contract not being performed within the reasonable time fixed there was a breach, and though the suit was filed on the basis of a subsisting agreement, plaintiff could withdraw his claim to specific performance and confine its claim to damages, etc and that such withdrawal was not a repudiation entitling the defendant to refuse the return of the deposit money (*Fawcett and Coyajee, JJ.*) *KARSANDAS KALIDAS v CHHOTALAI MOTICHAND*

25 Bom L. R. 1037

## —S 22—Specific performance—Decree for—Refusal—Discretion

Under section 22 of the Specific Relief Act the Court may properly exercise its discretion where the circumstances under which the contract is made are such as to give the plaintiff an unfair advantage over the defendant though there may be no fraud or misrepresentation on the plaintiff's part. Where the plaintiff, at the time when the contract was made, held an unfair advantage owing to the fact that the defendant's faculties were enfeebled, the Court might refuse specific performance (*Broadway and Brasher JJ*) *SHER SINGH v UDHAM SINGH*,

5 Lah L J 307 72 I C 586

## —S 22—Specific performance—Tender—Necessity for—Agreement to reconvey

In a suit for specific performance of an agreement to reconvey it would be proper for the plaintiff to tender the money or bring it into Court with his plaint. But having regard to the facts that the negotiations went on for several months, that the suit was filed before the 3 years had expired, and also the fact that the debts had been in possession of a portion of the villages when they undertook to reconvey to the plaintiff the court refused to apply the strict law as to tenders and directed debts to reconvey on payment of the consideration money. (*Macleod, C J, and Coyajee, J*) *TRISHOVANDAS VARIIVANDAS v BALMURUND DAS*

1923 Bom 15

—S. 26—Ill (b)—Variation as a defence—Evidence to prove variation. See (1922) DIG. COL. 998. *SUNDAR BAI v DWARAKADAS PARPIA*

70 I C. 768.

## SPECIFIC RELIEF ACT, S 27

—S 27—Agreement to sell—Specific performance—Option to purchase—Sale to third person before acceptance of offer—Effect of See (1922) DIG. COL. 999 *EGALA PADDA PAPA NAIDU v MUNISAMI AIYAR* 46 Mad. 30,

## —S 27—Contract to sell property—Subsequent purchaser with notice—Specific performance—Proof of

Where the defendant is in possession of property under a registered sale-deed, the plaintiff who sets up that the defendant purchased with notice of a contract to sell in plaintiff's favour must prove that there was a prior agreement to sell and that the defendant purchased with notice of the prior agreement. The burden of proof is on the plaintiff to prove notice. The defendant is not bound to prove a negative namely that he had no notice (*Macleod C J, and Crump, J*) *PEERKHA LAKHA v BAPU KASHIBA*

25 Bom L. R. 375.

73 I C. 231 1923 Bom 410.

## —S 27—Notice of agreement for sale—Oral agreement followed by delivery of possession

Defendant No 1 agreed orally to sell his land to plaintiff who was in possession of it as a tenant, received part payment of the price the balance of which was payable in 5 years, and accepted a rent-note at a rate which represented interest on the unpaid balance. Shortly afterwards defendant No 1 sold the land to defendant No 3 who made no inquiry into the nature of the plaintiff's possession. The plaintiff having sued for specific performance of the oral agreement

Held, decreeing the claim, that as defendant No 3 made no inquiries of the plaintiff as to the nature of his possession, he must be taken to have had constructive notice of the oral agreement (*Macleod, C J and Shah, J*) *VINAYAK-MORESHWAR NATH v GYNOBA HARIBA NAVALE*

1923 Bom 13.

## —S 27 (b) and (c)—Contract for purchase of land by manager of Joint Hindu family—Enforceability against other Coparceners Minors

A Hindu father, being the head of a joint Hindu family consisting of himself and his sons one of whom was a minor, contracted to purchase immoveable property, it was not proved that the contract was either necessary or beneficial to the family. In a suit by the vendor for specific performance of the contract against the sons, after the death of their father. Held that specific performance could not be granted because the case did not fall under S 27 (b) or (c) of the Specific Relief Act and the contract had not been proved positively beneficial to the minor defendant. 31 I C. 1, 4 M. L. J. 9, 23 M. L. J. 610 distinguished 22 Bom L. R. 997 followed (*Phillips and Davadoss, JJ*) *BAPPU v ANNA-MALAI CHETTIAR*

44 M. L. J. 228

17 L. W. 364. (1923) M. W. N. 218.

32 M. L. J. (H. C.) 253

72 I C. 42 1923 Mad. 313

—S 27 (b)—Contract of sale—Transfer in favour of third person—Bona fide transferee with-  
out notice—Plea of estoppel.

## SPECIFIC RELIEF ACT, S 27

From the time a contract for the sale of land is entered into the vendor, as to the land, becomes a trustee for the vendee, and the vendee, as to the purchase money, a trustee for the vendor, who has a lien upon the land therefor. And every one coming in by subsequent representative title and every subsequent purchaser from him either with notice, becomes subject to the same equities as the party would be to whom he succeeds or from whom he purchased. The onus of proving a *bona fide* purchase for value without notice of the prior contract for sale is on the person setting up. Proof of payment of full consideration for the sale in ignorance of the original contract of sale raises a presumption of good faith (*Abdul Raoof and Harrison, JJ*) *KANSHI RAM v ISHWAR DAS* 5 L L J 150. 1923 Lah 108

— S 27 (b) — *Contract to sell—Subsequent conveyance in favour of a third person—Notice of prior contract—Occupation of superstructure*

In the case of contracts for purchase of immoveable property the general principle of constructive notice is that notice of occupation (of the property purchased) by a person other than the vendor, which indicates that the vendor is not entitled to present possession at once puts the purchaser on enquiry as to the interest that the occupier holds in the property. The usual case is where the property is physically occupied by tenants, and then the purchaser, is by that occupation itself which puts him on enquiry in law affected with notice of the interest which these tenants have in the property. He is by their occupation not affected with notice of more than the term on which they held including any agreement collateral to their leases but is not bound to enquire, nor are they bound to answer to him they pay rent, so that the purchaser is not in such a case affected with notice of the tenant's or lessor's title or rights. This is the general principle laid down in the English cases and has been embodied in India in S 27 of the Specific Relief Act. So that where nothing more is known to the purchaser or would be known to him on reasonable enquiry than the fact that certain tenants are in occupation under a tenant right he is not affected with notice of more than the fact as to those tenants' rights. But when beyond this the purchaser is directly informed and therefore knows of the occupation of the property by another whether by himself or by his sub tenants he is equally put upon notice of entire into the interests of that other. This is not extension of the principle above mentioned, but a mere application of it. It makes no difference whether the occupation by another is brought to his notice by physical occupation or by information. Where the purchaser is definitely informed that another is in occupation of the property whether by himself directly or through sub tenants, he is at once put on enquiry as to the nature of the interest of that other in the property. The absence of such enquiry will fasten the purchaser with all the equities which the occupier holds against the purchaser's vendor (*Schwabe C J and Wallace J*) *BABA SAH v HAJEE MAHOMED AKBAR SAHIB*. 43 M L J 157 : 17 L W 541 : (1923) 11 W N 230 : 32 M L T (H C) 301 : 73 I C 287 : 1923 Mad 563.

## SPECIFIC RELIEF ACT, S 35

— S 27 (b) — *Subsequent transferee—Onus of proof*

In a suit for specific performance of a contract relating to land where the property has been transferred to a third party, the onus is on such transferee under S 27 (b) to show he is a *bona fide* transferee for value without notice of the prior contract (*Abdul Raoof, J*) *BINDRABAN v BODH RAJ* 69 I C 470

— S 31 — *Rectification of mistake—Mortgage—Plea of mistake raised in defence*

Where it is proved that what was intended by the mortgagor and the mortgagee alike to be included in the security has been so misdescribed by reason of a manifest clerical error that nothing would pass by the deed and the intention of the parties would be defeated, the court can give effect to the indisputably real agreement between the parties without driving them to a suit for rectification 34 C L J 256 Rel (*Mookerjee and Cumming, JJ*) *NANDA LAL AGRANI v JOGENDRA CHANDRA DATTAR* 70 I C 960 1923 Cal 53.

— S 35 — *Document stifling prosecution—Setting aside.*

A document under which one person agrees to stifle a pending prosecution a non-compoundable offence can be set aside by him. The parties in such a case are not in *pari delicto* (*C C Ghose and Panton, JJ*) *RAM KUMAR DAS v NANDA KUMAR SHAHA* 50 Cal 639 75 I C 27.

— S. 35 — *Specific performance—Grounds for refusing—Discretion of Court—Some of the interested persons not joining as plaintiffs but made defendants—Delay in suing—Tender of price—Waiver.*

Where on the vendor being asked to take the amount required to be paid to him by the vendee under the contract, the former said he would not do so. Held that the vendor must be deemed to have waived and dispensed with any actual tender.

The mere fact that some of the persons entitled to the benefit of a contract of sale refuse to join as plaintiffs in a suit for specific performance thereof by the others and are therefore added as defendants, is not a ground for not granting specific performance.

Delay when a ground for refusing specific performance (*Schwabe, C. J. and Wallace, JJ*) *ABDUL SHAKER SAHIB v ABDUL RAHIMAN SAHIB* 44 M L J 107. 46 Mad 148 17 I W 218. 72 I C 868 (1923) M. W. N 1 1923 Mad 284.

— S. 35 (c) — *Decree for specific performance—Delay in paying decree amount—Effect of—Power of Court to order rescission of contract.*

There are two kinds of relief after judgment for specific performance of which either party to the contract may in a proper case avail himself. He may obtain (on motion in the action) an order appointing a definite time and place for the completion of the contract by payment of the unpaid purchase money and delivery over of the executed conveyance and title deeds, or a period within which the judgment is to be obeyed, and if the other party fails to obey the order, may

## SPECIFIC RELIEF ACT, § 36.

thereupon at once issue a writ of sequestration against the defaulting party's estate and effects. He may apply to the Court (by motion in the action) for an order rescinding the contract. On an application of this kind, if it appears that the party moved against has positively refused to complete the contract its immediate rescission may be ordered, otherwise, the order will be for rescission in default of completion within a limited time. It is not necessary in such cases to drive the parties to a fresh suit or rescission of the contract. The words "in the same case" in the last para of S 35 of the Specific Relief Act refer to clause (C) and the Court has power to make an order in the suit in which the decree was made (*Macleod, C J, and Crum, J*) *KURPAL HEMRAJ v SHAM RAO* 47 Bom 589 25 Bom L R 234 72 I C, 321 1923 Bom 211

—§ 36—Admission of document in evidence—Admissibility not to be questioned on appeal.

When a document has been admitted in evidence in the trial Court, it cannot be called in question in the same suit on the ground that the document was not duly stamped 13 B 449, 18 B 737 Ref (*Macleod, C J and Crum, J*) *BALA RAGHU DHANWADE v BHIKU GENU*, 25 Bom. L R 450 73 I C 125 (1) 1923 Bom 412 (2)

—§ 36—Document not properly stamped—Admission in evidence—Subsequent rejection—Not permissible

It is contrary to the express provisions of S 36 of the Stamp Act to reject a document which has once been admitted in evidence on the ground that it ought to have been stamped (*Ross, J*) *DASI CHAMAR v RAM AUTAR SINGH*, 71 I. C 475 (2) 1923 P 404.

—§ 39—Declaration that a deed is void and inoperative—Literacy of plaintiff.

Where a person is induced to execute a document other than that he had undertaken to execute, the document is void and need not be cancelled. If an illiterate man has a deed falsely read over to him and he then seals and delivers the parchment, that parchment is nevertheless not his deed. This doctrine was not confined to the condition of an illiterate grantor and it made no difference whether the grantors were lettered or unlettered. The essential position is that if a grantor or a covenantor be deceived or misled as to the actual contents of the deed, the deed does not bind him. Nor this principle is limited in its application to deeds but the doctrine is equally applicable to other written contracts (*Mookerjee and Chotzner, JJ*) *UMARANNESSA BIBI v JAMIRANNESSA BIBI* 37 C L J 499 1923 Cal. 362

—§s. 39 42—Suit for declaration that the plaintiff was not liable to pay any sums on the basis of entries in the defendant's *bahi*—Whether maintainable without seeking consequential

Where S 39 of the Specific Relief Act expressly permitted the plaintiff to ask for further relief and the document should be adjudged void and ordered by the Court, to be delivered up and cancelled,

## SPECIFIC RELIEF ACT, § 42.

a suit for mere declaration that the plaintiff was not liable to pay on the basis of the entries in defendant's *Bahi* did not lie 87 P R 1916 Referred to, (*Campbell, J*) *SOHAN SINGH v SANTA SINGH* 1923 Lah 491.

—§ 41—Minor's Contract

A minor plaintiff praying relief must perform equity if he seeks equity and the Court may therefore under S 41, Specific Relief Act require him to restore any property, in his possession which he has obtained, by his misrepresentation. Such compensation does not extend to moneys received and spent by the minor (*Kennedy, J C, Raymond and Kemp, A J C*) *MT HURI v KOSHAN KHUDABUX* 16 S L R, 112 71 I C 161 (2 B) 1923 Sind 5

—§ 41—Minor—Sale—Refund of purchase money

A minor, who seeks to recover the property sold is bound in equity to refund the purchase money under section 41 of the Specific Relief Act as a condition precedent to obtaining a decree for possession, (*Mohi Sager J*) *KAPURA v HARDIT SINGH* 75 I C 261 1923 Lah 510

—§ 42—Cause of action

Every invasion of a plaintiff's rights gives him a cause of action to sue for a declaration of his right (*Datta A J C*) *RAM PARTAB SINGH v RAM KUMAR SINGH*, 9 O. & A. L R, 17.

—§ 42—Claim proceeding Adverse order—Suit for declaration by mortgagor—Maintainability—Consequential relief

O 21, R 63 gives a special right of suit to a party whose claim is rejected under O 21 R 58 and in such a case the proviso to S 42, Sp. Rel. Act does not apply (*Müller, C J and Foster, J*) *BHAGWAN LAL v RAJENDRA PRASAD SAHI* 4 Pat L T. 409 1923 P. 564

—§ 42—Cloud on title—Plaint not showing cause of action—Defendants attitude—If can be considered

Where plaintiff has a title to the property, any tendency on the part of the defendant to cast a doubt on his title is sufficient to give him a declaration of title. Apart from the pleadings, if the defendant's conduct shows any kind of resistance to plaintiff's title, that can be considered by the court and plaintiff given relief (*Dalal, J C and Wazir Hasan, A J C*) *BISHUNATH SARAN SINGH v SIFLA BAKSH SINGH*. 10 O L J 315

—§ 42—Consequential relief—Court fee. See (1922) DIG COL 1000 *SHIRAM v FIRM OF DATARAM MUNSHIRAM* 1923 S, 20 70 I C 862.

—§ 42—Consequential relief—Nature of—Plaintiffs in physical possession—Nature of possession

Where some of the members of a joint Hindu family sued for a declaration that an alienation of the joint family properties made by the other members were not binding on them and it was found that the alienees were not in possession, held, that the plaintiffs being in physical possession with other members of the family of the properties, were not bound to sue for possession and that S 42 of the Sp. Rel. Act

## SPECIFIC RELIEF ACT, § 42.

was no bar to the suit 36 A 126 Ref. (*Banerjee and Gokul Prasad, JJ*) KANHAI LAL v JAI LAL 69 I C 840 45 A 164 1923 A 54

## S. 42—Declaration and injunction—Defendant in possession

An injunction is a discretionary relief and cannot be claimed by a plaintiff out of possession when he does not ask for possession against defendants who are actually in possession 53 M 452, 3; M 62 Foll 14 S L R. 137, 36 M 364 Dist (*Kincaid J C*, and *Raymond A J C*) MANOHERDAS v. RAMDAS. 75 I C 549 1923 S 17

## S. 42—Declaration by a non party to a decree.

A person who is not a party to a decree may sue to it have declared void without claiming any consequential relief (*Broadway and Zafar Ali, JJ*) MT NIHAL DEVI v RAI CHUNI LAL 5 Lah L. J. 367 73 I. C 767 1923 Lah. 373

## S. 42—Declaration—Discretion of Court

It is always in the discretion of the Court to grant or refuse a declaratory decree (*Rafiq and Piggott, JJ*) LALA RAM RAGHUBIR LAL v DIP NARAIN SINGH 45 A. 311 L. R. 4 A 380 90 & A L. R. 349 21 A. L. J 168 71 I C 749 1923 A. 287

S. 42—Declaration—Suit by Hindu reversioners for declaring adoption valid, for declaring their right and questioning alienation by Hindu widow. See (1921) DIG. COL 1921. KILLI LATCHMAMMA v KILLI APPANNA 70 I C 190

S. 42—Declaratory relief—Covenant for pre-emption or re-conveyance—Void as offending the rule against perpetuities, See (1922) DIG. COL 1001 DINKAR RAO v NARAYAN 47 Bom. 191.

## S. 42—Declaratory relief—Power of Courts to grant

It is now well settled that the power of the Courts in India to entertain suits of a civil nature, does not carry with it the general power of making declarations, except in so far as such power is expressly covered by the statute. The plaintiff cannot sue for a mere declaration when a consequential relief is open to him, 49 I, C 355, 2 I, A 169 Ref. (*Mullick, and Ross, J, J*) MAULAVI MAHOMED FAHIMU HUQ v, JAGAT BALLAV GHOSH 2 Pat 391. 4 Pat L T 675 74 I, C 403 1923 P 475

## S. 42—Further relief—Whether necessary in each case,

Whether it is incumbent upon the plaintiff to ask for consequential relief must depend upon the circumstances of each case. It is plain that there may be cases in which a declaration may be sufficient for his protection. In such an event the plaintiff cannot be compelled to seek a consequential relief (*Mookerjee and Chotzner, JJ*) UMARANNESA BIBI v JAMIRANNESA BIBI, 37 C L J. 499 : 1923 Cal. 362

## S. 42—Mortgage—Redemption—Consequential relief—Amendment of plaint

Where a mortgage and a lease form part of the same transaction and the lease is invalid, but the

## SPECIFIC RELIEF ACT, § 42

mortgage is binding, it is not open to the mortgagor to sue for a declaration of the invalidity of the lease. He can however be allowed to amend the plaint and convert his suit into one for redemption (*Krishnan and Ramesam, JJ*) RARICHAN v. RAMAN SOMAYAJIPAD. 44 M L J 515 17 L. W 558, (1923) M W N, 301 32 M L T (H C) 107 74 I C 309 1923 Mad. 553

S. 42—Santal Parganas—Not applicable Power of a Court to grant declaratory relief No consequential relief prayed for See (1922) DIG. COL, 1002 ISWARI PRASAD SINGH v MT SAHODAR KUMARI 70 I C 486.

## S. 42—Scope of proviso

A suit for a declaratory decree should not be dismissed on the ground that it is barred by the proviso to S. 42 Specific Relief Act unless it is quite clear that the plaintiff should seek further relief which he has failed to claim, although such relief flows directly and necessarily from the declaration sought for. The proviso to S. 42 does not compel a plaintiff to sue for all the reliefs which could possibly be granted or debar him from obtaining a relief which he wants, unless at the same time he asks for a relief which he does not want, (*Mookerjee and Chotzner, JJ*) RAMKAMAL BANIK SAHA v, SYAM SUNDAR BANIK SAHA, 37 C L J 482 75 I C 41

## S. 42—Suit for declaration—Attachment of property—Ancestral property—Suit by sons for declaration—Maintainability

There can be no doubt that an attachment infringes the right of the judgment-debtor and has the effect of placing the property in *custodia legis*, but it does not by itself amount to an infringement of the rights of the reversioners to the property. It is possible, nay it is probable, that the attachment will lead to an alienation, and if the alienation is not confined to the period of judgment-debtor's life time, the plaintiffs (reversioners) will then be entitled to impeach the alienation. It is, however, clear that where no alienation has so far been made, the mere attachment does not give the plaintiffs (reversioners) a cause of action for a declaration that their rights will not be affected (*Shadi Lal, C. J and Lumsden, J.*) CHET RAM v SPEDDING & Co. LTD

5 Lah L, J 234 74 I C 479 1924 Lah. 52

## S. 42—Suit for declaration based on possession—Proof

In a suit for declaration of title where plaintiffs are in possession it is for the defendants to prove adverse possession (*Macleod and Crump, JJ*) GAVARAWA KOM v MALLANGOWDA.

1923 Bom. 382

## S. 42—Suit for declaration—Cause of action—Person not a party to litigation and not affected thereby—Suit to declare decree fraudulent—Parties—Injunction—Consequential relief

A landlord obtained an ex parte decree against a person alleged to be tenant and put the holding to sale in execution. The tenancy was purchased by a stranger. The plaintiff who was not a party to those proceedings instituted a suit for declaration that the decree and sale were fraudulent and

## SPECIFIC RELIEF ACT, S 42

did not effect him who held the tenancy under certain persons holding under the landlord. It was found that the decree and sale were fraudulent.

*Held*, that the plaintiff's suit was maintainable and a prayer for an injunction to protect the plaintiff's possession was unnecessary. 13 B 34, 38 M 1162 Ref.

To such a suit the representatives of the alleged tenant against whom the *ex parte* decree which was obtained were not necessary parties. (*Mookerjee and Chotzner, JJ.*) MOHESH CHANDRA MISRA v NISTARINI DASSYA 27 C W N 449 1923 Cal 382

—S. 42—*Suit for declaration—Compromise by proprietor—Suit by sons for declaration of invalidity—Customary law*

In cases governed by customary law it is open to the sons of a proprietor to maintain a suit for a declaration that a compromise entered into by their father should not affect their reversionary rights after their father's death. Although a compromise entered in good faith binds a man's heirs but they are entitled to challenge the compromise on the ground that it was not entered into in good faith. 97 P R 1906 Ref. (*Scott-Smith and Brasher, JJ.*) UJAGAR SINGH v, SUCHA SINGH. 5 Lah. L. J. 266 74 I C 489 1924 Lah 35.

—S. 45—*Power of High Court,*

Where the Legislature says that a public officer, even a Revenue officer, shall do a thing, and he without cause or justification refuses to do that thing, the Specific Relief Act would be applicable and there would be power in the Court to compel him to give relief to the subject. S 45 of the Specific Relief Act enables any of the three High Courts to "make an order requiring any specific act to be done or forborne by any person holding a public office whether of a permanent or a temporary nature, or by any corporation or by any Court of Judicature", provided that "such doing or forbearing is under any law for the time being in force, clearly, incumbent on such person or Court in his or its public character" or on such corporation in its corporate character" and subject to other certain conditions. The section is not to authorise the High Court "to make any order which is otherwise expressly excluded by any law for the time being in force." (*Lord Phillimore*) ALCOCK ASHDOWN AND CO. v THE CHIEF REVENUE AUTHORITY, BOMBAY. 47 Bom 742 45 M L J 592

33 M L T, 267 (P C). L. R. 4 P. C. 188.

18 L W 918. 75 I. C. 392.

25 Bom L R 920 21 A L. J. 689

(1923) M W. N. 557 50 I. A 227 (1923) P C 138

—S. 45—*Validity of nomination paper—Order of Returning officer—Jurisdiction over Completion of election.*

The jurisdiction under S. 45 Specific Relief Act is a discretionary one and is also limited by provisions (d), (e) and (h) to the same section. Where a Returning officer rejected a nomination paper and the aggrieved party moved the High Court under S. 45, but meanwhile to election had been completed, no action should be taken as any relief awarded would be incomplete. Also in such

## SPECIFIC RELIEF ACT, S 56.

cases the proper remedy was by means of an election petition (*Sanderson, C J. and Richardson, J.*) J N HALDAR v, S. N. MULLICK

28 C W N 127.

—S. 54—*Injunction—Noise—Discomfort*

Though it is correct to say that a person living in a manufacturing town cannot expect the same freedom from noise as a person living in the country, it does not justify a business which involves a violent hammering on iron in a room separated only by a partition wall from the house of the plaintiff. In the latter case, an injunction would be issued restraining the nuisance. (*Daniels J.*) HULAS RAI v SOHANLAL

71 I C 620 1923 A 443 (1)

—S. 55—*Dam—Enjoyment of flow of water—Injunction*

Where a lower riparian owner has been enjoying an uninterrupted flow of water for more than 30 years and then the upper riparian owner put up a dam which interfered with plaintiff's supply of water he is entitled to sue for an injunction for the removal of the dam. (*Shadi Lal C J and Le Rossignol, J.*) BALI RAM v BELA SINGH

1923 Lah 594

—S. 55—*Injunction—Erection of building pending suit—Order for demolition*

A co-sharer has a right in every portion of the land and the other co-sharers are not entitled to build on the common land without the consent of the former. Where a co-sharer brings a suit for restraining the defendant by an injunction from building on the common land and the suit is dismissed and the defendant without waiting for the result of any appeal that might be preferred by the plaintiff built on the land held that it a plaintiff succeeded on appeal he was entitled to an injunction demolishing the structure erected by the deft. The deft. could not resist the claim by asking the plaintiff to sue for a partition. (*Martineu, J.*) HAYAT ALI SHAH v MT TAJ-UL-NISSA.

71 I C 557 1923 Lah 205.

—S. 55—*Obstruction plaintiff's rights to—Injunction*

Where by the defendant's putting up a wall he completely obstructed plaintiff's four mows in spite of the latter's warnings, the injury is of a serious character which cannot be remedied by damages or any other relief except the demolishing of such part of the wall as obstructed the right. (*Shadi Lal C J and Le Rossignol, J.*) ATMA RAM v NANAK SARAN DAS

1923 Lah 593.

—S. 56—*Slight encroachment—Relief to be granted*

In the case of a joint wall where one of the parties encroached on the other's right by four inches, the proper remedy is not to direct the encroachment to be pulled down but to grant a declaration that the encroachment belonged to the other party. (*Macleod, C J and Crump, J.*) DAUDKHAN MUSEKHAN v CHANDULAL KANHAYALAL.

1923 Bom 370.

—S. 56 (e)—*Injunction—Imitation of criminal proceedings—Power of Civil Court to restrain*



## STAMP ACT, S 2.

The tendency of modern decisions is that even if the court has jurisdiction to restrain Criminal proceedings for the recovery of a penalty imposed by a statute for breach of its enactments, it will not interfere as a general rule. The principle is that though the extreme position cannot be maintained that there is absolutely no jurisdiction in the court to restrain proceedings before a magistrate, the court will not interfere unless in very special circumstances by way of injunction on declaration of right where the Legislature has pointed out a mode of procedure before a magistrate. It has been maintained, however, that a court of equity may in a proper case interfere by injunction to restrain an act or proceeding, Criminal or Quasi Criminal in form which tends to the impairment of property rights and proceedings for the enforcement of Municipal ordinances. It is also a well-settled rule that it is not the practice of the court to interfere with corporate bodies, unless they are manifestly abusing the powers (*Mookerjee and Rankin, JJ.*) CORPORATION OF CALCUTTA *v* BEJOY KUMAR ADDI

50 Cal. 813 38 C. L. J 360 27 C. W. N 787

## STAMP ACT (II OF 1899), Ss 2 (5) and 36—Scope

A written promise to pay a barred debt is not required by any provision under the Stamp Act to be stamped, it is not a bond. Even if it be, when an instrument has been admitted in evidence such admission shall not be questioned at any subsequent stage of the same suit under S 36 of the Stamp Act (*Abdul Raoof and Campbell, JJ.*) DAVID SUTHERLAND CLARK *v* ROSE GRIM SHAW

73 I. C. 652 1923 Lah 481

—S. 2 (15)—Evidence—Instrument of partition—Award. See (1922) DIG COL 1004 SYED MAHOMMED HAMEED *v* SYED MANZUR HASSAN

69 I. C. 807.

## —S 2 (22)—Promissory Note—Letter of request for a loan—Stamp

A document written by the defendant to the plaintiff in the form of a letter or *ruq'ar* ran as follows:—"According to our friendly agreement I would trouble you, as a friend, to get the execution file consigned to the record room at once. As agreed I will pay the remaining Rupees 1,400 by the middle of August without hesitation (*tal amal*) if God wills (*Insha Allah Ta' ala*). You should rest assured." Held that the document in question was not a promissory note and that it did not require to be stamped as such (*Pipon, J. C.*) SAYAD SIKANDAR SHAW *v* BHAI RAM CHAND SANT RAM.

71 I. C. 968

## —S 2 (22) and Sch I, Art 5—Undertaking to deliver grain on demand—Stamp

A document wherein a person gives an undertaking to give a certain quantity of grain on demand does not fall within S 2 (22) of the Stamp Act, but falls under Sch I Art 5 of the Act (*Daniels, A. J. C.*) ABHAIRAJ KUAR *v* DATA DIN

73 I. C. 465. (1)

## —Ss. 35 and 36—Admission of document by trial Court—Penalty—Admission not to be questioned

Where a document alleged to be a promissory

## STAMP ACT, S 36

note has been admitted in evidence by the Trial Court on payment of a penalty, the admission cannot be questioned in the Court of Appeal however erroneous that admission might have been (*Sadi Lal, C. J. and Abdul Qadir, J.*) MERA RAM *v* MT PREM KAUR

71 I. C. 42 (1) 1923 Lah 143.

—S 35—Unstamped bond—Suit on—Copy compared with original and filed—Subsequent loss of bond—Copy if admissible on payment of penalty. See (1922) DIG COL 1005 MUHAMMAD AYUB *v* RAHIM BAKSH

5 Lah. I. J. 172

69 I. C. 723

—Ss 35 and 36 and Sch I cl 5 (c)—Arbitration—Award—Submission not stamped—Effect of—Suit to set aside award—Objection

The parties to a pending suit agreed in writing to submit their disputes to arbitration under the order of the Court. The arbitrators gave their award in favour of defendant. The plaintiff sued to set aside the award on the ground, *inter alia* that the document containing the submission to arbitration was not stamped. Held that the submission having been once admitted by the arbitrators in evidence, its admissibility on the ground of want of stamp could not be questioned by any of the parties thereafter. The award was therefore not invalid on that ground. Once the instrument was admitted in evidence, it was for all legal purposes as good as it was stamped (*Sanderson, C. J. and Richardson, J.*) RUNG LAL KALOO RAM *v* KEDAR NATH KESWALLAL

27 C. W. N 513.

—S 35—Document acknowledging existence of debt—Document not stamped—Admissibility in evidence

The document in question was in the form of a letter on a printed form in a book kept by the plaintiff. A carbon copy was taken from it and given to the debtor (the defendant). It was addressed to the defendant and after mentioning certain credits and debits concluded with the statement that a sum of Rs 6,001 was due to the plaintiff from the defendant. This was signed by the defendant.

Held, that the document was an acknowledgment and was inadmissible in evidence without the stamp required by art 1 of the Stamp Act (*Ryves and Daniels, JJ.*) RAM DAS *v* INAYAT ULLAH

45 A. 374 21 A. L. J 263.

A. L. R. 4 A. 174 71 I. C. 1027 1923 A. 297

9 O. & L. R. 404

—S 36—Document held admissible by single judge in High Court—Letters Patent appeal—If open to question

Where a Judge of the High Court sitting singly differed from the court below and held a document was admissible in evidence and on that basis remanded the suit, he in effect admitted the document in evidence and his decision cannot be questioned further.

A Letters Patent Appeal is a stage in the suit within the meaning of S 36, Stamp Act (*Sharda Lal, C. J. and Martineau, J.*) BRIJ RAJ SARAN *v* JOTI PRASHAD

73 I. C. 799 1923 Lah. 657

## STAMP ACT, S 36

—S 36—Document—Insufficient—Stamp—Admission by trial Court—Effect of

Where a deed of release alleged to be insufficiently stamped has been admitted in the case by the trial Court the High Court cannot question its admissibility in revision (*Prideaux, A. J. C.*) KRISHNAJI v SUKHDEO 73 I C 65 1923 Nag 284

—S 61—Document not duly stamped—Admitted in evidence—If can be questioned later

Where an instrument has been admitted in evidence, such admission should not except as provided in S 61 of the Stamp Act, be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped (*Prideaux, A. J. C.*) RAJE UDAJIRAM v RAJESHWAR, 1923 Nag 109

—S 62 (2)—Award—Partition—Liability to stamp—Signature by arbitrator—Offence

Not only persons who execute an instrument of partition but also those who sign it otherwise than as witnesses are liable to prosecution, if they append their signatures to an instrument which is not duly stamped. Where the arbitrators signed an instrument of partition otherwise than as witnesses, they are liable to prosecution because they put their signatures to a duly stamped instrument which had not been duly stamped (*Dalal, A. J. C.*) EMPEROR v. PUTTOO LAL 90 & L R 378 73 I C, 336 24 Cr L J 592

—Sch. I Art 1—Acknowledgment—Essential to be considered

In deciding whether a given acknowledgment is one falling within Sch. I Art. 1 of the Stamp Act, the question to be considered is whether it is given with the dominant intent to supply evidence of the debt. Where a document contains other entries from which it can be deduced that the intention is to arrive at a statement of accounts or to put on record payment on either side, the document although it contains a balancing item at the end, is not an acknowledgment under the Stamp Act 4 Cal 885, 9 Cal 127, 15 Cal 162 and 30 Cal 687 folio 31 M L J 851 not folio (*Schwabe, C. J. and Ramasam, J.*) SURJIMULL MURLIDHAR CHANDICK v ANANTA LAL DAMANI 46 Mad 948 45 M L J 389 18 L W. 485 (1923) M W N 743 74 I C, 1029,

—Sch. I Art 5—Agreement to pay grain on demand—Nature of document

An agreement to pay a certain quantity of grain on demand falls within Art 5 of Schedule I of the stamp Act. It is not a promissory note under S 2 (22) but requires a stamp of 8 annas. (*Daniels, J. C.*) THAKURAIN ABHAIKAR KUAR v. DATA DIN 90 & A. L. R. 168.

—Sch. I Art 5—Undertaking to deliver grain on demand—Document not a promissory note—Stamp on See STAMP ACT, S. 2 (22) 73 I C 465 (1).

—Sch. I, Art 30—High Court—If include Court of Judicial Commissioner—Endowment fee

The court of the Judicial Commissioner of upper Burma is not a High Court within the meaning of Art 30, Stamp Act—If an applicant

## SUCCESSION ACT, ART. 47.

wants to be enrolled in a High Court he must pay the fees mentioned therein (*Robinson, C. J. Held and May Oung, J.J.*) CERTAIN FIRST GRADE ADVOCATES in the matter of 1 Rang 142 74 I C 913 1924 Rang 1.

—Sch. I, Art 35, Ex A—Patta—Stamp

A patta for one year and reserving a rent of less than one hundred rupees requires neither stamp nor registration (*Gokul Prasad, J.*) HARDIAT v ALAM L R 4 A 298 (Rev.) 74 I C 177

—Arts. 45 and 62 (c) —Instrument of partition—Transfer by trustee to beneficiary.

Certain shares in a company belonged to a joint Hindu family consisting of three brothers. The brothers became divided in interest but the shares stood in the name of the eldest brother who received the dividends and paid two thirds to his two brothers. Subsequently the eldest brother passed two deeds transferring some shares to each of the two brothers. Held that the deeds were chargeable under Art 45 of the Stamp Act (*Shah, A. C. J. and Crump, J.*) THE SUPERINTENDENT OF STAMPS, BOMBAY v CHIMANLAL LALBHAI 47 Bom. 321 25 Bom L R 112.

—Sch. I, Art 48 (d)—Power of attorney—Number of persons executing—If material.

In computing the Stamp duty payable on a power of attorney, the number of persons executing the power is not taken into account—It is the number of agents appointed and the powers of such agents which determine the amount of the stamp duty (*Wazir Hasan, A. J. C.*) JOGI RAM v MOHAMMAD RAFI 90 & A. L. R. 898 73 I C 718 1923 Bom 237

SUCCESSION ACT (X OF 1865) Art. 47—Policy of sea insurance—Protection note—Want of stamp—Admissibility in evidence

A document alleged to be a sea-policy was given by defendants to plaintiffs and it was in these terms —'Given in writing by the undersigned persons To wit, that we accepted the liability on goods shipped from the port of Muscat in the boat J for Bombay That liability is to exist up to the time the said goods have been discharged on the Bombay bunder having passed any intermediate ports The insurance is accepted in accordance with the usage of English policies without damage. The amount is to be paid within six months from the date of the loss deducting therefrom discount at the rate of 20 per cent through broker The signatures are to be duly affixed to the stamped pakka (i.e.) formal policy.' The document was not stamped. The cargo was lost on account of an accident. In a suit for damages, held, that the document in question was a policy of a sea insurance within art 47 of the Stamp Act. The document rendered the executants liable for a fixed sum for the insurance of the goods shipped by a particular boat and fixed a definite period. Therefore it is open to the plaintiffs on payment of the necessary penalty to tender the document in evidence. (*Shah, A. C. and Crump J.*) TRICAMU DAMJI & Co. v. VIRJI KANJI 1923 Bom. 142,

## SUCCESSION ACT, S 50.

—§ 50—Will-Attestation—Testatrix a marksman—Only one attesting witness—Endorsement of Sub-Registrar that execution was admitted—Effect See (1923) DIG COL 1006 SARADA PRASAD TEJ v TRIGUNA CHARAN RAY 70 I C 402

—§ 57—Will—Codicil—Revocation—Conduct See (1922) DIG COL 1006 SURENDRA NATH CHATTERJEE v. SIVADAS MOOKERJEE, 69 I C 267.

## —Ss 100, 101, 102—Applicability to Parsis

The rules in Ss 100, 101, 102 constitute the law of British India applicable to succession to the property of everyone except Hindus, Mohammedans or Buddhists. They are, therefore, applicable to those subjects to a variety of systems of jurisprudence, and must therefore be constructed according to the generally current meaning of the words used and apart from such technical considerations as are only appropriate in the law of England. Where the will was that of a Parsi *Held*, though the principle of joint family may not apply to a Parsi with the rigidity with which it applies, for example, in the case of a Hindu, still the conception of joint family right which is common in oriental countries ought not to be left wholly out of sight in interpreting the words of a Parsi. When the executors were enjoined to permit occupation to the daughter until death or marriage and to all the sons and also all their respective families during as well as after the respective lifetimes of the sons, including the widows of the testator's lineal male descendants the testator ought to be contemplated as having before his mind the family arrangements which would be natural in the case of his own sons. In the cases of the sons the title conferred on them to occupy extended to occupation along with their wives and families. The question is one purely of intention as shown by the particular words used in this will.

Where there is a direction implying a postponement of the division of the residue for ten years, or until the death of the last surviving son, the direction is inoperative, the interest to which it attaches being absolute (*Viscount Haldane*) PUTLIBAI v SORABJI NAORAOJI.

45 M L J 780 : 25 Bom L R 1099  
33 M. L. T. (P C) 401 1923 M. W. N 628  
1923 P. C. 122

—Ss. 103 and 250—Probate—Application for—Caveator—Interest necessary in—Objection to validity of bequest See (1922) DIG COL 1007 RAJAMANIKAM v FARRAR.

32 M L T (H C) 20 69 I C 954  
1923 Mad 131.

—Ss 106 and 107—Parsi will—Construction—Bequest to son—Son dying a minor—Gift, over—English rules of construction

*Held* on the construction of the will in the case of a bequest in favour of the testator's son was vested in interest at the date of the testator's death and it was not divested by the son's death before attaining majority.

Per *Shah A. J. C.*, The exception to S 107 of the Succession Act would apply even where a

## SUCCESSION ACT, S 204

part of the income is directed to be applied for the benefit of the legatee,

Per *Pratt, J.*,—The exception to S 107 of the Succession Act goes beyond the English Law and it is sufficient to bring the case within the exception if the direction is to apply so much as may be necessary of the income to maintenance (*Shah, A. C. J. and Pratt J.*) RATANBI RUSTAMJI v CAWASJI EDALI. 70 I C 178 1923 Bom. 96

## —§ 111—Applicability to Punjab.

Section 111 Succession Act has been made applicable to cases governed by the Hindu Wills Act. This Act however, is not applicable to Punjab. Therefore, section 111 cannot apply to Punjab (*Abdul Raouf and Lumsden, JJ*) PREM SINGH v HARDIT SINGH. 1923 Lah 649

## —S. 187—Hindu Wills Act, S 2—Compliance with after suit

S. 187 of the Succession Act is made applicable to Hindus by S 2 of the Hindu Wills Act and so long as compliance with the section is prior to the decree, the fact that it was after the institution of the suit makes no difference. The court is entitled to proceed with the suit (*Mookerjee and Cumming, JJ*) CHARU CHANDRA PRAMANICK v NAHUSH CHANDRA KUNDU 50 Cal 49 1923 Cal 1 74 I C 630

## —S 187—Will—Probate not taken—Rights of legatee

Under S 187 of the Indian Succession Act a person who in Court has to prove title and has to deduce that title from a will, whether that person is plaintiff or defendant, cannot do so without producing probate 39 M. 91 ref (*Schwabe, C. J. and Wallace, J*) PARTHASARATHY IYER v SUBBARAYA GRAMANY, 45 M L J. 175 17 L. W 763 : 72 I C 558 1924 Mad. 67

## —Ss 204 227 228 and 246—Letters of administration—Joint letters when granted coheirs of equal degree—Rights of

Special circumstances should be made out before granting joint letters of administration and even where the claimants are equal in degree of kindred to the deceased, only one should be appointed according to the established practice. The Court should prefer a sole to a joint administration and even where several persons stand in the same degree of kinship to the deceased it is the rule to select one only, the selection being made according to certain recognised principles. The interest of the estate which has to be administered and the interests of the parties entitled thereto must be primarily looked to and other things being equal a person with business capacity and experience will be preferred to one who has none. Where two persons are equally entitled by consanguinity, preference will frequently be given to the one chosen by the majority of those entitled to the distribution of the assets although other considerations may be sufficient to overrule the wishes of the majority of those interested. A son as a rule will be preferred to a daughter and where none of the usual tests can be applied the Court frequently appoints the applicant who is first in the field. The Court never forces a joint administration upon unwilling parties. Where

## SUCCESSION ACT, S 311.

the applicants are quarrelling between themselves and are antagonistic to each other the administration of the estate is likely to suffer. As they must act jointly one of them if obstinate, could defeat the proper administration of the estate. 5 C L R 38 Ket

S 204 of the Succession Act does no more than state that those who are in equal degree of kindred to the deceased are all, from that point of view alone equally entitled to be appointed administrator but the section does not say that they are all entitled to be appointed jointly. Under S 225 of the Act the Court is given very wide powers where it considers necessary or convenient to appoint some person to administer the estate other than the person who in ordinary circumstances would be entitled to the grant. There is nothing in the Act which makes it obligatory upon the Court to grant letters of administration to all persons who may be entitled thereto merely by reason of their equal nearness of kin to the deceased. Separate letters of administration can be granted under Ss 227 and 228 of the Succession Act where the deceased leaves a will in respect of a person of his properties and the rest has to be administered by a person other than the executor of the will (*Miller, C J and Foster J*) STONEY v STONEY 2 Pat 251 4 Pat L T 151 (1923) Pat 130 72 I C 811 1923 F 348 (2)

S 311—Scope. See (1922) DIG, COL 1908, ZAMINDAR OF BHADRACHELLAM v SRI RAJA VENKATADRI APPA RAO 46 M 180 70 I C 689

S 331—Brahmos, *vs* Hindus—Declaration under Act III of 1872—Effect of

A person by becoming a Brahmo does not necessarily cease to be a Hindu, that is to say something further than mere becoming a Brahmo is necessary for a man to cut himself off from Hinduism. A declaration under Act III of 1872 is effective only for the purposes of the act and does not involve a renunciation of the Hindu faith (*Greaves, J*) JNANENDRA NATH ROY in the goods of 49 Cal 1069 70 I C 463 (2) 1923 Cal 265

SUCCESSION CERTIFICATE—Hindu widow—Demand of security—If legal.

A Hindu widow has a beneficial interest in the debts due to her husband and is entitled to ask for a succession certificate. Under ordinary circumstances she ought not to be called upon to give security at all, and thus obstructed in the collection of debts which she is legally entitled to collect (*Walsh and Ryves, JJ*) MT KAUSILLA KOER v SUKHDEVI 21 A L J 452 L R 4 A. 246 74 I C 761 1923 A 579

SUCCESSION CERTIFICATE ACT (VII OF 1889), S. 4—Application for certificate—Nature of enquiry—Decree in respect of debt—Effect of

Three executors appointed under the will of a Hindu testator had propounded the will and obtained probate. The testator's great grand daughter applied for a succession certificate for collection of three specified debts two of which were due and payable to her father on bonds and the third due to him and the testator jointly. Held, that she was entitled to a Succession Certificate

## SUCCESSION CERTIFICATE ACT, S 9.

in respect of the first two debts. The question whether the debtors on being sued could prove that the debts had been satisfied could not be considered in those proceedings. The third debt having merged in a decree no Succession Certificate could be granted in respect of it (*Piggott and Walsh, JJ.*) SAKAT MULL v KATORI 21 A L J 122 L R 4 A 78 71 I C 376 1923 A 265

S 4—Debt—Meaning of—Paddy rent due from tenant

Where paddy rent remains due from a tenant to a deceased lessor it is not a debt within the meaning of S. 4 of the Succession Certificate Act and it is not necessary for the heir of the deceased lessor to take out a certificate for suing for recovery of the said rent (*Heald, J*) MA HLA KYA v. MAUNG NYUN 2 Bur L J 45 75 I C 237

S. 4—Omission to produce certificate—Dismissal of suit—Impropriety of

The dismissal of a suit for non production of a succession certificate is improper. All that S 4 of the Succession Certificate Act provides is that the Court shall not pass a decree without the production of a Succession Certificate, 88 P R 1891, 10 P R 1901 19 C W N 794, 27 I C 822 Ref (*Broadway, J.*) NANHA v SUNDA, 71 I C 840 1923 Lah 597

Ss 5 and 6—Jurisdiction to grant certificate—District Court—Residence

The jurisdiction to confer a succession certificate is given by S 5 of the Succession Certificate Act and that jurisdiction is not enlarged by S 6 (1) of the Act which relates merely to procedure. *Prima facie* a District Court has no jurisdiction to grant a succession certificate where the deceased has not ordinarily resided within the local limits of its jurisdiction. Where however the deceased at the time of his death had no fixed place of residence at all the certificate may be granted by the Court within whose jurisdiction any part of the deceased's property may be found (*Robinson, C J and Macgregor, J*) CHAN PYU v CHAN CHOR KHINE 2 Bur L J 42 75 I C 225 1923 Rang 238

S 6 (1) (e)—Will—Effect

Even where petitioner's right is based on a will, a succession certificate can be granted except where the Indian Succession Act governs. The omission to obtain probate does not affect the right (*Chandrasekhara Iyer, C J and Subbanna, J*) THAMMAYAPPA v. NANJAPPA 1 Mys L J 42,

S 9—Security when to be demanded—Interest of reversioners

In the ordinary way a Hindu widow ought not to be called upon to give security at all. There may be reversioners who are interested but it is not the business of the Court to go out of its way to look after the reversioners who have no vested interest and to assume everything against the widow. The fact that the widow is engaged in handing over the estate either to her brother or to religious institutions is not a reason for creating an obstacle to her recovering debts before they become time barred.

## SUCCESSION CERTIFICATE ACT, § 10

The object of a Court is to grant certificates to the persons lawfully entitled to them and not to go out of its way to make it difficult for them to obtain them (*Walsh and Ryves, JJ*) *MT KAUSILLA KUER v MT SUKHDEI*

21 A L J 452 L R 4 A 246 74 I C 761  
1923 A, 579

## —§§ 10, 19 and 26—Extension of certificate—Order refusing—Appeal

The petitioner obtained a certificate of succession under Act VII of 1889 to collect certain debts of a deceased person. Subsequently he applied for extension of the certificate under § 10 of the Act to collect other debts. That application was refused by the Munsif who was empowered to deal with applications under this Act. An appeal against his order was preferred to the District Judge. *Held* that an order refusing certificate as to some of the debts alleged to be due to the deceased came within the terms of § 19 and that the order was appealable (*Newbould and Suhrawardy JJ*) *RADHA RAMAN KUNDU v GOPAL CHANDRA SINHA*

27 C W, N 947 (1)

## SUCCESSION PROPERTY PROTECTION ACT (XIX OF 1841), §§ 3 and 5—Appointment of Curator—When justified

To apply the Act XIX of 1841 to any particular case it is a condition precedent that the Judge should find or be satisfied that the applicant was likely to be materially prejudiced if left to the ordinary remedy of a regular suit and that the application was *bona fide*. Without that finding the Court has no jurisdiction to act under the Act and its order is revisable. 12 M 341 *Ref* (*Krishnan, J.*) *KOTHANDARAMA REDDY v JAGA THAMBAL AMMAL*

71 I C 32  
1923 Mad 229 (1)

## SUITS VALUATION ACT (VII OF 1887)—Forum—Suit to set aside award See JURISDICTION

18 L W 399

## —§ 8—Redemption—Valuation of suit.

In suits for redemption, the valuation for purposes of jurisdiction is that of the mortgage amount and not of the property. The fact that incidentally other questions such as an adjudication of rival claims to redeem incidentally arise for determination is immaterial (*Kanhaya Lal, J C*) *MUNWAN SHANKAR BAKSH SINGH v RAM BAHADUR SINGH*

26 O C 297

## —§ 8—Suit for partition—Valuation of the subject-matter—Valuation of Plaintiffs share of the whole of the subject-matter See COURT FEES ACT, SCH, II, ART 17 Cl. 6

4 Pat L T 257

## —§ 8—Suit for specific performance—Prayer for possession—Effect—Nature of suit not altered See COURT FEES ACT, S 7 (10) (a)

18 L W 333

## —§ 8—Mortgage—Redemption—Suit for valuation

The amount of the Court-fee to be paid and the valuation of a suit for redemption of a mortgage depends on the amount of the mortgage. It is an ancillary part of the claim that an account should be taken and any amount found due to or by one

## SUPER TAX ACT, (XIX OF 1920), § 3.

of the parties should be awarded to the party to whom it is due. This does not alter the nature of the suit nor increase the value of it. 31 A 44 *fol* (*Banerjee and Gokul Prasad, JJ*) *CHIDDU SINGH v JAHANJHAN RAI*

45 A 154  
1923 A 261.

## —§ 11 (a) and (b) Scope of—Valuation reduced by plaintiff without objection by defendant—Appeal—Decree not a nullity

The plaintiff reduced the valuation of the plaintiff from Rs 5,300 to Rs 2,300. The defendant raised no objection as to under-valuation. No issue was framed on the point, and in the appeal preferred to the District Judge no mention was made of under valuation. On Second Appeal to the High Court, the Taxing Officer on the report of the Stamp Reporter held the correct valuation to be Rs. 5,300, which was accepted by both the parties. The appellant thereupon contended that the decree passed by the District Judge was without jurisdiction and null and void, *Held*, that having regard to Sec 11 of the Suits Valuation Act the decree of the District Judge could not be challenged as a nullity, there being no objection under clause (a) nor any prejudice under clause (b), (*Kulwant Sahas and Foster, JJ*) *MAHARAJA BAHADUR KESHO PD SINGH v LAKHU RAI*

4 Pat L T 525

(1923) Pat 258 75 I C 305 1923 P 581

## —§ 11 (1)—Objection to jurisdiction—when allowed in appeal

A plea as to want of jurisdiction in the trial court cannot be argued in appeal when it has not been raised in the memorandum of appeal (*Dalal A. J C*) *SAIYED ASHFAQ HUSAIN v SYED BUNYAD HUSAIN*

9 O & A L R 415  
1923 Oudh 252,

## —§ 11 (2)—Undervaluation—Right of appeal affected—Prejudice.

§ 11 of the Suits Valuation Act, when referring to "prejudicially affecting the disposal of a suit or appeal on its merits", is not considering at all the different rules of procedure that there may be on appeal from one Court to another Court. Where a suit has been undervalued and tried by a Munsif instead of a Subordinate Judge, the District Court has jurisdiction to hear an appeal from the Munsif's decree and must do so unless it is satisfied as required by § 11 of the Suits Valuation Act, first that the point was taken, and secondly, that the decision on the merits was prejudicially affected. 20 M L J 726, 41 I C 167 approved, 5 Pat L J, 397 Dissented from *Schwabe C, J. Oldfield and Coutts Trotter, JJ*) *NADUVIL EDOM KARNAN AND MANAGER KELU ACHAN v CHERIYA PARVATHI NETHIYAR*

45 M L J 135 (1923) M W N 489  
46 Mad 631 73 I C 87 18 L W 1  
1924 Mad. 6 (F B)

## SUPER TAX ACT (XIX OF 1920), § 3—Firm—what is—Husband and wife—Husband's option to take in fresh partners or determine her share—Partner-ship See CONTRACT ACT 5 239

25 Bom L R, 1225,

## TENDER

**TENDER**—*Debtor and creditor—Tender of a portion of the debt—Conditions attached to tender*

When a debtor tenders to a creditor really part of his debt, not the entire debt, and asks him to take that in full satisfaction of the debt, it is clear law that the creditor is entitled to refuse to accept the tender, because otherwise he would virtually preclude himself from saying that he had not been paid the full amount due

If you go and attach your offer to pay a debt the condition that the creditor must accept it as full satisfaction, although really it is not the whole amount due, you attach a condition to your offer and the creditor is entitled to reject it (*Fawcett, J*)  
**NADERSHAW v SHIRINBAI** 25 Bom L R 839

———*Validity of—Tender of portion of debt—Acceptance by creditor—Effect of*

A creditor is not bound to accept less than his whole debt, and there can be no valid tender of part of an entire and indivisible debt. But there is nothing to prevent the creditor from accepting the amount tendered in part payment, and his doing so will not preclude him from afterwards claiming the residue of his account provided that the debtor did not make it a condition of his tender that it be accepted in discharge of the whole. A tender must be unconditional, or, at all events free from any condition to which the creditor may rightfully object (*Mookerjee and Rankin JJ*)  
**BEHARI LAL BISWAS v NASIMUNNESSA BIBI** 37 C L J 222 73 I C 482 1923 Cal 527.

**THEKADAR**—*Rights of—Power to confer occupancy right*

Unless a *thekadar's* powers are restricted and made known to the tenants, he has acting in good faith and in the interests of the lessor, power to confer occupancy right to tenants (*Fremantle, S M*)  
**GOMTI BIBI v BAIJ NATH SINGH** L R 4 All 421 (Rev)

**TORT**—*Action for damages—Death—Canadian law,*

Under the Canadian Law, if a workman dies as the result of a railway accident, his relations have only a right to compensation as per statute law, and not a general common law right for damages (*Mr Justice Duff, J*)  
**AMELIA MC COLL v CANADIAN PACIFIC RAILWAY COMPANY** 33 M, L T 219 (P C)

———*Damages—Act committed abroad—Suit when lies*

Where a tortious act is committed abroad, an action in respect of it can be maintained in the local courts only if the wrong is of such a character that it would be actionable by the law of the country if committed there, and also if it is not justifiable under the law of the country when the act was committed, (*Viscount Cave*)  
**HAROLD EATON McMILLAN v CANADIAN NORTHERN RAILWAY COMPANY** 33 M L T 209 (P C)

———*Damages—Measure of Wrongful detention*

For wrongful detention and insult of the plaintiff, and her servants by the Rly servants vindictive damages cannot be awarded. However the sum awarded should be substantial. In the

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particular case a sum of Rs 12,000 as against plaintiff's demand of Rs 25,000, was awarded (*Macleod, C J and Crump, J*)  
**KASTURIBAI v G I P RAILWAY COMPANY** 1923 Bom 172

———*Damages—Wrong committed in one country—when actionable in another country*

An action will not lie in one country or province for a wrong committed in another unless two conditions are fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in the country of the forum and, secondly it must not have been justifiable by the law of the country where it was done. 'Justification' means legal justification and an act or neglect which is neither actionable nor punishable cannot be said to be otherwise than justifiable within the meaning of the rule (*Viscount Cave*)  
**EDITH MAY WALPOLE v THE CANADIAN NORTHERN RY CO** 32 M L T 205 (P C)

———*Defamation—Privilege—Report by sub-committee*

Defendants were members of the Water Works Committee of a municipality and were interested in the regulation of the water supply, and they submitted a report which was addressed to the Chairman of the Water Works Committee containing substantially one statement that the appellants used by threatening the municipal servants to get water at times other than those sanctioned by the municipality and this statement was found not to be true. Held that in the absence of proof of malice defendants were not liable in the damages (*Kotwal, A J C*)  
**SHRIRAM MOTI RAM v SHAIKH AHMAD** 73 I C 39 (1) 1923 Nag 226

———*Defamation—Vulgar abuse—Prostitute,*

To impute unchastity to a woman is defamatory of her and of her husband, if she is married. The words cannot be justified on the ground of being mere verbal abuse (*Duckworth, J*)  
**MA WIN v MA NGON** 1 Bur L J 148 74 I C 44 (1923) Rang 77

———*Fishery—Obstruction—Liability,*

Where there is a right in one person and another deliberately infringes that right, the person injured can succeed without proof of special damage that is to say whether any damage has been proved to have accrued to him or not. Where the plaintiff and defendant were owners of adjoining fisheries and where owing to the obstruction of the free passage of fish to the plaintiff's waters caused by the defendant's the plaintiff's catch was materially lessened, held that the plaintiff was entitled to damages (*Duckworth, J*)  
**MAUNG THIT SA v MAUNG NAT** 1 Bur, L, J 146 74 I C 41 1923 Rang, 76 (2)

———*Joint tortfeasors—Death of one—Suit for contribution,*

The plaintiffs brought a suit in the Court of the Munsif, for damages against several defendants on the allegation that they had stopped the working of a water mill belonging to the plaintiffs for a considerable period. One of the defendants entered in the plaint was dead before the plaint was filed. On this account the munsif dismissed

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the suit *in toto* and the order was upheld by the learned District Judge *Held* that it was a trite proposition that the liability of a wrongdoer in tort is joint and several and that it was open to the Court to strike his name out and allow the suit to proceed against the others (*Campbell, J*) MT PHILLO v GORI 72 I C 670 (2)

———*Malicious prosecution—Reasonable and probable cause—Burden of proof*

In execution of a decree, the officer of the Court went to judgment debtor's house and attached some articles. The judgment-debtor thereupon filed a complaint of theft against decree-holder, which was found to be groundless. In a suit for malicious prosecution by decree-holder against judgment debtor, *held* where on the face of it, the charge brought by defendant against plaintiff is groundless, the plaintiff cannot be asked to give further evidence directly going to show that there was no reasonable and probable cause (*Rafique, J*) BISHUN SARUP v BINDRABAN 73 I C 446 1923 All 531,

———*Negligence—Dog—Ferocious animal—Injury due to dogbite—Invitation,*

Plaintiff had made bets on horse races with the defendant on October 9, 1920. She went to the house of the latter at about 7-30 P M on October 11, to recover moneys she had won. She went up the steps of the house, crossed the verandah, looked into a window of the sitting room and was making for the door of the dining room with the object of entering it, when she was attacked by a dog which was chained to the door inside the room. The dog bit her on the left thigh and right knee. When she peeped into the window, the defendant noticed her and shouted out to prevent her from going towards the dining room door but the shout was not heard by the plaintiff in time. The dog was ordinarily not ferocious, but was accustomed to bite when chained and on guard and in January 1920 it had attacked and bitten a customs peon. The plaintiff had, on a previous occasion been taken by the defendant's wife into the dining room, and the sitting room was used as sort of club for playing cards and billiards. In a suit for damages by the plff against the defendant *Held* that putting a dangerous dog behind the door in a room is just as much a trap to an innocent passer by as if there were a hole or man trap which might cause him injury and that the plaintiff who came on an implied invitation was entitled to damages.

The liability of the occupier is only commensurate with the extent of the invitation. Where, therefore, the occupier of the premises has placed a notice warning persons of the existence of danger, and a person disregards the notice, or the circumstances show that the limits of the invitation have been otherwise exceeded, the liability is limited in a corresponding degree and if the invitee wanders about in such a way as to be unable to see if there is danger or not, or if he knows the danger and undertakes the risk, the occupier of the premises is not liable (*Harbeck, J*). MARY LENNON v PERCY FISHER 25 Bom L R 873

## TRADE NAME.

———*Negligence—Injury to passenger travelling by Railway—Negligence of fellow passenger,*

The plaintiff was a second class passenger in the mail train of the defendant Railway. He travelled in a compartment which had seven berths, three of which were suspended from the roof and a ladder was kept for getting into the upper berth. On the day the plaintiff travelled, he occupied the middle lower berth and stretched himself at full length and went to sleep. Some one among the passengers had folded the ladder and kept it in a rack near the roof of the compartment. While the train was running, the ladder fell on the plaintiff's head and caused him injuries. In a suit by the plaintiff for damages caused by negligence against the deft Railway *Held* that there was no proof of negligence on the deft's part and the suit was not maintainable, (*Crumph, J*) VISHNU DIGAMBER v B B & C I RAILWAY 25 Bom L R 881

———*Trees—Damage caused by over hanging trees—Rights to have them removed,*

In the absence of any express stipulation to the contrary, the owner or occupier of the land over which the offending branches hang is entitled, as of right to remove them or to have them removed.

The fact that the party complaining has merely a leasehold and not a freehold would not appear in any manner to alter the case. Further it would not seem to make any difference whether plaintiff had built a house or not, so long as the branches overhang his land (*Duckworth, J*) MAUNG PO THAUNG v MA GYI 1 Rang 281 2 Bur L J 136 1923 Rang 205

———*Trespass—Essentials of—Use of force—Justification*

Unlawful entry is not an essential element to constitute trespass.

The mere fact that there was a general notice forbidding trespass is not sufficient to dispense with a request to withdraw. Before force is used a trespasser must always be given an opportunity of withdrawing peacefully (*Newbound, and Panton, JJ*) KUMUD KANTA CHAKRABURTHY v. BIGNOLD, 1923 Cal 306

TRADE NAME—*Injunction—Colourable Imitation—Test of*

The principle underlying the use of trade names is that a person shall not trade under a name so closely resembling that of the plaintiff as to be mistaken for it by the public. In other words a person shall not carry on his business in such a way as to represent that his business is another person's. The question to be determined in case of this description is whether there is such a similarity between the two names as that the one is in the ordinary course of human affairs likely to be confounded with the other. It is not necessary to prove that the defts in taking the name complained of by the plaintiffs had any fraudulent intent. It is enough if the plaintiffs prove that the act of the defendants in assuming the name complained of does an injury to the plaintiffs' rights. There is no question in such cases of property or monopoly in the name. There is no property in the word but at the same time it is fraud on a person who has

## TRADE NAME

established a trade and carries it on under a given name that some other person assumes the same name with a slight alteration in such a way as to induce persons to deal with him in the belief that they are dealing with the person who has given a reputation to the name. (*Mulla, J*)  
**THE NATIONAL BANK OF INDIA v THE NATIONAL BANK OF INDORE** 1923 Bom, 119 70 I C 47

——— *Right of action—Claim to exclusive user*

Where the plaintiffs have the sole right to import and sell a certain kind of goods in India, that does not give them such a proprietary right as to enable them to maintain an action against the defendant who hold the same goods after obtaining it from elsewhere. In India there is no statutory provision for registering exclusive rights to particular trade mark (*Sanderson, C J* and *Richardson, J*)  
**IMPERIAL TOBACCO COY v ALBERT BONNAN** 50 Cal 762

**TRANSFER OF PROPERTY ACT (IV OF 1882)—Applicability of—to Berar**

Although the Transfer of Property Act did not apply to Berar in 1902 yet the principle embodied in that Act would be applicable as principles of equity, justice and good conscience. Consequently the Court could extend the time for payment under a mortgage in the exercise of its equitable jurisdiction (*Kotwal, A J C*)  
**KISHAN LAL v ABDULLA** 71 I C 421 (1923) Nag 88

——— *Applicability* See (1922) DIG COL 1011  
**ZEMINDAR OF BADRACHALAM v VENKATA DRI APPA RAO** 46 M 190 70 I C 689

——— *Applicability to Punjab as regards principles*

The principles of the Transfer of Property Act certainly apply to Punjab but in order to take advantage of the provisions of the Act it is necessary to show that a principle has been transgressed as opposed to the non-observances of prescribed formalities (*Harrison and Zafar Ali, JJ*)  
**JHUMAN v DUBA.** 4 Lah 439 1923 Lah 646

——— **S 3—Actionable claim—Right to recover goods sent or to claim damages therefore—If amounts to** See T P ACT, S 6 (e)

69 I C 238.

——— **S 3—Non-proprietary resident of house—Materials of standing house—Whether moveables—Limitation**

A non proprietary resident is the owner of the materials of his house and his rights in them are not temporary rights and the house is not moveable property, and the period of limitation for recovery is twelve years (*Martineau, J*)  
**SHANCHI KHAN v. KARAM CHAND**

78 I. C. 705 1923 Lah 150 (2)

——— **S, 3—Notice constructive notice—Occupation of portion of the property—Effect of**

A person who has acquired a property under a voidable title can himself give good title to the property to a bona fide purchaser or mortgagee from him, who dealt with for value and has no notice of the defects in title. Under S 3 of the T. P. Act constructive notice of all the rights of a person in possession of property sold or mortgaged

## T P ACT, S 3

is to be imputed to purchasers or mortgagees who made no enquiry of the persons in occupation. The rule is based on the principle that where another is in exclusive possession would *prima facie* be inconsistent with the full rights of ownership of the vendor or mortgagor and purchaser or mortgagor does not choose to ask what that possession is, he must be taken to have got the information that he would have obtained if he had asked. But the unknown occupation of a part of the premises by a tenant or other person does not put the purchaser or mortgagee on enquiry as to the possible rights of the occupier of the portion over the remainder of the premises  
*Hunt v Luck* (1901) 1 Ch, 45  
*Hunter v Walters* L R 7 Ch 75, 35 B 342 Ref. (*Schwabe, C J*, and *Wallace, J*)  
**PARTHASARATHY IYER v SUBBA RAYA GRAMANY.** 45 M L J 175  
 17 L W 763 72 I C 558 1924 Mad 67

——— **S 3—Notice—Registration—Effect of**

Registration does not operate as constructive notice and the purchaser from an ostensible owner whose title deeds are themselves complete is not bound to search the registration office to see if the original owner may not have given a title to somebody else (*Batten, J C*)  
**MR KASTURI BIBI v BALIRAM** 1923 Nag 15

——— **S 3—Notice—Registration—Mortgage**

The registration of a mortgage is sufficient notice to a subsequent purchaser of the incumbrance on the property (*Maung King, J.*)  
**AUNG KAING SAING v MAUNG SAN**

1923 Rang, 41 (2).

——— **S 3—Notice—What amounts to—Abstention from enquiry—Equitable mortgage**

A mortgagee taking a mortgage in a place where he knows mortgages by deposit of title deeds are legal and usual without ascertaining whether they are already pledged has in effect abstained from an enquiry which he ought to have made and must be attributed with notice within the meaning of S 3 T P Act (*Lord Dunedin*)  
**THE IMPERIAL BANK OF INDIA v H RAI GYAW THU AND CO, LTD**

1 Rang 637 45 M L J 505 21 A L J 784

25 Bom L, R 1279 9 O. & A L R 937

33 M L T 395 (P C) 2 Bur L J 254

50 I A 283 (1923) M W N 609

1923 P. C 211 (P C)

——— **S 3—Registration—Notice—Erroneous description of the property**

In Order to bind the subsequent transferees with a prior lien the law of registration has been enacted so that the subsequent transferee may have an opportunity to ascertain whether the property transferred to them was subject to any prior encumbrance or not, and once that prior encumbrance is effected by means of a registered instrument, the subsequent transferees are presumed to have notice of the same and are in law bound by it. A mere misdescription of the property dealt with will not take away the jurisdiction of the Registrar to register the same if he was otherwise empowered to do so under the Act (*Jwala Prasad and Ross J*)  
**MR WAHHUNNISA BEGAM v VALMIKI SAHAY.**

1 Fat L R 90 71 I C 589.



## T P ACT, S 4

—Ss. 4 and 107—*Agreement to lease—Registration—Necessity for—Contract—Construction*

The only effect of the provision in section 4 of the Transfer of Property Act that section 107 shall be read as supplemental to the Registration Act (i-e) to section 17 of the Registration Act is that the provision (that leases of immovable property from year to year or for any term exceeding one year or reserving a yearly rent shall be registered) contained in section 17 of the Registration Act shall be read as amplified by the proviso to section 107 of the Transfer of Property Act. It has not the effect of requiring the Court to construe the word "lease" in section 107 of the Transfer of Property Act in the wider sense in which it is defined in the Registration Act.

The question whether a contract is to be construed as a lease or merely as an agreement to lease must be gathered from the terms of the whole document and where a contract operates as an actual demise it must be deemed to be a lease (*Ashworth J C*) MAHOMED ALI v SYED HASAN JAFAR 100 L J 109 74 I C 480 1923 Oudh 237

—S 5—*Mutual relinquishment—Admission of claim*

Where a transaction can only be regarded as a mutual relinquishment and admission of claim by all the parties, it cannot come within any of the class of transfers dealt with by the Transfer of Property Act 33 A 356 referred to (*Hathfax, A J C*) JAINNABI v GHULAM MOHIUDDIN 69 I C 545 1923 Nag 55 (2).

—S 5—*Transfer of property—Definition not applicable to Pres. Towns Ins. Act*

The definition of 'transfer of property' in S 5 of the Transfer of Property Act does not apply to transfers contemplated by the Presidency Towns Insolvency Act (*Marten, J*) MAHOMED HASHAM & Co *In re* 75 I C 203 (2) 1923 Bom 107

—S 6—*Lease—Rent due under—Assignment—Renewal of lease—Right to rents*

An assignment of rent cannot operate in respect of future possible lease that may come into existence as the result of a renewal (*Ramesam, J*) RAMA PAITAR v RAMAN KUTTY ACHAN 44 M L J 236 32 M L T (H C) 136 72 I C 139 (1923) Mad 316

—S 6—*Religious office—Transfer of to another member of the family—Validity of See RELIGIOUS OFFICE* 25 Bom L R 207

—S 6—*Transfer of expectancy—Hindu Law—Daughters—Partition—Relinquishment of interest—Validity of. See HINDU LAW* 32 M L T (H C) 343.

—S, 6 (a) — *Reversioner—Agreement to transfer rights—Validity*

An agreement by a reversioner to transfer his reversionary rights is opposed to S 6 (a) T. P. Act and is invalid. (*Dalal, A J. C*) DURGA v. JAMNA PRASAD 90 & A L R 617

—S, 6—*Spes successions—Transfer of—Estoppel—Punjab and N W F. Province*

## T P ACT, S. 6

The principles of the Transfer of Property Act are binding upon the Courts of the Punjab but the Act itself with its technicalities has no force as such in the province.

In the Punjab and North-West Frontier Province a transferor of reversionary right is bound by his act when succession opens to him even if S 6 of the Transfer of Property Act makes the transfer itself inoperative when made and even if S 6 of the Transfer of property Act is to be regarded as making such a transfer illegal and therefore, a nullity from which no equity can arise, the Act itself is not in force in the Punjab and North West Frontier Province and, therefore, constitutes no statutory bar to a contract which would otherwise be enforceable in equity (*Pir-poon, J C*) KABAL SHAH v MAHOMED BAGA, 73 I C, 120

—S 6 (a)—*Spes successions—Hindu reversioner Transfer of estate—Void and inoperative—Rights of vendee See CONTRACT ACT, S 65* 50 I A, 69

—Ss 6 (d) and 10—*Hindu widow Compromise—Life interest in lands under compromise—Widow having no disposing power over lands Property not open to attachment in execution See C P CODE S 60* 25 Bom L R 293.

—S 6 (d)—*Right to future maintenance—If alienable*

The right under a contract to a fixed amount of maintenance is property within S 6 T P. Act. Whether it is an interest in property restricted in its enjoyment personally must depend on the facts of each case the question being whether the intention of the parties was that the right should be personal and inalienable. The language of the document and surrounding circumstances must be looked to in each case. The right to future maintenance properly so called is inalienable (*Schwabe, C J, Oldfield and Coutts Trolter, JJ*) SUBRAYA SAMPIGETHAYA v KRISHNA BAIPADI THAYA 45 M L J 533 33 M L T 57 (H C) 46 Mad 659 19 L W 6 73 I C, 584 1924 Mad 22 (2) (F B.)

—S 6 (e)—*Applicability—Amount in court deposit pending suit See (1922) DIG COL 1013, ZAMINDAR OF BADRACHALAM v VENKATADRI APPA RAO* 46 Mad 190 70 I C 689.

—S 6 (e)—*Contract to transfer expectancies—Validity*

A contract for the future sale of future expectancies cannot be enforced (*Lord Sumner*) ANNADA MOHAN ROY v GOUR MOHAN MULLICK, 45 M L J 617 21 A L J 718 4 Pat. L T 609 50 I A 239 50 Cal 929 L R 4 P C 164 (1923) M W N 803 25 Bom L R 1269 33 M L T, 385 (P C) 74 I C 499 (1923) P C, 189 (P C)

—S, 6 (e)—*Loan of articles—Right to recover them or in default damages—Nature of—If transferable*

A right to recover goods is a personal claim and cannot be transferred. Where the document

## T P ACT, S 6

evidencing the loan provides for damages in case the goods are not returned, a claim for damages is not an 'actionable claim' within the meaning of the T P Act but a mere right to sue within S 6 (e) and as such cannot be transferred (*Batten J C*) *MT NAKHOLA v KOKAYA*

69 I C 238 1923 Nag 67 (2)

—S 6 (e)—Mere right to sue—Assignment of—Claim for unascertained damages—English and Indian law See (1922) DIG COL 1013 *JEWAN RAM v RATAN CHAND KISSEN CHAND*

70 I C 498,

—S 6 (e)—Right to, sue—Contribution Right to—Assignment, See (1922) DIG COL 1014 —*RAMASWAMI, AIYAR v DEIVASIGAMANI PILLAI*

69 I C 957 (2)

—S 6 (e)—Right to sue for damages for breach contract—Transfer of

A right to sue for damages for breach of a contract for sale or purchase of goods cannot be transferred (*Maolod, C J and Crump J*) *HIRA CHAND AMICHAND v NEMCHAND* 47 Bom 719

25 Bom L R 445 73 I C 465 (2)  
1923 Bom 403

—S 6 (e)—Title in dispute—Effect

There is nothing in law to prevent a man transferring property of which he claims the ownership by reason of the fact his title to it may be in dispute S 6 (e), T P Act, does not apply to such a case (*Daniels, A J, C*) *GULAB RAI v, MT KHUDAIYA BIBI*,

10 O L J 295  
90 & A, L R 141

—S 6 (e)—Transfer of property—Mesne profits—Right to

A transfer of arrears of rents with immoveable property is valid and is not obnoxious to S 6 of the T, P Act (*Krishnan J*) *KOWTHA SURYA-NARAYANA GARU v YARUDALA VENKAYYA*

70 I C 38 1923 Mad 177

—S 7—Sale of Property not one's own

A man has no right to deal with property which is not his own and unless he can show some right to deal with it, either as agent or guardian of the owner or trustee or the like any transfer which he purports to make cannot bind the lawful owner (*Daniels, J*) *CHITU v CHARAN SINGH*

1923 A 563

—S 8—Sale of house—What passes—Fixtures if pass—English law if applicable

The English law as to fixtures does not apply to India and when a house is sold in court auction, the fixtures therein do not pass to the purchaser. The test to determine whether articles claimed are fixtures under S 8 T P Act is whether they are provided for the permanent use of the house and whether they are necessary for the beneficial enjoyment of the same. Machinery brought into a house for carrying on a business is not included in the term 'fixtures' (*Kumarasamy Sastri, J*) *NARAYANA SA v BALAGURUSWAMI NAPPAR*,

45 M L J 385  
18 L W 928 33 M L T 227 (H C)

## T P ACT, S 35

—Ss, 10 and 12—Lease—Covenant running with the land—Liability of transferee

The tenancy in suit was created on the 23rd March 1908, when a *kabuliyat* was executed by the second defendant in favour of the plaintiff. The tenancy was described as an *itmam*. Consequently on the authority of the decision in 47 C 979 it may be assumed that the tenancy was a permanent, heritable and transferable tenure. The lease contained a covenant to the effect that the tenant would, if he transferred the property, pay to the landlord, out of the purchase money in his hands, one fourth as *nazar*, and would obtain registration of the name of the transferee. The covenant further provided that if this step was not taken, the transfer would be invalid and the tenant would continue to be liable for the rent. Held that the provisions of sections 10 and 12 of the Transfer of Property Act made it abundantly clear that restrictive covenant of this description was valid when inserted in a lease between a landlord and his tenant and that the covenant was one running with the land and binding on the transferee from the tenant, (*Mookerjee and Cholsner, JJ*) *SARADAKRIPA LALA v BEPIN CHANDRA PAL*

37 C L J 538  
74 I C 555 1923 Cal 679

—Ss, 10 and 11—Restraint on alienation—Time uncertain—Legality See (1922) DIG, COL, 1014 *KUAR NAGESHAR SAHAI v KUAR MATA PRASAD*

69 I C 730

—S 14—Ostensible owner—Manager of property during owner's absence—Entry of manager in Municipal house tax register—Effect of—Dealing with property See (1922) DIG COL 1015 *MAHOMED SULAIMAN v SAKINA BIBI*

69 I C 701

—S. 14—Rule against *perpetuities*—Applicability to *Mahomedans*

The rule against perpetuities does not rest solely on the religious laws of Hindus or Muhammadans but on the general considerations of public policy. Consequently even under the Muhammadan law one of the main features opposed to public policy is the attempt to restrict for all time the alienability of property by donees or legatees (*Pipon, J C*) *YUSAF KHAN v MISAL KHAN*

73 I C, 99

—S 25—*Lis pendens*—Execution of mortgage deed before institution of suit—Registration pendente lite—Effect of See (1922) DIG COL 1042 *PINGALI VENKATARAMANA REDDI v, KOTIGARI RANGIAH CHETTI*

70 I C 212

—S 35—Election—Hindu widow—Claim as legatee—Right to maintenance—Waiver—Knowledge of facts necessary election—*Pardanshin lady*

Plaintiff the widow a Hindu testator was a legatee under his will in respect of one house and an annuity of Rs 100. In addition she was entitled to suitable residential quarters in the family house. There was a litigation in respect of the administration of the estate and in that the widow claimed maintenance from the husband's estate. But this question was left open. Subsequently the widow brought a suit for arrears of

## T P ACT, S 40

*maintenance* Held that she was *prima facie* entitled to maintenance and she had done nothing to waive that right To constitute a waiver or election by a Hindu widow it must be shown that she was fully aware of her right under the law and with that knowledge made an election A pardashin lady is entitled to special protection in this respect (*Macleod, C. J Harrington and Fletcher, JJ.*) *TRIGUNA SUNDARI DAS v RADHARANI DAS* 37 C C L J 20

—S 40—Judicial sales—Title—Vagueness in notice—Effect *See* (1922) DIG CGL 1015  
*NUR MAHOMED v DINSHAW.* 45 M. L J 770  
33 M L T 241 (P C) 71 I C 625 (P C)

—S 41—Object of — Property vested in shrine—If applies to

S. 41, T P Act, in protecting a transferee in good faith from an ostensible owner lays down the condition precedent that the persons interested in the property must have given their consent express or implied

The section was intended primarily to apply to cases where an ostensible owner has acquired a title benami Religious endowments are actually protected from its operation, as the idol is the shrine itself and no particular being can give consent, express or implied, (*Pipon, J C*)  
*GHULAM HAIDAR v MANAGER, COMMITTEE SAMADH BABA PHULA SINGH* 73 I C 711

—S 41—Ostensible owner—Transfer of title

Transferee from an ostensible owner has to plead and prove that he took reasonable care to ascertain that his vendor had power to make the transfer and that he took the sale deed in good faith and for consideration (*Batten, J C*) *MT KASTURI BIBI v BALIRAM* 1923 Nag 15

—S 41—Ostensible owner—Property in the possession of—Execution sale—Rights of purchaser

The question whether on the facts found the principle of S 41 of the T P Act applies is one of law 26 A 490, 36 A, 303 Ref The property in question originally belonged to a Mahomedan who died leaving a son and daughter The son's name alone was entered in the revenue papers on the death of the lady in 1890 and he alone remained in physical possession of the property In 1896 the son alone mortgaged the property and paid it off in due course subsequently Again he mortgaged in 1908 and 1911 In a suit by the mortgagee the property was sold in execution and purchased by him Subsequently in 1919 the daughter sued for a 1/3 share of the property. Held that the son having dealt with the property as his own with the consent of the daughter, the latter was estopped from claiming it as her own (*Walsh and Ryves, JJ*) *MUL RAJ v FAZL IMAM* 45 A. 520. 21 A L J 424 L R 4 A 234  
74 I. C 307 1923 A. 583

—S. 41—Scope of.

Where a person purchases property at an auction sale under circumstances which do not lead him to an enquiry S 41, T P. Act, does not apply (*Ryves and Daniels, JJ*) *MATHURA PRASAD v ANAND KUMAR.* 21 A. L J 498  
44 A. 555: 74 I C. 911 1924 A. 63.

## T P. ACT, S 43

—S 41—Transfer by ostensible owner—Silence—Estoppel—Judgment

Where one man allows another to hold himself out as the owner of an estate, and a third person purchases it for value from the apparent owner in the belief that he is the real owner the man who so allows the other to hold himself but shall not be permitted to recover upon his secret title, unless he can overthrow that of the purchaser by showing either that he had direct notice or something which amounts to constructive notice of the real title or that there existed circumstances which ought to have put him upon an enquiry that, if prosecuted would have led to a discovery of it The circumstances which would prompt enquiry might be infinitely varied but it might be said that they must be of such specific character that the court could place its finger on them and say that upon such facts some particular enquiry ought to have been made It is not enough to assert generally that enquiries should be made or that a prudent man would make inquiries Some specific circumstances should be pointed out as the starting point of an inquiry which might be expected to lead to some result These principles apply to the case of sales as well as mortgages. 11 B L R 46, 19 W R 292, 26 A 490 Rel

One who culpably stands by and allows another to hold himself out to the world as the owner of property and thereby sell it to a *bona fide* purchaser cannot afterwards assert his title against the latter It may be difficult on the concrete facts of a particular case to determine what standing by is culpable It is the duty of a man who knows that another is relying on a document bearing a counterfeit of his signature to give notice of the forgery without delay 6 A C 82, (1904) A. C 806, (1893) 1 Ch 736 Rel (*Mookerjee and Cuming, JJ*) *BAIDYA NATH DUTT v ALEFJAN BIBI* 70 I C 194 1923 Cal. 240.

—S 43—Applicability of—Person having no title executing sale—Estoppel.

S. 43 of the Transfer of Property Act has no application to persons who merely sign a sale deed whereby another person who has no title professes to transfer the property as his own (*Walmsley and Ghose, JJ*) *JAGEDALI SHEIKH v PRASANNA KUMAR NAG,* 27 C. W N 433  
75 I C 281 1923 Cal 423.

—S 43—Mortgage by manager of Hindu joint family—Absence of necessity—Subsequent partition—Liability of share of manager

A mortgage of the whole or a share of the joint family property of a Mitakshara family is void and inoperative as against the property hypothecated and gives the mortgagee no rights even against the mortgagor's undivided share Where the mortgagor's interest has subsequently been separated from that of the other members of the family, it may become available as security for the mortgage debts 5 Pat L J 605 2 Lab L J 689 foll (*Simpson and Dalal, A. J C*) *RAM RATAN, v GANGA BUKSH SINGH* 26 O C. 245  
100 I J 193 90 & A. L R, 222  
71 I C 581 1923 Quah 265.

—S 43—Subsequent title to the property—Executory contract.

## T P ACT, S 52

The conveyance of a non-existent property though in operative as a conveyance, is operative as an executory agreement which would attach to the property the moment it is acquired by the grantor and which in equity would transfer the beneficial interest to the vendee without any new act being done by the vendor to confirm the conveyance. Where there was consideration for the contract and the grantor having subsequently become possessed of the property not only referred to in the Hibanama but answering to the description of the property set out therein there cannot be any doubt that on those facts, a court of equity would compel the grantor to perform the contract and that the contract would in equity transfer the beneficial interest to the vendee at the moment of the subsequent acquisition of the property by the grantor, (*Ghose and Pantou, JJ*) *RUSTAM ALI MIA v ABDUL JABBAR*

1923 Cal 535

—S 52—*Applicability—Suits for specific performance—Auction sale*

The doctrine of *lis pendens* applies to suits for the specific performance of agreements to sell immoveable properties. It applies equally to Court sales and private sales (*Krishnan and Odgers, JJ*) *VEDACHARI v NARASIMHA MUDALI* 45 M L J 825 19 L W. 28 (1924) M W N 14 (1)

—S 52—*Sale—Pendency of mortgage suit—Compromise—Effect*

A sale of property pending a mortgage suit relating to the same is affected by the doctrine of *lis pendens* and will be only subject to the decree passed in it. The fact that the suit was finally compromised does not make it non contentious (*Krishnan and Coleridge, JJ*) *PARVATI AMMAL v GOVINDA RAJA* 45 M L J 682 (1923) M W N 766

—S 52—*Scope of—Suit for money—Charge on property*

Where in a suit for money a charge for the same is given by the decree on some property, the alienation of the property during the pendency of the suit is not affected by *lis pendens* (*Chandrasekhara Aiyar, C J.*) *NARASAPPA v PATTABIRAMIAH* 1 Mys L J 69

—Ss 52 and 69—*Suit for redemption—Sale under power reserved in the mortgage* See (1922) DIG Col 1018 *RAMAKRISHNA MUDALI v OFFICIAL ASSIGNEE OF MADRAS* 69 I C 407

—S, 53—*Fraudulent transfer—Binding as between the parties*

Where under a mortgage which is impeached as a fraud on creditors, the creditors of the mortgagor have been paid off out of the mortgage money, the mortgage is binding on the parties and enforceable, (*Miller C J and Foster, J*) *BHAGWAN LAL v. RAJENDRA BRASAD SAHAI*

4 Pat L T 409 1923 P 564

—S. 53—*Fraudulent transfer fraud effected—Sale not to be set aside*

Where a debtor with a view to defraud his creditors transfers his property to a third person and as a result thereof succeeds in compounding the claim of his creditors for much smaller

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amounts than they were entitled to be is thereafter precluded from putting forward his own title to the property by taking advantage of his own fraud 35 C 551 referred to, (*Gokul Prasad, J.*) *LACHMAN DAS v MULCHAND*

71 I C 441 1923 A. 411

—S 53—*Fraudulent transfer—Gift—When voidable by creditors—Delivery of possession*

Even a gratuitous transfer made for the sole purpose of defeating the creditors of the transferor is not void, it is only voidable and that only at the instance of a creditor who has been actually defeated or delayed by it. Where the transferee offers the debt due to the creditor he cannot complain that he is defeated or delayed by the transfer and so cannot avoid it. A question as regards delivery of possession to validate a gift under Hindu Law can arise only between the donor and the donee and cannot be raised by the third party 11 C P L, R 11 referred to (*Halhax, A J C*) *MT KRISHNA BAI v DEBI SINGH*

71 I C 409 1923 Nag 195

—S 53—*Fraudulent transfer—Intention to defeat or delay creditors—Proof* See (1922) DIG Col 1912 *AMINA BIBI v SAHYID ALI ZAFAR.*

44 A 748 . 70 I C 968

—S 53—*Fraudulent transfer—Intention to defraud—Not carried out—Effect of*

Where a party admits that he has made a fictitious transfer of his property to another with a view to effect a fraud but asks to have his act undone, the court would refuse relief and would leave the parties to the consequences of their misconduct, dismissing the claim when the suit was brought by the real owner to get back possession of his property and refusing to listen to the defence when he set it up in opposition to the person whom he had invested with the legal title. Upon this rule has been engrafted the distinction that although where the intended fraud has been carried into effect, the court will not assist the true owner, yet if he has not defrauded any one, and the purpose for which the assignment was made has not been carried into execution, the mere intention to effect an illegal object does not deprive the assignor of his right to recover the property from the assignee who has given no consideration for it 35 C. 551, 33 C 967, 18 C L J 616, 22 C L J 197 Rel. (*Mookerjee and Chotzner, JJ*) *DHIRENDRA KUMAR BOSE v CHANDRA KANTA ROY* 1923 Cal 154

—S 53—*Fraudulent transfers—Setting aside of—Creditors need not be judgment creditors*

Section 53 of the Transfer of Property Act does not require that the persons complaining of a transfer coming within the purview of that section should obtain decrees proving their debts before they are entitled to set aside the conveyance. There is no warrant for the proposition that a creditor cannot maintain a suit to set aside a deed obnoxious to the provisions of the section until he establishes his debt by obtaining a decree from a Court of Law. As soon as the person who complains, proves his debt either by producing a decree in his favour or by any other evidence

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oral or documentary, he is entitled to sue and it is not necessary that he must be a judgment creditor or should have obtained a lien or charging order on the property transferred by his debtor, 7 Equity Cases 347 Foll I L R 27 Bom 146 Foll (Shadi Lal, C, J and Fforde, J) CHINA-MAL v GUL AHMAD

73 I C 719 1923 Lah 478

—S 53—*Fraudulent transfer of a substantial portion—Effect*

Where a substantial portion of the transfer is fraudulent, the whole transfer must be treated as fraudulent (Broadway and Harrison, JJ) MULA RAM v JAWINDA RAM

4 Lah 211

5 Lah L J 200 72 I C 452 1923 Lah 423

—S 53—*Intention presumed from Effect*

Where a transfer is made gratuitously and the effect of the transfer is to defeat or delay any creditor, the intention on the part of the transferor so to defeat or delay may be presumed. If the available assets left after the conveyance were not enough to pay the debts of the transferor, then the law would infer an intention to defeat and delay. The mere fact that the creditor had not at that time obtained a decree is immaterial 27 Bom 146 Foll (Baker, J C) MULLA FAIZ ALI v MT HARKUAR

1923 Nag 334

—S 53—*Judgment creditor and ordinary creditor—Distinction*

The only distinction between a judgment-creditor and an ordinary creditor, who seeks to set aside an alienation as fraudulent under section 53, appears to be that, while the former is not bound to bring a representative suit on behalf of all the creditors of the debtor, the latter should bring an action on behalf of the general body of the creditors (Shadi Lal, C J and Fforde, J) CHINA MAL v GUL AHMAD,

73 I C 719 1923 Lah, 478

—S 53—*Lease—Fraud on purchaser—Void*

A lease given to defraud purchaser of a property is voidable under S 53 of the Transfer of Property Act (Kremantle, S M and Brown, J M) ZORAWAR v MIRZA MD RAZA BEG

L R 4 A 279 (Rev.) 90 &amp; A L R 882,

—S 53—*Mortgage—Defeating of creditors,*

Where the consideration of a mortgage by successor is practically all money due by the deceased, there is nothing to prevent the successor from satisfying the claims of certain of deceased's creditors to the exclusion of others. The auction sale in execution of a money decree in case of unrecovered debt really taken place subject to the mortgage. The fact of the mortgage having been executed does not itself imply that its execution was made to defeat creditors (Prideaux, A J C) SUBHANALI v BODULAL

1923 Nag 17

—S 53—*Transfer in fraud of creditors—Evidence of—Intention to defeat particular creditor—Sust to avoid the transfer—Form of*

The position with regard to transfers made by a judgment-debtor which have the effect of defeating a decree holder is this, the transaction

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may defeat or delay. The transferor may intend that it should, the transferee may know that it will, the consideration may be inadequate, and yet unless the transferee himself has been wanting in good faith the presumption in S 53 Para (4) of the T P Act does not arise. The question really is one of fact and it is the intention of the parties. But the intention which the Court must consider is not so much the intention to defeat the decree-holder but the intention to create a valid transfer at all. The second clause of the T P Act relates to a question of evidence. A certain presumption arises when the effect of the transfer is to defeat the creditor and where the transfer is gratuitous or without adequate consideration. But it is a presumption which can be rebutted. The question at issue really is whether the transfer ever actually occurred. The failure or absence of consideration and the omission to transfer possession are evidence of fraud. It is open to a defeated creditor to bring a suit under O 21, R 63, C P Code on his own behalf without impleading all the other creditors of the transferor. 42 M 143 relied upon (Pisbon, J C) LOBNATH v THAKARDAS

71 I C 20

—S 53—*Transfer in fraud of creditors—Test of Intention—Evidence of*

Even where consideration has been paid and possession delivered the transfer will not affect the rights of the creditor if the intention was to defeat or delay him, but so far as the transferee is concerned it must be found that he participated in the intention to defeat or delay the creditor. 34 C 999 referred to. In dealing with a question of this sort the court has to consider the facts and relation to each other and weigh as a whole. If the transferee has no notice of and did not share in the fraudulent intention the transfers will not be set aside. 43 B 707 referred to (Kotwal, A, J C) PANDURANG BAPUJI v BAPUJI

1923 Nag 103 (1) 71 I, C 28 (1)

—S 53—*Transfer of property—Partition among member of a family.*

A partition among the members of a joint Hindu family is a transfer to which the provision of S 53 of the Transfer of Property Act would be applicable. Per Spencer, J in Indoso Jithajai v Kothopalli Ramachariu 10 L W, 498, 507 not followed (Oldfield and Venkatasubba Rao, JJ) RASA GOUNDAN v ARUNACHALA GOUNDAN

44 M L J 513 17 L W 613

(1923) M W N, 320 32 M L T (H C) 344

72 I C 978 1923 Mad 577.

—S 53—*Proviso—Applicability—Fraudulent transferee—Bona fide transferee for value without notice from—Who is—Such transferee if protected by proviso*

The proviso to S 53 of the Transfer of Property Act protects a bona fide purchaser for valuable consideration, whether he purchases from the fraudulent grantor himself or from a fraudulent transferee from him.

A transferee who fails to make any inquiry of the person who could have given the best information as to the defects in the title is not a transferee in good faith with notice within the

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meaning of the proviso to S. 53 of the transfer of Property Act (*Oldfield and Ramesam, JJ*)  
KUNHU POTHU NAIR v. RARU NAIR

46 Mad. 478 44 M. L. J. 527 17 L. W. 547

32 M. L. T. (H.C.) 372

72 I. C. 727. 1923 Mad. 558

—S 54—*Agreement for sale—Delivery of possession to vendee—Conveyance not executed—Rights of vendee*

A purchaser who has actually taken possession under an agreement to sell can retain such possession as against the seller even though the agreement to sell has not been converted in the actual sale. But this principle is one of equity only. It does not amount to the conversion of the agreement of sale, into an actual sale and the enforcement of this equity depends entirely upon the fact of the purchaser having taken actual possession. It is in fact a principle which prevents a fraudulent seller who has actually delivered possession of the thing which he had agreed to sell from taking advantage of the incompleteness of the sale and ousting a person who has obtained a *bona fide* possession. But the principle has no application as against a subsequent purchaser of the property without notice of the agreement (*Pipon, J. C.*) SAID KHAN v. ZARIFAHAN

71 I. C. 781

—S 54—*Agreement for sale—Possession given—rights of vendee*

Where a person agrees to sell his property to another and receives the purchase money and puts him in possession of the property but there is no registered deed of sale, the vendee can successfully resist a suit by the vendor to recover possession of the property whether or not the time for filing a suit for specific performance has expired 46 B. 722 3 N. L. R. 72, 17 C. P. L. R. 19. Rel. on (*Prideaux, A. J. C.*) SAMPAT v. MOTILAL

71 I. C. 808 1923 Nag. 177

—S 54—*Contract by guardian of minor—Voidable—Deposit—Suit for refund*

Where a guardian enters into a contract for the purchase of immoveable property, it is not void but only voidable. If such a contract falls through the default of the purchaser, the vendor need not return the earnest money, if he is willing to perform his part. In a suit for refund, the questions of mutuality and enforceability by specific performance do not arise (*Drake Brockman, J. C.*) MOONGALAL v. MT. NANNI

19 N. L. R. 131

—Ss 54 and 14—*Contract of sale—rule against perpetuities—Contract when repugnant to—Contract Act, S. 37.*

A contract of sale creates no interest in immoveable property and consequently such a contract cannot be vitiated by the rule against perpetuities.

*Quære* whether S. 37 of the Contract Act enables an owner of immoveable property to enter into an agreement imposing a restrictive covenant for an indefinite period on the disposition of the said property so as to bind his heirs and representatives. 39 M. 463 dss. (*Rafiq and Piggott JJ.*) GORI RAM v. JEOT RAM

45 A. 478 :

21 A. L. J. 430 : L. R. 5 A. 17 1923 A. 514

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—S 54—*Deed—Construction—Sale—Agreement to sell—Want of formalities—Part performance*

It is immaterial whether a transaction is described as sale by a parol or an agreement for sale. If the sale cannot take effect as a sale for want of formality, it would have the effect of an agreement for sale with its consequences in equity. Where the question is whether as a result of the agreement for sale of the entire plot in consideration of an advance made, followed by possession the defendant obtained a good title in equity to the land in suit, *Held* that the equitable doctrine of part performance clearly applied to the case. To constitute part performance the act must be an act, unequivocally referring to, and resulting from the agreement, and such that the party would suffer an injury amounting to fraud, by the refusal to execute that agreement. The principle of the cases is, that the act must be of such a nature, that, if stated it would of itself infer the existence of some agreement, and then parol evidence is admitted to show what the agreement is (*Ross, J.*) RAM KISHUN MAHTO v. HARIHAR MAHTON

73 I. C. 30

—S 54—*Oral sale—Land worth more than Rs. 100—Possession given—Subsequent registered sale to another—Effect*

Under an oral sale of land for Rs. 150, the consideration was paid, possession delivered and mutation of names in the revenue records effected. Ten years later the vendor sold the same under a registered document to the plaintiff who sued for possession. *Held*, even though specific performance of the first agreement was barred, the possession obtained thereunder was a complete answer to plaintiff's claim (*Shah, A. C. J. and Coyajee, J.*) LAXMAN MANKAR KASAR v. RAVJI DHANSINGH PATIL

25 Bom. L. R. 1027

—S. 54—*Sale of equity of redemption—Unregistered document—Actings of the parties—Doctrine of part performance*

In 1906 plaintiffs conveyed certain property to the defendants under a registered sale for Rs. 1,200 subject to the condition that if the plaintiffs repaid a sum of Rs. 125 per annum for 10 years the defendants were to reconvey the property to the plaintiffs. The plaintiffs were to lose all right to the property in case of default in payment. Subsequently in 1908 the parties arrived at an arrangement under which the defendants agreed to take possession of a portion of the property absolutely free from liability to redemption and the plaintiffs were to take possession of the remainder free from the mortgage debt. The arrangement was embodied in a document which was not registered. Defts. took possession of the property allotted to them under the arrangement and the plaintiffs continued in possession of the remainder as before. In 1919 the plaintiff sued to redeem the property in the possession of the defendants who set up the unregistered agreement as their defence. *Held* that the transaction of 1908 though embodied in an unregistered agreement had still been acted upon by the parties and under the equitable doctrine of part performance the plaintiffs were estopped from

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going behind the agreement and claiming redemption

*Per Marten, J* To establish the application of the principle of part performance it must be shown that the respective parties have so changed their respective positions that the change can only be referable to the contract alleged. A mere payment of the purchase money, for instance, is insufficient. 42 I A 1, 23 Bom L R 506, 40 A. 187 foll. 29 M. 336, 40 M. 1134 not foll. (*Marten and Fawcett, JJ*) SANDU VALJI v. BHIK CHAND 47 Bom 621 25 Bom L R 381 75 I C. 118 1923 Bom 473

———S 54—Sale by *pyatpaing*—Registered deed—Absence of parties

A sale by *pyatpaing* does not transfer any interest in the property. In such a case there is neither a sale nor a mortgage and no registration is necessary (*Maung kin, J*) MG PO KIN v. MG OH 2 Bur L J 4 1923 Rang 230

———S 54—Scope of—Conveyance and contract—Distinction between—Absence of registered deed but possession given—Suit for possession—Defences open—Part performance

What S 54, T P Act enacts is that a conveyance or a document of title to land can only acquire validity and be provable if it is registered. So far from forbidding unregistered contracts for sale, it expressly recognises their existence, denying to them only the creation of an interest in or charge on the land. The section prohibits only unregistered conveyances and not contracts.

Where in pursuance of a contract of sale, possession has been given but no registered sale deed executed and thereafter a suit is brought for the recovery of the lands on the ground that there was no registered document, *Held*, a plea in defence that the defendants had a valid contract capable of specific performance is quite good. The defendant can only rely on possession as part performance of the contract. 29 Mad 336 and 40 Mad. 1134 overruled (*Schwabe, C J* *Coutts Trotter and Krishnan, JJ*) VIZAGAPATAM SUGAR DEVELOPMENT COY v. MUTHURAMAREDDY 45 M L J 528

33 M. L T 53 (H C) 18 L W 553  
46 Mad 919 (1924) M W N 14 (2)

———Ss 54 and 107—Transfer of property—Agreement for—Delivery of possession—Effect of

Where in pursuance of an agreement to transfer property the intended transferee has taken possession though the requisite legal documents have not been executed and registered, the position is the same as if the documents had been executed, subject to the proviso that specific performance can be obtained between parties to the agreement in the same Court and at the same time as the subsequent legal question falls to be determined. 21 Ch D 9, (1892) 2 Q B 255, 31 C L J, 75 Rel (*Moorejee and Cuming, JJ*) CAJENDRA NATH DEY v. MOULVI ASHRAF HOSSAIN. 69 I C 707 27 C W N 159 1923 Cal 130

———S. 55—Contract of sale—Implied agree-  
ment to give possession.

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*Per Venkatasubba Rao, J*—In every contract of sale unless the contrary appears, the vendor must be deemed to impliedly agree to give possession of the property to the purchaser, in addition to executing a conveyance in his favour (*Krishnan and Venkatasubba Rao, JJ*) SUNDARA RAMANUJAM NAIDU v. SIVALINGAM PILLAI 45 M L J 431 18 L W 333

———S 55—Covenant for title—Assignment of mortgage-debt—Immoveable property—Contract to the contrary See (1921) DIG COL 1047 BALAGURUMOOTRY CHETTY v. NAGULU CHETTY 69 I C 473

———S 55—Vendor's lien—No right to possession.

When the vendor does not get the full consideration money he has a lien for his unpaid purchase money; but that lien does not entitle him to retain possession of the property and he is therefore liable for mesne profits (*Coutts and Das, JJ*) HARI PRASAD CHOUDHURY v. HARIHAR PRASAD CHOWDHURY 1923 Pat 20 70 I C 804 1923 P. 205

———S 55—Vendor & purchaser—Delay in completing the sale—Interest—Liability for

Lapse of time occasioned merely by the defect of the vendor's title not known to him at the date of the contract especially where immediate steps are taken by the vendor to remedy the defect does not exempt the purchaser from paying interest (*Mulla, J*) SUBHADRAI v. MAHOMED BHAI 25 Bom. L R 931

———S 55—Vendor and purchaser—Duty of vendor to convey title free from reasonable doubt—Breach—Damages See (1922) DIG COL, 1022 LACHHMAN DAS v. JOWAHIR SINGH 70 I C 250

———S 55 (1) (A)—Disclosure—Failure—Effect

If a seller does not disclose to his buyer any material of which he is aware but of which the buyer is not aware, it amounts to fraud. But if he had no knowledge of it himself, the position is different (*Sanderson C J and Richardson, J*) NURSING DASS KOTHARI v. CHITOO LALL MISSEER 50 Cal 615 74 I C 996 1923 Cal 641

———S 55—(1) (g)—Encumbrance—Vendee paying of—Effect See (1922) DIG, COL, 1023, RAM GOPAL v. THAKUR BAKHTAWAR SINGH, 70 I C 802

———S 55 (2)—Covenant of title—Implication

Even where there is no express covenant for title in a contract of sale S 55 (2), T P Act implies one and based on that a suit for damages will lie (*Sanderson, C J and Richardson, J*) INJAD ALI v. MOHINI CHANDRA ADHIKARI 27 C W N 1025

———S 55 (2) Rule of caveat emptor—Applicability in the Punjab

Though the T. P. Act does not extend to the Punjab, the provisions thereof are generally applied to decisions there. The rule of caveat

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emplot has become obsolete and where the sale has failed on account of defect in title, the sale price must be returned even in the absence of a covenant guaranteeing title (*Martineau and Zafar Ali, JJ*) **KANSHI RAM v JAIMAL SINGH**  
75 I C, 562 1923 Lah 590

———§ 55 (d)—Sale—Interest on purchase money—Vendee's duty to prepare draft

When a purchaser is in actual possession or receipt of the rents and profits he must pay interest upon his purchase money (unless lying idle with notice of the fact to the vendor) from the time fixed for completion of the transaction. It is the purchaser's business to propose a proper draft of the sale deed and submit it to the vendor (*Pradeaux, A J C*). **DINKAR RAO v AYUB**  
1923 Nag 37

———§ 55 (6)—Suit for return of earnest money—Charge

Where defendant failed to perform his part of a contract to sell, the plaintiff is entitled to get back his purchase money and to a charge on the property for the amount (*Shah, A C J and Crump, J*) **KARSANDAS PURSHOTTAMDAS v GOPALDAS**  
25 Bom L R 1144,

———§ 58—Agreement to receive less amount—Validity of mortgage

An agreement by the mortgagor to receive a smaller sum than that mentioned in the document does not invalidate it (*Wazir Hasan, A J C*) **BALBHADRA PRASAD v DANPAT DAYAL**  
90 & A L R 707

———§§ 58 and 100—Leave—Security of property for rent—Mortgage or charge—Distinction See (1922) DIG Col 1024 **SHIVA PRASAD SINGH v BENI MADHAB CHOWDHURY**  
70 I C 24

———§ 58—Mortgage—Construction—Simple or usufructuary—Tests of—Interest—Charge on property

Under a mortgage deed the mortgagee was to be in possession of the mortgaged properties and to set off the rents and profits towards interest and if any portion of the interest was unpaid the mortgagee might recover the interest month after month from the mortgagor. The mortgagors were to redeem the property on payment of the principal money. *Held* that the mortgage was neither a simple nor usufructuary mortgage and that the interest was not a charge on the mortgaged property 2 A 537, 35 A 107 Ref (*Schwabe, C. J. and Wallace, J*) **NAMMALWAR CHETTY v KRISHNASWAMI CHETTY**  
72 I C 987  
1923 Mad 71

———§ 58—Mortgage—Delivery of possession of land as security for money—Absence of writing or registration—Rights of parties

Where a person delivers possession of land to secure the payment of a debt but there is no writing or registration in evidence on the transaction, it is not a mortgage. In a suit the proper decree to be passed would be one for recovery of possession on repayment of the debt. (*Pratt, J*) **MAUNG AUNG v MAUNG SHWE LIN**  
73 I C 1029 1923 Rang 51.

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———§§ 58 and 105—Mortgagor lease—Zuripeshgi—Redemption—Existence of debt

The test to find out whether a zuripeshgi is a mortgage or lease is to find out whether there is a secured debt and a right of redemption. In a zuripeshgi lease properly so called there is an advance to the lessor in consideration of which the lessee is given possession of the land for a term during which he recoups himself for the sum advanced and interest out of the profits of the land of which he is put in possession. There is no question of redemption upon paying off an advance. The lease terminates at the expiration of the term and the lessor may thereupon reenter. The transaction is really one in which rent is paid in a lump sum in advance instead of by instalments during the term. Where however the interest created in the lease after the expiration of the term until the advance which is essentially loan not an advance of rent, is repaid, the transaction has the essential characteristics of a mortgage (*Miller, C J and Mullick, J*) **MAHARAJAH KESHO PRASAD SINGH v CHANDRIKA PRASAD SINGH**,  
2 Pat 217 1923 P, 122

———§ 58—Simple mortgage—Mortgagor if can grant permanent lease

Even where a mortgagor in creating a simple mortgage agreed not to transfer the property, so long as the debt remained unpaid, he is not barred from granting a permanent lease (*Fremantle, S M and Burn, J M*) **HAIDER ALI v. FARAS RAM NONIA**,  
I R 4 All. 308 (Rev)

———§§ 58 (a) and (b)—Mortgage—Simple mortgage—Provision for entering into possession on default of payment of interest—Effect of

Under a simple mortgage, the mortgage money including interest was to be paid in two instalments failing the payment of any one instalment the mortgagee was entitled to take possession of the property and pay himself the principal and interest out of the usufruct. The mortgagee did take possession under that clause. *Held* that the relationship between the parties continued to be that of a mortgagor and mortgagee under a simple mortgage. The mortgagor did not lose his right of redemption by the fact that the mortgagee was given an additional security for his money by taking possession of the land 21 M L J 1147 P C Rel (*Batten, J C*) **PUNA v, LAXMAN PRASAD**  
1923 Nag, 161 (1)

———§ 58 (c)—Mortgage by conditional sale—Sale in lieu of prior debt—Condition for reconveyance,

Where in lieu of a portion of the amount due under a mortgage the mortgagor (co-sharer) purported to transfer his share in the village out and out in favour of the mortgagee and the deed also contained a covenant for reconveyance of the property by the vendee in case the money was repaid. *Held*, that the transaction was one of mortgage by conditional sale (*Kanhayalal and Sulaiman, JJ*) **MOHINDRA MAN SINGH v MAHARAJ SINGH**  
45 A. 72 1923 A 48  
70 I C 132

———§ 59—Attestation—Proof of

Where a witness states a mortgage bond was executed in the presence of himself and others



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and that he signed after seeing it executed, it is sufficient proof that he signed as attesting witness (*Das and Kulwant Sahay, JJ*) ISHWARI PRASAD NARAYAN DEO v CHOTA NAGPUR BANKING ASSOCIATION LTD 74 I. C 841

—S 59—Attestation—Proof of—Question if to be raised in appeal

Where the validity of a mortgage deed has never been questioned, the question of alteration or of its proof does not arise. Such a point cannot be allowed to be raised for the first time in appeal (*Odgers and Hughes, JJ*) RANGASWAMI AYYANGAR v VEERA RAGHAVACHARI

46 M L J 56  
18 L W 620 (1923) M W N 789  
33 M L T 73 (H C)

—S 59—English and Indian Law—Difference

S 59 T P Act does not recognise the distinction between legal and equitable mortgage as in English law where the legal mortgage will always prevail against the equitable. Unless the holder of the former has done or omitted to do something which prevents him in equity from asserting his paramount rights (*Lord Dunedin*) THE IMPERIAL BANK OF INDIA v U RAI GYAW THU AND CO LTD 45 M L J 505 1 Rang 637  
21 A L J 784 25 Bom L R 1279  
90 & A. L R 937 33 M L T 395 (P. C.)  
2 Bur L J 254 50 I A 283  
(1923) M W N 609 1923 P C 211

—S. 59—Inclusion of stranger's property in mortgage to resume registration—Effect

If a property has been introduced in a mortgage bond, which has either no existence or does not belong to the mortgagor, with a view to revenue registration of the document in a particular office, the registration must be deemed to be futile, with the result that there is no enforceable security under S 59 T P. Act 41 I. A 110, 48 I A 127 fold, (*Mukerjee and Chotener, JJ.*) KEDARNATH DAS v JYANTA KUMAR SHOME.

38 C L J 355 70 I C 583

—S 59—Mortgage—Attestation

A one of the attesting witnesses admitted that he signed the deed, but said that he did not see the executants sign the deed, but that he did accompany the executants to the registration office to identify them. Another witness said that the deed was executed in the presence of A. It was found that A was speaking false.

Held the deed was properly attested (*Robinson, C J. and May Oung, J*) DAWSON'S BANK, LTD v. C R V V CHETTY FIRM  
1 Rang. 121 1923 Rang 254

—S 59—Mortgage—Attestation—Validity—Invalid attestation—Bond—Enforceability

A mortgage deed is not validly attested unless the attestors had actually seen the executant sign the document. Where a mortgage is invalid for want of proper attestation it can be enforced as a bond against those who are personally liable under it (*Spencer and Devadoss, JJ*) KURU KONDI SAMA RAO v FIRM OF MARWADI VANNAPI VAIJANJI

46 Mad 64 17 L. W. 661  
32 M. L. T. (H C) 9  
71 I C 153 1923 Mad 36,

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—S 59—Mortgage—Deposit of title deeds—Necessity for registration

A memorandum merely evidencing a deposit of title deeds by way of equitable mortgage does not require registration. In any event the mortgage can be proved by other evidence 4 L W, 472, 16 L W 615 P C Ref 24 Bom L R 502 Diss (*Spencer and Devadoss, JJ*) VADAMALAI PILLAI v SUBRAMANIA CHETTIAR  
(1923) M W N 57 (2) 71 I C 130  
1923 Mad. 262

—S 59—Mortgage—Due execution—Attestation—What constitutes

Formalities imposed by law against perjury and fraud must be strictly observed. A mortgage is not duly executed and cannot operate as a mortgage or create a charge unless it was in fact signed by the mortgagor in the presence at least of the attesting witnesses 35 M 607, 27 C L J 548 Ref (*Richardson and Suhrawardy, JJ*) ARJUN CHANDRA BHADRA v KAILAS CHANDRA DAS  
27 C W N 263 70 I C 532 1923 Cal 149 (2)

—S 60—Clog on the equity—Long period fixed—Mortgages at liberty to make any improvements and charge for same—Effect

The mere fact that the mortgagors are prohibited from redeeming for a long period of 51 years does not render the clause unconscionable. But when in addition to this, the mortgagors are not entitled to rents and profits though they have to pay interest at 7½ percent, and the mortgagees are entitled to spend any amount they take on improvements and charge the same on the property with interest at 6 percent, and that at the same time the mortgagors are not entitled to the increase in rents or profits, the whole transaction is unconscionable and courts are entitled to give relief (*Shadi Lal, C J and Fforde, J*) FAUIDAR KHAN v ABDUL SAMAD KHAN

5 Lah L J 394

—Ss 60 and 98—Clog on equity—Provisions of I P Act not extended—Effect

Even in those parts of India to which the T P Act has not been extended, in all mortgages except anomalous mortgages, clauses which take away the right of the mortgagor to redeem after stipulated period should be deemed to be clogs on the equity of redemption and as such not enforceable. The rule enunciated in S 60, would be applicable as a rule of justice, equity and good conscience (*Robinson, C J and May Oung, J*) MA MIN BYU v MAUNG CHIT PE 1 Rang 419

—S 60—Clog—Mortgages prior and subsequent—Redemption

A usufructuary mortgage was followed by another mortgage in favour of the same person over the same property which recited that if interest was not paid annually the mortgagee could sue and also that the first mortgage could not be redeemed without redemption of the second also—Held, it was a clog and could not be enforced (*Gokul Prasad, J*) LALA MAKHAN LAL v KISHUN LAL 74 I C 320 1923 All 454

—S 60—Clog on redemption—Deed of further charge—Effect of.

The doctrine as to clog on redemption relates only to dealings which take place between the

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parties at the time when the original contract of mortgage is entered into and they are at liberty to deal subsequently with each other so as to vary the terms upon which redemption of the original mortgage can be had. 20 O. C. 97 24 O. C. 240, 25 O. C. 134 Rel. (*Ashworth and Simpson, A J C*) SANGAT BAKSH SINGH v RAWAT DEJDEO BAKSH

72 I C 263 1923 Oudh 143

—S. 60—Clog on redemption—English principles—If applicable—Object of section

The equitable maxim "once a mortgage always a mortgage" is not in any way done away with by the T P Act and contains the principle of justice, equity and good conscience which courts have to apply in the absence of statutory enactments to the contrary. The object of S 60 T P Act is to legalise this equitable right and give the parties the right to redeem even in cases where the right has been waived or postponed. (*Wazir Hasan, A J C*) BALBHADRA PRASAD v DHANPAT DAYAL

90 & A L R 707.

—S 60—Clog on redemption—Permanent lease by mortgagor to mortgagee—Lease and mortgage forming part of the same transaction

Where a mortgage and a permanent lease by the mortgagor to the mortgagee from part of the same transaction the lease is a clog on the equity of redemption and the court would not recognise or enforce it. 46 B. 409 foll. (*Prideaux, A J C*) VITHAL v BHOLU

1923 Nag 115 (1)

—Ss 60 and 95—Co-mortgagors—Redemption—Purchase of a portion of mortgaged property by mortgagee

Co-mortgagors who are entitled to a portion of the mortgaged property could not redeem against the will of the mortgagee who has himself purchased a portion of the hypotheca any portion of the property save their own village. (*Dalal and Simpson, A J C*) JAI GOVIND SINGH v ABHAI RAJ SINGH

26 O C 308

100 L J 216 90 & A L R 651

—S 60—Equity of redemption—Divisibility

Where the plaintiff himself purchased the whole of the equity of redemption, without consulting the other landlords, and then by virtue of litigation between himself and the other landlords, he was allowed to retain  $\frac{1}{2}$  share of the equity of redemption of the occupancy rights. *Held*, he himself was responsible for dividing up the equity of redemption and cannot now take advantage of its being originally indivisible. (*Shadi Lal, C J and Abdul Qadir, J*) KARIM BAKHSI v KARIM BAKHSI

1923 Lah. 22.

—S 60—Mortgage—Forfeiture clause—Redemption—Transfer of ownership—Possession

Under the law as it existed prior to the general extension on 1st January 1922 of the Transfer of Property Act, 1882 to the whole of Burma, excepting certain areas, a forfeiture clause should be construed strictly according to its tenor and given its effect as a clause effecting its purpose and conferring on the mortgagee the additional rights to the property on expiry of the period if redemption had not been effected (or

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property demanded within the specified period for redemption)

If the mortgage commenced without possession being delivered to the mortgagee the forfeiture clause would not be sufficient to show that the ownership had been transferred to the mortgagees, and the onus of proof would lie on the mortgagee to prove a subsequent transfer of ownership. (*Leniaigne, J*) MA HIN THA v MA THET SU

2 Bur L J 119 1923 Rang 232

—Ss 60 and 72 (c)—Mortgage-money Costs of litigation incurred by mortgagee—Right to add to the mortgage-money

The mortgagee is entitled to tack on the costs of litigation relating to the security as part of the terms on which redemption is allowed.

A mortgagee is allowed proper costs charges and expenses incurred by him in relation to the mortgage debt or mortgage security including the costs of litigation properly undertaken by him. But all these items are allowed only as a condition of redeeming. There is no implied contract by the mortgagor to pay them, and they are not, in the absence of express agreement, recoverable against him personally.

The words "mortgage money" in S 60 must be taken as including all money which on taking account between the parties may be properly allowed to the mortgagee.

S 72 cannot be taken to imply that a mortgagee not in possession has no similar right to charge the mortgaged property for payments properly made by him in relation to the security and that the mortgagee is not entitled to have amounts so paid added to the amount of the original lien.

The expression "mortgage-money" as used in S 60, includes costs properly incurred by the mortgagee such as costs of litigation which are allowed under the law of mortgage in England. (*Fawcett J*) NADERSHAW v SHINBAI

25 Bom L R. 839

—S 60—Mortgagee purchasing mortgage properties in auction—Sale afterwards set aside in part—Effect

When the mortgagee in court auction purchases the equity of redemption, and afterwards the sale is held partly invalid, the security is extinguished only to the extent to which the sale is valid—43 Mad 372 F B Foll. (*Odgers and Hughes, JJ*) RAMASWAMI REDDIAR v PERIA VEERAKUDU

45 M L J 719. 18 L W 692

(1923) M W N 781

—S 60—Mortgage—Redemption—Clog on—Onerous terms—Long term for redemption.

It is an essential ingredient of every mortgage, that it should be redeemable, until the right of redemption is extinguished or lost in the manner provided by Law, and any fetters intended to render redemption practically difficult or impossible cannot be recognised, unless there are circumstances indicating that they were intended to compensate for the advantages allowed to the mortgagor and were not unreasonable or repressive. A mortgagee cannot be allowed to fetter redemption by terms which are unreasonable or oppressive. An agreement made at the time of the mortgage between a mortgagor and the mortgagee cannot operate to make that mort-

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gage irredeemable. Incidental to every mortgage is the right of the mortgagor to redeem it, which is called his equity of redemption. The right to redeem is so inseparable an incident of a mortgage that it cannot be taken away by an express agreement of the parties that the mortgage shall not be redeemable or that the right shall not be exercised except in a particular manner or under certain onerous conditions. If the conditions are one sided and designed to thwart or defeat redemption, equity will interpose in favour of the mortgagor and relieve him of the oppressive conditions which unreasonably hinder redemption without interfering with what might really be due to the mortgagee on account of the principal and interest secured by the mortgage. There could have been no object in fixing such a long term for redemption and requiring the mortgagors to pay three times the principal sum secured by the mortgage in addition to any deficiency in the interest, which was to be paid out of the profits unless the intention was to hinder redemption by rendering the same extremely onerous to the mortgagors. A long term may not by itself operate as a clog on the equity of redemption, but where such a long term is accompanied by other conditions, such as exist in this case, rendering redemption extremely difficult and onerous without any corresponding benefit to the mortgagors, the mortgagee cannot be allowed to take advantage of those conditions to defeat the right of redemption. A mortgagor cannot compel the mortgagee to accept payment of the mortgage money before the date fixed for redemption where there is a covenant in the mortgage deed that redemption shall not take place before that date but where the effect of a covenant is to postpone redemption for an unduly long period without any corresponding advantage to the mortgagor or there are circumstances indicating that the covenant postponing redemption is unreasonable and oppressive and intended to fetter the right to redeem, a Court may allow redemption irrespective of that term as it may deem fit. (*Kanhaya Lal, J C*) ABDUL HAQIM *v* SAJJAD HUSAIN, 26 O C 209 9 O & A L R 733 10 O L J 46 74 I C 304 1923 Oudh 209

## S 60—Mortgage—Redemption—Long term

Where the vendees from the mortgagors bring a suit for redemption before the expiry of the term of 60 years, they cannot raise the plea that the terms 60 years was excessive having regard to the value of the property and the necessities of family (*Ryves and Stuart, JJ*) RAM SAMUJH *v* SHEORAJ TEWARI, 1923 A 123

## S. 60—Mortgage—Redemption—Partial redemption—Decree on prior mortgage—Sale—Right of auction-purchaser

There was a first mortgage and subsequent thereto all the rights which the original mortgagor had, were mortgaged to the second mortgagee. In execution of a decree on the prior mortgage the whole of these rights (that is the whole of the equity of redemption of the prior mortgage) vested in the auction purchaser. No part of the equity of redemption vested in the successor to the original mortgagor. Held that

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the integrity of the prior mortgage was not broken up and the mortgage would not be redeemed piece meal (*Mears, C J and Banerji, J*) ABDUL GHAFOR *v*, QAMAR UDDIN

21 A L J 279 71 I C 973  
L R 4 A 360 1923 A 397.

## S 60—Mortgage—Redemption—Period fixed by deed—Expiration of—Rights of parties

When a period for a mortgage is specified, the right of redemption can only arise on the expiration of that period in the absence of a special condition entitling the mortgagor to redeem during the term for which mortgage was created.

Where nothing more than a period is specified the onus lies on the mortgagor to prove that he can redeem before that period and not upon the mortgagees to show that the mortgagor cannot do so.

The view that the simple expression 'ba mayad' or 'ta mayad' without qualification means that the time is the essence of the contract and that the mortgagor cannot redeem before the expiry of that term is one which must be taken as settled law for the North Western Frontier Province (*Fipon, J C*) DHANNA RAM *v* CHHABIL DAS 72 I C 931

## S 60—Mortgage—Rights of mortgagee—Part payment—Effect of

A mortgagee is entitled to bring a suit for sale of the entire mortgaged property for the balance due upon his mortgage, although he received half the mortgage debt from one in whom one half of the equity of redemption became vested subsequent to the mortgage, unless it was proved that he had consented to the integrity of the mortgage being broken up (*Das and Adami, JJ*) PANDE SATDEO NARAIN *v* RAMAYAN TEWARI

4 Pat L T 147 2 Pat 335 71 I C 705  
1923 P 242 (2)

Ss 60—Mortgage—Splitting up—Right of redemption—Partial redemption See (1922) DIG COL 1033 AMBA PRASAD *v* WAHIDULLAH 44 A 708

## S 60—Mortgage—Splitting up—Right of redemption—Partial redemption

Ordinarily a mortgagee is entitled to claim that his security should not be split up, but if he becomes by his own act the purchaser of a portion of the mortgage security, he has no longer any right to claim that the security should not be split up and mortgagors or assignees from mortgagors become liable for only so much of the mortgage debt as is proportionate to the portion of the mortgage security that they have purchased. (*Robinson, C J. and McGregor, J*) KO THINE *v* ISMAIL CASSIM MORAD 69 I C 204 1923 Rang 61

## S. 60—Redemption—Clog on—Restrictions on right of mortgagor

The mere length of the period fixed for a mortgage is not sufficient to constitute an undue restriction on the right to redeem.

Whatever authorities there are for the view that the terms of the mortgage however, onerous,

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must be upheld if the parties entered into a contract with their eyes open, there is equally good authority for the view that those terms must not be such as to prevent redemption in all circumstances (*Pipon, J C*) *RAM CHAND v GHULAM HASAN* 72 I. C 941.

—S 60—Redemption—Notice to mortgagee—When necessary

A mortgagee is ordinarily entitled to six calendar month's notice of intention to pay off the mortgage or in default thereof is entitled to six months' interest in advance in lieu of notice, but if the mortgagee has given notice calling in the mortgage debt the mortgagor even though he is a few days late in complying with the notice and tendering the money is not bound to give six months' notice before redeeming (*Fawcett, J*) *NADERSHAW v SHIRINBAI* 25 Bom L R 839

—Ss 60 and 98—Right of redemption put off under certain circumstances—Effect of clause of construction. See (1923) DIG COL, 1031 *MUHAMMAD SHER KHAN v RAJA SETH SWAMI DAYAL* 28 C W N 79

—S 60—Suit by mortgagee for his share of the mortgage money—Decree—Form of—Merger—Acquisition of interest See (1922) DIG COL 1034 *MOHAN LAL v PRASADI LAI* 74 I C 999 1924 A 11 45 A 46.

—S 61—Consolidation See (1922) DIG COL, 1034 *JADU RAI v RAM BIRICH, RAJ.* 70 I C 637

—S 63—Accession—Meaning of—Govt. waste lands

Government waste lands adjoining the mortgaged property do not constitute an accession to it within S 63 of the T P Act, (*Pratt, J*) *MAUNG SHWE ON v N K R PONNIAH MUDALIAR* 1 Bur L J 262 1923 Rang 127 (1)

—S. 63—Fraudulent transfer—Avoidance of—Fraud not effected

It is only where the attempted fraud has been wholly or partially successful and has been carried into effect the Court will give effect to the fraudulent transaction as between the transferor and the transferee. On the facts it was found the fraud was not carried into effect 23 B 406, 28 C 370 followed (*Stuart, J*) *MT MUSTAFAI BIBI v, SHEIKH MD, SHABBI R.* 71 I C, 273 1923 A 164

—S 63—Mortgage—Redemption

The defendants, successors of the mortgagee, who had somehow obtained possession of the mortgaged plot under a usufructuary mortgage, got their names entered in the revenue papers, as if they were occupancy tenants of the disputed land and set up their title by adverse possession. Held, no such possession, short of the statutory period of sixty years, would be a bar or defence to a suit for redemption, if the parties were otherwise entitled to redeem. If the defendants obtain unlawful possession by ousting the mortgagees at any time within the last twelve years or before, still their possession cannot be treated as adverse to the owner (mortgagor) so as to defeat his lawful title, because the right of the successors of the

## T P ACT, S 68

mortgagor to get possession could only arise on redemption and not earlier 32 Cal 296 38 All. 411, Foll (*Kanhaya Lal, J*) *MT. DURGA DEVI v GIRWAR SINGH* 70 I C 958, 1923 A 11 (2)

—S 63—Redemption—Substitution of property through mistake

The mortgagee had been in possession of extra land not as if it were an accretion to the property in the original mortgagee but as a substitution through mistake

Held, obviously the mortgagor in a suit for possession would be entitled to recover that property (*Macleod, C J*) *NANCHI KOM KHATAL v SHITITI KULSAMBI KOM* 1923 Bom 42 (1).

—S 67—Decree for sale—English mortgage See (1922) DIG COL 1035 *ASKARAN BAID v GOBORDHAN KOBRA* 70 I C, 158

—S 68—Diminution in rent—If security diminished—Inclusion of plots not belonging to mortgagor

The value of a property depends largely on the income derivable from it and where it falls, the mortgage security is diminished and the mortgagee is entitled to sue for his mortgage money.

The inclusion of plots not belonging to the mortgagor and the failure to give possession of the same entitles the mortgagee to sue for his money (*Lindsay and Daniels, JJ*) *FATEH DIN v KISHEN LAL* 73 I C 902 L R 5 A 29 1923 A 584

—S 68—Fault of mortgagee—Effect.

It is clear from the wordings of S 68, T P Act, that it is applicable only to cases where the security is lost to the mortgagee otherwise than by his own fault, and that a suit for the mortgage money is not maintainable where the property is lost owing to the default on the part of the usufructuary mortgagee himself. The help of section 68 can be invoked only in cases where the mortgage is not void. To hold otherwise would be tantamount to enforcing an agreement part of the consideration of which was unlawful. In such cases under section 24 of the Contract Act the whole contract must be considered to be void. 16 I C 42 foll 20 A L J Page 318, foll (*Abdul Raof and Moti Sagar, JJ*) *HAMAD YAR KHAN v SHANKAR DAS,* 1923 Lah 357

—Ss 68 and 66—Mortgage Misdescription—Action in deceit See (1922) DIG COL, 1035, *RAGUNATH SADASHIV THAKUR v, DADAJI SHAM RAO THAKUR* 70 I C 423

—S 68—Mortgage—Mortgagee dispossessed by stranger—Suit for recovery of mortgage money.

Where a mortgagee is dispossessed by a stranger claiming adversely to the mortgagor, the mortgagor is bound to defend the mortgagee's title and restore him to possession. If he fails to do so he must repay the mortgage money (*Heald, J*) *MAUNG PO KIN v, MAUNG KYAUK YE* 2 Bur L J 47

—S 68—Usufructuary mortgage—Implied contract for payment of Government revenue—Mortgage arrived at as a result of a compromise—Document not executed with stamp nor registered—Effect of.

## T P ACT, S 68

In every contract of usufructuary mortgage there is an implied covenant for quiet possession which implies a contract to pay the Government revenue. Where in execution of a money decree a compromise was arrived at as a result of which the decree-holder took possession of certain properties of the judgment debtor as usufructuary mortgagee but the document was not stamped or registered, held that the transaction having been entered into before the Transfer of Property Act did not require registration and that, even otherwise, the long course of conduct on the part of the mortgagor prevented him from disputing the validity of the mortgage. Both under the Hindu Law and under S 68 of the Transfer of Property Act a mortgagee could, if the property mortgaged is diminished insist on the mortgagor giving another security. 40 A, 187 referred to (*Ryves and Gokul Prasad, Jf*) RAM SEWAK RAI v SHEO NAIK RAI 45 A 388 L R 4 A 389 21 A L J 294 73 I C 945 1923 A 433 (2).

—S 68 (A)—Mortgage—Foreclosure Agree-  
ment to pay within fixed period—Default—  
Rights of mortgagor.

Where under a mortgage with a condition for foreclosure, the mortgagor agrees to pay the mortgage money within a fixed period, the remedy of the mortgagee in case of default by him to repay within the due date is to foreclose the mortgage. The agreement for payment cannot be construed into a personal covenant on the part of the mortgagor. Where there is no personal liability created under the terms of a mortgage, a subsequent acknowledgment cannot extend the time for meeting a non-existent liability (*Kotwal and Pricedaux, A J C*) HARLAL SA v SHAIKH RAHIM 70 I C 224

—S 69—Power of sale outside Court—  
Validity

It is possible in India to put a clause into a mortgage deed allowing of sale except through the medium of the Court, at least there is no positive enactment prohibiting such a stipulation being annexed to a mortgage where S. 69 of the T P. Act does not apply. To say that a limited company a creature of statute requires protection or that the trustees for the debenture holders are the persons who might take advantage of the scanty knowledge of the mortgaging company is really to consider the situation in a light almost absurd. (*Lord Dunedin*) KANHAYA LAL v. NATIONAL BANK OF INDIA, LTD

45 M. L. J 497 33 M. L. T 349 (P. C.)  
25 Bom. L. R 1248 75 I C. 7 50 I A 162  
4 Lah. 284 (1923) P. C. 114

—S 72—Improvements to suit the tenant—  
Increased rent—Mortgagor if to pay as for  
repairs.

Where a mortgagee incurs expenses in making improvements to suit his tenant and receives increased rent in consequence, the mortgagor cannot in redemption be asked to pay the money spent on the same. (*Ryves and Daniels, Jf*) CHHAMVU LAL v BHAIAN LAL.

73 I. C 985 (1); 1924. A. 47.

## T P ACT, S 74

—S 72—Mortgage—Suit for redemption—  
Covenant for re payment payable by mortgagor to  
landlord

An usufructuary mortgage contained the following stipulation, "Then payment of Zemin-dari rent shall rest with the Dharnadar, I the executant neither have nor shall have any concern there with. The Bharnadar shall himself obtain receipt on any behalf. At the time of payment of the said principal amount I shall pay the rent with interest at Rs 2 per cent per mensem." Held that both under the law and under the contract the mortgagee was bound to pay the rent due to the Zemindar and entitled to add it to the mortgage money. (*Ross J*) HIRA RAUT v. FAKIR CHAND 1 Pat L R 167 72 I C 391

—S 72—Puisne mortgagee—Redemption—  
Right to be paid moneys due under prior mort-  
gage.

Though the Transfer of Property Act does not in terms apply to the Punjab, the general principles contained in the Act govern the rights of parties. Consequently where a puisne mortgagee has paid off a decree on a prior mortgage he is entitled to be paid that decree amount as well as the amount of his own mortgage in a suit for redemption by the mortgagor (*Shadi Lal C. J and Abdul Qadir J*) HENRY ALFRED v. KARIM BAKHS. 69 I C 578.

—S 72 (b)—Improvements—Compensation  
for

Where a mortgagee in addition to repairing the house which had become uninhabitable extended the same and it was found the amount of money spent was not unreasonable he is on equitable grounds entitled to be paid for the improvements (*Marineau and Zafar Ali, JJ*) LABHU RAM v. ABDULLA 75 I. C 183 1923 Lah 587

—Ss 74 and 101—Mortgage—Prior and  
subsequent—Discharge of prior mortgagee by  
puisne mortgagee—Right to sue on prior mortgage  
—Defence

A puisne mortgagee who had discharged two prior mortgages sued to enforce all the three mortgages and the defence was that he had done so in pursuance of a contract for the purchase of the property itself. Held that assuming the contract to be true the plaintiff was entitled under the specific terms of S 74 of the Contract Act to enforce the prior mortgages. 4 A L J, 349, 6 A L J 549 dist. In cases where S. 74 of the T P Act applies no question arises as to whether the payment was for the benefit of the mortgagor or the mortgagee. It is enough if the person claiming the benefit of the payment was a mortgagee at the time of the payment (*Oldfield and Ramesam, JJ.*) GUJULUVA NAGAYYAR v. THUDUKUCHI GOVINDAYYAR 17 L. W. 14 70 J C 286 (2) 1923 Mad 349

—S 74—Mortgages prior and subsequent—  
Prior mortgagee purchasing property—Suit for  
sale by subsequent mortgagee—Rights of parties  
—Form of decree.

Where a prior mortgagee has brought the properties to sale under his decree and purchased

## T P. ACT, S 74

them himself he is entitled to hold up his mortgage as a shield against any attempt made by the subsequent mortgagee to deprive him of his rights

In a suit by the latter the form of decree should be that unless within the date fixed he pays in the amount due under the earlier mortgage the prior mortgagee would be entitled to ask for a dismissal of the suit (*Ryves and Daniels JJ*) PHUL CHAND v MT. SURJI  
74 I C 684 1923 All 457.

—S 74—Prior and puisne mortgagees—Redemption of prior by puisne mortgagee—Rights that pass to puisne mortgagee on redemption—Lease granted by redeemed mortgagee  
See (1921) Dig Col 1064 ALAGIRISAMI PILLAI v AKKULU NAIDU  
69 I C 651

—S 74—Prior and subsequent mortgages—Decree obtained by one without impleading the other—Effect of See C. P. CODE, O 34 R 15  
1923 All 423

—S. 74—Prior and subsequent mortgagees—Effect of not impleading latter—Rights of party

Where in a suit for sale by a prior mortgagee, a subsequent mortgagee is not impleaded and a sale takes place, the estate becomes vested in the purchaser, but he is subject to redemption by the puisne mortgagee. Redemption is the only right of the latter (*Halifax, A J. C*) LAXMI CHAND v NARAYAN  
6 N L J 237 1923 Nag 225

—S 74—Subrogation—Right when can be claimed See (1922) Dig Col 1036 SIBANAND MISRA v JAGMOHAN LAL  
1 Pat. 780.

—S 75—Puisne mortgagee—Right to redeem—Mesne incumbrance

A puisne mortgagee can redeem a prior one, even where there is a mesne incumbrance (*Dalal and Simpson, A J C*) DUBER v RAM SAHAL  
10 O L J. 305.

—S 76—Deposit—Mortgages remaining in possession after valid deposit—Liability to account for profits—Payment of Government revenue and charges incurred in repairs—Rights to deduct See T P, Act, Ss 83 AND 84  
44 M. L J 34

—S. 76 (a) & (h)—Mortgagee, in possession

The intention of parties in a case where the mortgagee is put in possession is merely that the land shall be properly cultivated and that the mortgagee in possession of the land shall put it to the best use so that a fair amount of profits may be realised and credited towards interest on the principal mortgage-debts, (*Chevis, J*) ZORA v. CHANDU.  
1923 Lah 71 (2)

—S 76 (g)—Duty to keep accounts—If can be contracted against

Under S 76 (g) T, P Act a mortgagee cannot contract himself out of the statutory liability to keep accounts. It is only under the circumstances mentioned in S 77 that the duty can be dispensed

## T P. ACT, S, 83

with (*Simpson and Wazir Hasan, A. J. C*) LAL BAHADUR v MURLI DHAR.  
74 I. C 95.

—S 79—Partition deed—Provision for discharge of debts according to allotment—Provision for charge on default—Effect of See (1921) Dig, COL 1065 See (1922) Dig COL 1037 SETHA AYYAR v SRINIVASA AYYAR  
70 I C 362.

—Ss 79 and 80—Scope of—

The words in section 80 in the case mentioned in S. 79 do not mean mortgages to secure further advances or the balance of a running account. The words of S 79 mean that the mortgage there referred to must express a maximum. The words to secure further advances, etc denominate the different classes of mortgages, but to bring them under S 79 they must have the common feature of a maximum expressed (*Lord Dunedin*) THE IMPERIAL BANK OF INDIA v U RAI GYAW THU & CO LTD  
45 M L J 505 1 Rang 637  
21 A L J 784 25 Bom L R 1279.  
9 O & A L R 937 33 M L T 395 (P C).  
2 Bur. L J 254 50 I. A 283  
(1923) M. W N 609  
1923 P. C 211 (P C).

—S 80—Priority—Subsequent advance—Notice

A mortgage by deposit of title deeds was entered into with a Bank as security for advance to be made but the maximum of advance was not fixed. The mortgagor then mortgaged some of the items to another and at the same time went on borrowing from the Bank. Held the second mortgagee would have priority except to the extent of the debt due to the Bank at the date of this mortgage (*Lord Dunedin*) THE IMPERIAL BANK OF INDIA v U, RAI GYAW THU & CO LTD,  
1 Rang 637 21 A. L J 784 25 Bom L. R. 1279  
9 O & A L R 937 33 M L T, 395 (P C),  
2 Bur. L J 254 50 I A 283 45 M. L. J. 505  
(1923) P. C 211 (1923) M W N 609 (P. C)

—S. 82—Contribution claim against mortgagor—Failure of mortgagee to redeem prior mortgage—Integrity of broken.

Two properties were mortgaged to same debt. A prior mortgagee of one of the properties brought a suit on his mortgage impleading the subsequent mortgagee and had it sold. Held the failure of the subsequent mortgagee to redeem did not split up the mortgage and when he recovered the whole of the mortgage amount from the other mortgagor, the latter was entitled to claim contribution against his co mortgagee (*Das and Macpherson JJ*) SANT LAL SINGH v NANKU LAL SINGH.  
(1923) Pat 389 75 I. C 96

—S 82—Contribution—Right to—Decision

The question of contribution between several subsequent mortgagees can be decided only in a properly framed suit for contribution. (*Das and Kulwant Sahay, JJ*) JAI PRAGASH SINGH v. RUP MANJARI  
4 Pat L T 91 71 I C 940  
1923 P. 199.

—S. 83—Deposit in Court Interest—Mesne profits.

## T P ACT, S 83

Where the mortgagor deposited the sum due in court and did all he could to enable the mortgagee to draw the amount and the same was not done because of the disputes among the mortgagee's heirs interest ceases to run from the date of deposit and the mortgagor is entitled to mesne profits (*Phillips and Devadoss JJ*) NAGATHAL v ARUMUGAM FILIAI

44 M L J 362  
17 L W 154 32 M L T (H C) 371  
1923 Mad 354

—Ss 83 and 84—*Deposit of mortgage money—Mortgagee, a minor—Procedure*

Section 84 of the T P, Act provides that, in the case of a deposit made under section 83 interest shall cease from the day on which the mortgagor has done all that has to be done by him to enable the mortgagee to take the amount out of Court. Where the mortgagee is a person who is unable to draw the money out of Court it is necessary that a guardian *ad litem* should be appointed and therefore unless such a guardian was appointed, it cannot be said that the mortgagor had done all that was necessary for him to enable the mortgagee to draw the money. Where the mortgagee happens to be a person incapable of entering into a contract, section 103 lays down the mode in which the mortgagor has to act in order to enable the mortgagee to take away the deposit made in court. According to the provisions of that section, in the case of such a mortgagee, the mortgagor has to apply to the court to have a guardian appointed in the manner provided for in chapter XXXI of the Code of Civil Procedure, which now corresponds to order XXXII of the present Code of Civil Procedure. Under that order the court may appoint a guardian upon application made by the plaintiff or by the guardian. It is the duty of the present plaintiffs, who stood in the shoes of the mortgagors, to apply to the court to have a guardian appointed, inasmuch as no one could withdraw the deposit on behalf of the minors unless there was a guardian appointed by the court. The mere fact of making an application would not enable any one to withdraw the money on behalf of the minors unless a person was appointed guardian *ad litem* by the court. It was, therefore incumbent on the mortgagor, or his representative, to see that a proper guardian was appointed by the court. It seems to us that section 103 was intended to provide for preliminary proceedings to be adopted by a mortgagor before making a tender or a deposit and it could not have been the intention of the section that the mere making of an application would be sufficient but that there should be a person appointed by the court to whom a tender could be made, or by whom a deposit could be taken out of the court.

When a guardian has been appointed by the court, it should be open to the person making a deposit of the mortgage money, to pay the difference of interest between the date of the original deposit and the date of the appointment of the guardian, and in a case where such a deposit has been made, and the full amount has been deposited on the date of the appointment of the guardian, further interest on the principal amount of the mortgage should, under the provisions of section 84, cease. (*Mears, C J and Banerji, J*) KANNU MAL v. INDARPAL SINGH

45 All 273

## T P ACT, S 83

—S 83—*Deposit Non-acceptance by mortgagee—Effect of—Mortgage if subsists*

The making of a deposit under S 83 of the T P Act by the mortgagor does not *ipso facto* extinguish the mortgage when the mortgagee has refused to accept the deposit. The parties remain in the relationship to one another of mortgagor and mortgagee. It is for the mortgagor dissatisfied with the action of the mortgagee in refusing to accept the money deposited to bring a suit for the enforcement of his legal rights. Unless and until he does so successfully, the mortgage still subsists (*Mears, C J and Piggoth, J*) AHMADULLAH v ABDUL RAHIM

45 A 592 21 A L J 545  
74 I C 763 1924 A 26.

—Ss 83, 84, 76—*Deposit under S, 83—Right of mortgagor—Mortgagee becoming owner of part of mortgaged property—Effect—Validity of deposit—Conditions—Effect of void deposit on rights and liabilities of mortgagor and mortgagee—Proper decree in such cases—"Gross receipts" in S 66 Cl (i)—Interest on profits if concluded—Payments by mortgagee of public demands on mortgaged property for necessary repairs and collection charges—Mortgagee's right to credit for—Rents and profits left uncollected—Mortgagee's liability for—Failure of mortgagor to get possession of portion of mortgaged property in pursuance of decree—Profits of that portion—Mortgagee when not liable for—Trusts Act, S 90—Applicability—Revenue sale of equity of redemption in mortgage property—Purchase by mortgagee—Validity—Revenue due in respect of property not mortgaged—Effect—Decree—Acquiescence by decree-holder—Execution of decree if amounts to*

An assignee of a three-fourth's share of the mortgagor's interest in one of the items mortgaged is entitled to make a deposit under S 83 of the Transfer of Property Act of the whole mortgage-debt notwithstanding that the mortgagees have become owners of part of the mortgaged property. The effect of such a deposit is to determine the mortgagee's right to possession as mortgagees and to transfer the same to the assignee who makes the deposit.

Mortgagees remaining in possession after a lawful deposit are entitled to credit for amounts which they paid after the tender to meet the revenue demands on the mortgaged property, and for necessary repairs and collection charges. The words "notwithstanding the provisions in the other clauses of this section" in S. 76, Cl. (i) of the Transfer of Property Act are not sufficient, especially having regard to the omission of any reference to S 72, to put the mortgagees in accounting for the gross receipts of property in a worse position than a trespasser.

Though after a lawful deposit by the assignee in such a case the mortgagees have no right to retain possession and should be made accountable on that basis, still, having regard to practical convenience and the scheme of Transfer of Property Act, the proper course in such a case would, be to determine the amount of the mortgage debt for which the properties purchased by the mortgagees are liable and to finally settle the

## T P. ACT, S 83.

question arising between the parties so as to obviate the necessity for a fresh suit

" Gross receipts from the mortgaged property, in S 76 cl (1) of the Transfer of Property Act do not include interest upon the amounts collected. *Held*, therefore that the assignee making the deposit was not entitled to interest on the profits from the date of collection

For arrears of Government revenue due on properties of the mortgagor other than those comprised in a mortgage the equity of redemption in certain of the mortgaged properties was sold and purchased by the mortgagee themselves. There was nothing to show that the mortgagees availed themselves of their position as such in getting the properties sold or in buying them. *Held* that the revenue sale was valid and binding on the mortgagor and the equity of redemption thereby became vested in the mortgagees.

*Per The Chief Justice*—Even in cases in which the mortgagees have become the owners of part of the mortgaged property, the mortgagor making a deposit under S 83 of the Transfer of Property Act is bound to deposit the whole of the mortgage amount where the amount of the proportionate reduction of the mortgage debt has not been ascertained either by agreement or by the Court

*Per Krishnan, J*—Where, in a case in which the mortgagor deposited under S 83 of the Transfer of Property Act the whole of the mortgage debt, the mortgagees applied to draw out the amount without prejudice to certain contentions they were raising and asked for an order of Court to that effect, but the mortgagor objected to any such order being made, and the mortgagee's application was thereupon dismissed, *held* that the mortgagor was justified in so objecting and that his action did not affect the validity of his tender in any way

Execution of a decree does not estop the decree holder from appealing from it so far as it is against him

After a valid deposit by the mortgagor under S 83 of the Transfer of Property Act the mortgagee becomes liable not only for the total amount of rents and profits actually collected by him but also for the amount it left uncollected by him on account of his failure to make his best endeavours to collect them,

On a valid deposit under S 83 of the Transfer of Property Act, the Court directed the whole of item 1 of the mortgaged properties to be put in possession of the mortgagor. The mortgagor got possession of the item with the exception of 19 and odd acres, which were in the possession of a third party. The mortgagor's failure to obtain possession of the 19 and odd acres was not due to any default on the part of the mortgagee. The mortgagor did not complain to the Court that there was a short delivery, neither did he intimate to the mortgagee that there was any difficulty on account of short delivery. On the other hand, the mortgagor sued the party in possession for recovering the 19 and odd acres from him with mesne profits. *Held* that having had recourse to make the mortgagor liable he was not entitled to make the mortgagee liable for the pro-

## T P ACT, S 83.

fits to that extent (*Krishnan and Venkatasubba Rao, JJ*) *TADEPALLI SUBBA RAO GARU v SRI BALUSU BUCHI SARVARAYUDU*

44 M L J 534 72 I. C 292  
18 L W 61 1923 M W, N, 533 1923 Mad 533

—Ss 83 and 84—Minor mortgagee—Appointment of guardian to draw out money—Duty of mortgagor—Interest when ceases to run

Where a mortgagor deposits the money due in court, but the mortgagee happens to be a minor, it is the duty of the former to see that a proper guardian is appointed for the purpose. The mere fact of making an application will not enable any one to withdraw amount unless a person is appointed by court, and until that is done, interest will not cease to run (*Mears, C J and Banerjee, J*) *KHUNNU MAL v INDARPAL SINGH*  
21 A L J 39 71 I C, 278 L R 4 A, 331.  
1923 A 183

—S 83—Mortgage money—Deposit by mortgagor—Refusal to accept deposit—Subsequent application by mortgagor to withdraw deposit—Legality of

On the 13th June 1922 the mortgagor deposited a sum of Rs 2,825 in the Court of the Subordinate Judge by way of tender in satisfaction or discharge of two mortgage debts due to the opposite party mortgagees. On the 29th June the mortgagees filed a petition objecting to the tender on various grounds and the Subordinate Judge instead of disposing of the petition summarily allowed the parties time to compromise the case. Finally there was no compromise and on the 29th July 1922 the Subordinate Judge, made the following order—*Hazri on behalf of both parties filed* Ordered that the case be disposed of.

On the face of it the order did not seem to be very clear, but having regard to the papers on the record what the Subordinate Judge decided was that as the tender was not accepted, the case was disposed of and the mortgagor was entitled to withdraw his money. On the 29th November 1922 the mortgagees apprehending that the mortgagor was about to carry out the order of the Court *held* an application that a criminal case of theft in connection with the mortgage deeds was pending against the mortgagor and praying that the money might not be paid over to the mortgagor till the disposal of that case.

On the 4th December 1922 the mortgagor applied for the return of the money but the subordinate Judge directed that the payment should be withheld till the disposal of the criminal case. On the 11th April 1923, the case was heard in the presence of both sides, the criminal case by that time having been disposed of and having ended in the acquittal of the mortgagor. On that day the mortgagees finding that the money was about to be returned to the mortgagor suddenly changed their willingness to accept the tender in full discharge of their dues. The Subordinate Judge allowed the prayer and directed that the money should be paid to the mortgagees upon their executing a security bond to refund the money. *Held*, it was not competent to the Subordinate Judge to direct the money to be paid to the mortgagees when the tender was no longer open,



## T P ACT, § 83

After the disposal of the case on the 29th July 1922 there was no other tender, and the money was the mortgagor's money and the mortgagor was entitled to withdraw it at her own pleasure. Being therefore of opinion that there was no tender outstanding the order directing the money to be paid to the mortgagees seems to have been made without jurisdiction.

It is also not clear how a security bond was taken, for § 83 of the Transfer of Property Act does not authorize the Court to take any security bond from any party, (*Mullick and Bucknill, JJ*) MT RATNA KOER v MT NANHARI

(1923) Pat 256 73 I. C. 1053  
4 Pat L. T. 720 1924 P 41

—§ 83—Tender by deposit in Court—When sufficient See (1922) Dig COL 1038 SANT RAM v JARBHANDAN 70 I C 494 (1)

—§ 83—Tender of mortgage money—Validity of—Offer and refusal—If necessary Propriety of tender—Test of

It is not the practice of the Court to require a party to make a formal tender where from the facts stated in the plaint or from the evidence it appears that the tender would have been a mere form and that the party to whom it was made would have refused to accept the money. At the same time there must be a clear release to the mortgagor of his obligation to tender the money to justify the latter in not having presented the money to the mortgagee. In considering the question of tender it is not necessary for the Court to speculate as to whether the mortgagor had the money or the control of the money that would have enabled him to meet the large amount that was due on the mortgage. It is very difficult indeed to say whether or not a man will be able to have control of money at a future date (*Lord Buckmaster, J*) CHLIKANI VENKATA RAYANIM GARU v. SREE RAJAH VATSAVAYA VENKATA SUBADRAYAMMA 44 M L J 631  
46 Mad 108 71 I C 1035 25 Bom. L R 541  
38 C L J 34 28 C W N 25 50 I A. 41  
32 M. L T (P C.) 70 17 L W. 383  
1923 P. C. 26 (P C)

—§ 84—Cessation of interest

Where the mortgagor did apply for issue of notice to the mortgagee and gave the correct address, though as a matter of fact notice was not actually served on the mortgagee till after a long time, the duty of getting service effected on the mortgagee was no part of the duty of the mortgagor. The mortgagor therefore had done all that had to be done by him to enable the mortgagee to take the money out of Court and hence interest ceased to run from that date (*Stuart and Sulaiman, JJ*) PANDIT JIVA RAM v. THAKURAN KHEM KOER 70 I. C. 811  
1923 A 24

—§ 84—Tender—When proper

The mortgagor gave the defendants mortgagees notice to redeem. To that notice the defendants replied that the deed was really one of sale and not of mortgage, but at the same time they set forth the sum which they claimed. The mortgagors never asked for further details of the defendant's claim and made no counter. They sued nearly

## T P. ACT, § 91

two years later, they did not offer any specified sum in the plaint or pay anything into Court, held, that they made no legal tender within section 84 36 All 139, 42 All 420 Ref, (*Scott Smith and Fforde, JJ.*) BUDHU RAM v NIA MAT RAI 4 Lah 406. 75 I. C. 375  
1923 Lah 632

—§§ 88 and 89—Attachment of property—Mortgage pending attachment—Decree for sale on mortgage—Purchase by money decree holder—Exemption from sale under mortgage decree See (1922) Dig COL 1039 SARJU PRASAD MISSIR v MAKSUDAN CHOWDHURY 27 C W N 275  
73 I C 882

—§ 89—Order absolute for sale—Effect of—Advance to pay off the mortgage.

The effect of the passing of an order absolute under § 89 of the T P. Act has the effect of extinguishing both the security and the rights of redemption in the entire mortgage. Consequently an advance of money for the payment of decree cannot revive the mortgage (*Rafiq and Stuart, JJ*) JAGANNATH PRASAD v MT. CHATUR KUR 45 A 149 (1923) A 171

—§ 91—Attaching creditor—if necessary party to redemption suit—Right to redeem. See C P CODE, O 34, R. 1 1923 Nag 311

—§ 91—Mortgage—Prior mortgagee claiming to redeem—Puisne mortgagee in possession

After a mortgage of 1898, the mortgagor again mortgaged the property in 1904. The puisne mortgagee defendant brought his mortgage suit in 1906 and it was compromised in 1907. The mortgagor failed to pay the instalments and the property as provided by the decree passed in execution to the puisne mortgagee defendant in 1911, his foreclosure suit having been dismissed. In 1909 the prior mortgagee brought a suit on his mortgage, obtained a decree for sale in 1910 and assigned it in 1915 to plaintiff who in 1918 purchased the property. Plaintiff then sued defendant claiming to redeem him and contended that there never was passed a final decree in defendant's suit.

Held, Assuming that a prior mortgagee is a person who has a right to redeem under § 91 (a) of the T P Act, his rights as a mortgagee having become merged in his decree he cannot any longer claim to redeem the mortgage in that capacity. So long as the defendant's right to redeem the plaintiff as prior mortgagee subsists the plaintiff cannot exercise his right, if any, to redeem the defendant's mortgage, for the result of allowing him to do so would be to compel the defendants to redeem the plaintiff at a time chosen by the plaintiff or be redeemed themselves. As an auction purchaser the plaintiff's rights came into existence after the defendants had got their decree and possession thereunder and he cannot claim to be in any better position than the mortgagor whose interests he claims to represent. T P Act was not in force in Berar at the date of the defendant's decree and there was no compulsion on the Court to pass a final decree nor did the decree actually passed contemplate a final decree (*Kotwal, A. J. C.*) LAXMI NARAYAN v RADHAKRISHNAN. 1923 Nag 24

## T. P. ACT, S. 91

—S 91—Persons entitled to redeem—Grand daughter—Collaterals.

A Mahomedan lady mortgaged her property to defendant and assigned her mortgagor's right to her daughter after whose death the names of her daughter (plaintiff) and son were entered in the revenue papers. After her brother's death, plaintiff sued for redemption.

*Held*, the defendant was certainly entitled to object to redemption being claimed by any one except the original person.

The plaintiff without showing that she had a right of succession against the collaterals was not entitled to a decree, and the question as to whether plaintiff had preferential right of succession must be tried in the suit for redemption (*Abdul Raoof, J*) MAHAMMADA v MUSSAMMAT AIJAN 1923 Lah 222

—S 91—Tenant from year to year—Right to redeem.

A tenant from year to year is not one of the persons who are entitled to redeem under S 91 T P Act (*Dalal, J. C*) KALU SINGH v HANSRAJ UPADHYA 90, & A L R 812

—S 95—Co-mortgagors—Redemption by one—His rights

A mortgagor who redeems the whole property is entitled to a rateable contribution from the other mortgagors and as a security for which he is entitled to hold the entire property in charge until he is in turn redeemed by his co sharers on payment of their share of the debt. He has only an equitable charge and it cannot be said that the shares of the co-mortgagors are mortgaged to him who has redeemed the whole mortgage. Once one of the mortgagors has redeemed the whole mortgage the mortgage comes to an end and the redeeming mortgagor is not a mortgagee within the meaning of S 58 of the Transfer of property Act but merely has an equitable charge against his co-mortgagors on the security of their share 27 C. L. J 110 referred to. (*Scott Smith Brasher, JJ.*) ALI AKBAR v SULTAN-UL-MULK 69 L. C 653 1923 Lah 129,

—S 95—Co-mortgagors—Redemption by one—Rights of persons redeeming.

Where one of several mortgagors has redeemed a mortgagee under which all were liable he is entitled to be treated as an assignee of the security which he pays off and his remedy would be to enforce that security in the usual way by a suit for sale. (*Dalal and Simpson, A J C*) LUTAR RAM v. LAL RANJIT SINGH, 90 & A. L. R 677 73 I C 113

—S. 95—Anomalous mortgage—Period fixed—Redemption.

A mortgage for a fixed term without any provision for accounting is in the nature of an anomalous mortgage and it automatically redeems itself at the end of the fixed period, (*Batten J C*) BHILKA v SHAIKH AMIR, 19 N L R 1 69 I C, 511 1923 Nag. 60

—S. 98 and 60—Anomalous mortgage—Redemption—Suspension of right—Clog on redemption. See (1922) DIG. COL. 1039 MAHOMED SHER KHAN v RAJA SETH SWAMI DAYAL 28 C. W. N 79

## T. P. ACT, S. 101

—S 98—Clog on equity of redemption—How far enforceable See T P, ACT Ss 60 AND 98 1 Rang 419

—S 100—What is charge

At the foot of a hundi a note was added in the following words —“*Hamari Delhi wa Luthiana khajadad is garze ki zimmedar hogi*”, *held* these words do not create a charge (*Abdu Raoof, J*) PURANCHAND v PURAN CHAND 75 I C 441 1923 Lah 652 (2).

—S. 101—Charge—Extinguishment

Under S 101 T P Act, the charge will not be extinguished if the owner of the charge declares by express words or necessary implication that it should continue to subsist or such continuance would be for his benefit (*Kulwant Sahay and Foster, JJ*) MAHARAJA BAHADUR KESHO PRASAD SINGH v LAKHU RAI (1923) Pat 258 4 Pat. L T 525 75 I C 305 1923 P 581

—S. 101—Merger—Acquisition of equity of redemption by mortgagee—Effect of—Presumption See (1922) DIG. COL. 1040 BAI REVA v VALIMAHOMED MIYAMAHOMED. 70 I C 912

—S 101—Mortgage—Keeping alive—Decree on prior mortgage.

Where an intermediate mortgagee discharged a prior and puisne mortgage on which a decree had been passed in a suit to which the intermediate mortgagee was a party *Held*, that the intermediate mortgagee must be deemed to have kept alive the two mortgages for his own benefit (*Oldfield and Remesam JJ*) GUJULUVA NAGAYYAR v GHUDUKUCHI GOVINDAYYAR. 17 L W 14 70 I C 286 (2) 1923 Mad 349

—S 101—Mortgage—Keeping alive—Presumption—Intention of mortgagee

In cases where the ownership of the property itself has come into the hands of the mortgagee and the mortgagee wishes to hold up his mortgage as a shield against some person, who is entitled to a decree for possession of the property the question is whether the mortgagee kept the mortgage alive at the time he came into possession of the equity of redemption or whether he allowed it to become extinguished. In England where the rules of the conveyancing are very strict, it is the invariable practice to have the mortgage assigned to trustees for the express purpose of keeping it alive. This is never done in India and the Courts have usually looked to see whether it was to the interest of the mortgagee to keep his mortgage alive, and if they found it to be this interest, they have assumed that he did intend to keep it alive (*Dalal and Simpson, A. J. C*) BALDEO SINGH v, THE DUPUTY COMMISSIONER, KHERI 100 L. J. 112

—S 101—Mortgagee purchasing equity of redemption—Effect

The second part of S 101 T P. Act does not apply where no intervening encumbrances exist and in such a case where the mortgagee purchases the equity of redemption, the mortgage is extinguished (*Broadway and Zafar Ali, JJ*) GOBIND SARUP v. KULDIP SINGH 73 I. C 764

## T P ACT, S 101

—S 101—*Prior mortgagee purchasing property—Agreement to pay subsequent mortgage—Priority if can be pleaded in suit by latter*

The prior mortgagee of the suit property purchased the property and a part of the consideration agreed to redeem the subsequent mortgagee. Held, in a suit by the puisne encumbrancer on his mortgage, the former cannot set up his own priority as a shield, as the effect of the covenant was to extinguish his own charge. (Krishnan and Venkatasubba Rao, JJ) GARUDAPPA v JANAKI 45 M L J 693 18 L W 530

—S 103—*Scope of*

S 103, T P Act, was intended to provide for preliminary proceedings to be adopted by a mortgagor before making a tender or deposit and it could not have been the intention that the mere making of an application for appointing a guardian would be sufficient to prevent interest running against a minor mortgagee. There should be a person appointed by court to whom a tender could be made or by whom a deposit could be taken out of court. (Mears C J, and Banerjee J) KHUNNU MAL v INDARPAL SINGH 21 A L J 39 L R 4 A. 331 71 I C 278 (1923) A 133

—S 106—*Contract to the contrary*

Where it was clearly stated that after the expiry of the time of lease, the lessor, if he wanted the lessee to quit was to give him a week's notice and if the lessee quitted the premises in accordance with the notice well and good, otherwise he would be liable to pay rent at the enhanced rate entered in the notice.

Held ten days notice was sufficient and as lessee did not quit he was liable to pay rent for that month at the enhanced rate if it is reasonable. (Scott-Smith, J) SAHIB DAYAL v DHANPAT RAI, 75 I C 490 1923 Lah 281 (2)

—S. 106—*Expiry of lease—Tenancy from year to year—Notice to quit*

Where a tenant of agricultural lands continues to be in possession after the expiry of his lease with knowledge and consent of his landlord, then there is, by operation of law a new tenancy from year to year in favour of the tenant determinable only by a notice under S 106 of the T P Act. (Das and Kulwant Sahay, JJ) STONEWIGG v KAMESHWAR NARAYAN SINGH (1923) Pat 122 71 I C. 1022 1923 P. 340

—Ss 106 and 116—*Invalid permanent lease by head of religious endowment—Position of lessee*

Where a tenant took a lease for 10 years from the mutwalli of a mosque with a covenant for renewal and it was found that the covenant for renewal was *ultra vires* the trustee, the lessee holding over must be deemed to be holding on a monthly tenancy. 32 C 123 Rel. (Mookerjee and Cuming, J) GAJENDRA NATH DEY v MOULVI ASHRAF HOSSAIN. 27 C W N 159 69 I C 707 1923 Cal, 130

—S. 106—*Notice to quit—Objection of legality of not to be raised on appeal for the first time.*

## T P, ACT, S 108

Where there is an allegation in the plaint as to the service of a due and proper notice to quit which is not denied in the written statement and no issue is raised as to the sufficiency of the notice, the debt must be held to have waived any objection to the adequacy of the notice. The objection cannot be permitted for the first time on appeal. (Robinson C J and Macgregor J) THE PUNJAB MOTOR CO v SHEIKH JUMAN 70 I C 834 1923 Rang, 13

—S 106—*Scope of Applicability to Punjab*

S 106 merely lays down in a codified form what in fact has always been understood to be the general law on the subject. A condition in the lease that the landlord would give one month's notice if he wanted to have the premises vacated does not mean that notice could be given at any time and that it was not to expire with the end of the month of tenancy as required by S 106. The principle of the section applies to the Punjab. (Moti Sagar J) CHUNI LAL v, CHUNI LAI 1923 Lah 659

—S 106—*Service of notice—Joint tenants*

Where in a case of joint tenants, there is a tender or delivery of the notice to quit to the heads of their respective families, the service is sufficient notwithstanding that there is no proof of prior tender or delivery to each of them personally.

The word "or" in S 106 T P Act is used in an alternative sense. The expression "if such tender or delivery is not practicable" is used with reference to the contingency when service is effected by fixing the notice to a conspicuous part of the property. (Mookerjee and Chotzner, JJ) KEDAR NATH SADHUKHAN v MADHU SUDAN DAS 37 C L J 478 75 I C 105 1923 Cal 682

—S 108—*Damages for holding over*

The landlord is entitled to special damages where a tenant holds over, either for breach of contract to yield possession or for possession English Law considered. (Page, J) SUNDERMULL v LADHURAM KALURAM 50 Cal 667

—S 108—*Duty of lessor to effect repairs—Neglect—Effect*

None of the clauses of S 108 T, P Act, entitles lessee to call upon the lessor to repair the property. In fact unless there is a contract to the contrary the lessor is not necessarily bound to make any repairs whatever. Even if the lessor was under an obligation to effect the repairs and failed to comply with the request of the lessee the lessee is not entitled to terminate the tenancy. Under S 108 he could remedy the breach himself after giving a reasonable notice to the lessor and to recover the amount expended by him together with interest either by deducting it from the rent or otherwise. (Mookerjee and Chotzner, JJ.) BIJOI CHANDRA SINGH v HOWRAH AMTA LIGHT RAILWAY CO, LTD 38 C L J 177 72 I C 98 1923 Cal 524

## T P ACT, S. 108

—S 108—Lease—Joint family—Hindu Law—Co parceners—Contemporaneous sale and mortgagee See (1922) Dig Col. 1041 NARAIN DAS v ABINASH CHANDER 44 M L J 728 27 C W N 299 21 A L J 201 37 C L J 457, 69 I C 273 (P C)

—S 108 Cl 1—Lessee—Transfer of interest to third person—Liability to pay rent

A lessee who transfers his interest in a portion of the property leased does not thereby escape liability to pay rent to the landlord under the term and covenant contained in the lease, 22 C 494, referred to, 22 C, 494 Ret (Ghose, J) MANMATHANATH CHUKERBUTTY v BAIJAI CHANDRA BAG 70 I C 111

—S 109—Lessee claiming under foreclosure decree purchaser

A lessee was granted after a mortgage. The lessee. The lessor instituted the present suit after the expiry of the lease.

Held when the lease has terminated it is open to the man in possession to dispute the lessor's title to the land on the ground that ownership of it had passed either by a transfer or operation of law, to another (Prideaux, A J C) DAULAT v SARDARSINGH 1923 Nag 91 2)

—S 109—Transfer of lease-hold interest Absence of notice to lessee—Effect of suit for rent

Where the lower Court dismissed a suit for rent on the ground that the defendant was not a tenant of the plaintiff for the reason that the transfer of the property by defendant's lessor to the plaintiff was not notified to the defendant held that S 109 of the T P Act provided no penalty for want of notice except the loss of rent paid by the lessee to the original lessor and that the dismissal of the suit *in toto* was improper (Le Rossignol, J) BHOLA NATH v SUPFER, 72 I C, 86 (1) 1922 Lah 318 (1)

—Ss 111 and 114—Distinction between clauses of forfeiture and nullity—English Law and Indian law See (1922) Dig Col 1043, HIRANANDAN OJHA v RAMDHAR SINGH, 4 Pat L T 292 69 I C 886

—S 111—Surrender of lease—Acceptance of new lease implied—Surrender—Subsequent lease invalid—Effect of

An implied condition of surrender of a lease by operation of Law is that a new lease should be a valid one. Accordingly, a lease which is void or voidable or which does not pass interest according to the contract of the parties does not operate as a surrender. Where the new lease does not pass an interest according to the contract, the acceptance of it will not operate as a surrender of the former lease, in the case of surrender implied by law from the acceptance of a new lease a condition ought also to be understood as implied by law, making void the surrender in case the new lease should be made void and in case of an express surrender so expressed as to show the intention of the parties to make surrender only in consideration of the grant, the sound construction of such instrument, in order to effectuate the intention of the parties, would make

## T P ACT, S. 114

that surrender also conditional, to be void in case the grant should be made void. An alteration of the terms of the tenancy, namely, the rent reserved under the lease is not equivalent to an implied surrender of the lease 32 C 41, 32 C, 51, 34 Cal 904 referred to (Mookerjee and Chotzner, JJ) JAMINI MOHAN SARKAR v DEBENDRA NARAYAN SINGH 71 I C 976

—S 111 (g)—Landlord and tenant—Forfeiture—Overt Act—Necessity for, prior to suit

Denial of a landlord's title by a tenant to work a forfeiture of the tenancy must be in clear and unmistakable terms and must be before the suit. Denial in the written statement in the suit is not sufficient. Where a person has substantial rights in the land, his assertion of a title as owner does not amount to a denial of the landlord's title and does not involve a forfeiture. Though the T P Act does not, *proprio vigore* apply to the Punjab still the principles embodied therein may be applied as being principles of equity, justice and good conscience 32 M 589 Rel (Broadway, J.) CHIRAGH DIN v MAHOMED USMAN KHAN 70 I C 439

—S 111 (g) and 114—Lease—Non payment of rents—Forfeiture—Covenant for re-entry—Relief against

Where the landlord had taken a large sum by way of premium under a registered lease for ten years and the rent was payable on the first of every lunar month falling which the lease was to stand cancelled held that it was against equity and good conscience to allow the landlord to cancel the lease after having taken such a large sum as premium simply on account of a few days delay in payment of rent especially as the lessee had not even then taken possession of the premises (Broadway and Abdul Qadir, JJ) KALLAN v JAWAHAR SINGH, 5 Lah L J 99 71 I C, 837. 1924 Lah. 49

—S 112—Rent accepted under protest

The acceptance of rent due after forfeiture from the lessee—and this notwithstanding the protest of the lessor that such acceptance is without prejudice to his right to insist upon his forfeiture operates as a waiver of a notice (Mookerjee and Rankin, JJ) BENGAL NAGPUR RY Co v FIRM OF BAL MUKUNDA BISSESWAR LALL 1923 Cal 663

—S. 114—Landlord and Tenant—Non-payment of rent—Forfeiture—Power to relieve against—Period of grace—Provision in deed—Effect of.

It cannot be laid down broadly that if a lease provides for a period of grace the Court has, no power to relieve against forfeiture for default in payment of rent. The law treats the condition of forfeiture as a penalty intended to enforce the payment of rent and liable to be relieved against by the Court. The discretion in granting relief against forfeiture for default in payment of the rent should as a rule be exercised in favour of the lessee unless sufficient reasons for refusing it are shown. Where however the tenant pleaded discharge which was found against the Court, refused to relieve against forfeiture having regard

## T P ACT, S 116

to the failure of the tenant to pay the arrears during the hearing in the Lower Courts and having regard to the fact that a sufficiently long period of grace given by the lease was allowed to to pass without payment (*Kotwal, A' J C*)  
**AKJUN v NARAYAN** 19 N. L R 50 71 I C 445  
 1923 Nag 193

———S 116—*Holding over—Dispossession by claiming under landlord—Suit for possession*

Where a lessee holds over after the expiry of his term without the express or implied consent of the landlord he is only a trespasser and where he is dispossessed by a person claiming under the landlord, he cannot maintain a suit for possession or declaration of title based on his previous possession (*Jwala Prasad, A C J and Ross, J*) **MATHURA PRASAD v NAJU KHAN**  
 4 Pat L T 696

———S 116—*Holding over—Notice to quit*

Where a tenant holds over after the expiry of the lease on payment of rent to the landlord, he must be deemed to be a tenant from year to year or from month to month according to the object for which the property was leased having regard to the provisions of S 106 of the Act. A notice of determination of a monthly tenancy must expire with the end of the month and a notice of more than 15 days expiring in the middle of a month is imperative to terminate the tenancy (*Mukerji and Choizner, JJ*) **BIJOICHANDRA SINHA v HOWRAH AMTA LIGHT RAILWAY CO LTD**  
 72 I C 98 38 C L J 177  
 1923 Cal 524.

———S 116—*Holding over—Payment of rent—effect of—Tenancy from month to month or year to year* See LIM ACT, ART 139

(1923) Pat 54

———S 117—*Agricultural lease—Casuarina cultivation* See (1923) DIG COL 1043 **PAVADAI PATHAN v RAMASWAMI CHETTY** 70 I C 657

———S 117—*Agricultural lease—Oral lease*

The letting out of agricultural land need not be by a document only, it may be by oral agreement or even by conduct of parties (*Suhrawardy and Cuming, JJ*) **ALAM MULLA v SURENDRA KUMAR**  
 1923 Cal. 432

———Ss. 120, 118 and 119—*Exchange and sale on same footing*

The provisions of sections 118, 119 and 120 show that the Legislature has put an exchange on the same footing with a sale in almost every respect. For example, a transfer of property in completion of an exchange can be made only in manner provided for the transfer of such property by sale. According to S 120, each party has the rights and is subject to the liabilities of a seller as to that which he gives, and has the rights and is subject to the liabilities of a buyer as to that which he takes (*Abdul Raoof, J*) **KUNDAN EAL v ANUND SARUP,**  
 73 I C 709  
 1923 Lah 456

———Ss. 122 and 123—*Gift deed—Donor adopting after handing over deed to donee but before registration—Effect.*

## T P ACT, S 123.

A Hindu made a gift of his immovable properties, but between the date of handing over the deed to the donee and the registration thereof adopted a son to himself. Held, the deed was irrevocable and the adopted son could not question the same (*Schwabe, C J Coutts Trotter and Kumaraswamy Sastry, JJ*) **KALIYANASUNDARAM PILLAI v KARUPPA MUPPANAR**  
 17 L W 232 73 I C 206 1923 Mad. 282

———Ss 122 and 123—*Gift—Essentials of—Intention to give—Acceptance—Gift of moveables*

In order that a transaction may operate as gift there must first be a transfer of the property which in the case of moveable property may be effected either by a registered instrument or by delivery, and secondly, there must be acceptance by or on behalf of the donee. Under S 123 of the T P Act a gift of moveables may be made by doing anything which has the effect of putting them in the possession of the donee or of any person authorised to hold them on his behalf (*Das and Adami, JJ*) **RAMESHWAR NARAIN SINGH v RIKNATH KOER** 1923 P 165

———S 123—*Attestation—Proof—Acknowledgment of execution—Effect of*

An attestation of a deed of gift by a person without seeing the actual execution of the document but merely on the executant's acknowledgment or admission of its execution is insufficient. Where there was no issue to the court below as to whether the deed of gift relied on by the plaintiff was validly attested but it was clear from the document itself that the witnesses who purported to attest had not been present at the time of the execution of the deed, the High Court refused to frame an additional issue on the point and to send it down to the lower court for decision and declared the invalidity of the gift (*Miller, C J and Mullick, J*) **BAJUNATH SINGH v. MT BIRAJ KUER** 2 Pat 52 4 Pat L T. 239

———S 123—*Gift—Attestation—Proof—Denial of attestation by attester*

Even though one of the attestors denies having attested the execution of a deed of gift, it is open to the Court to come to the conclusion from other evidence that he had in fact so attested (*Duckworth, J*) **AUNG RHI v MA HUNG KEWA FREE** 1 R 557

———S 123—*Gift—Incomplete gift—Rights of donor and donee—Relationship of trustee*

The defendant was the employee of a Railway company and on his retirement the company sanctioned a retiring gratuity of Rs 7,700. The defendant desired the payment to be made in London and the company sent the amount to their bankers at Bombay for being forwarded to the Secretary of the G I P Ry in London. Before the money could be so remitted the plaintiff in execution of a money decree against the defendant attached the sum in question. Held that at the date of the attachment there was no completed gift of the amount or any part thereof to the defendant and that the attachment was therefore inoperative. The retiring gratuity being in the nature of a gift if should be completed either by a registered document or by actual payment. A transfer intended to operate as a gift but

## T P ACT, S 123

invalid as such will not constitute the donor a trustee of the property for the intended donee, in other words, an imperfect gift will not be construed as a declaration of trust. (*Mulla J*) *NATHA GULAB & Co v W C SELLER*

25 Bom L R 599

—S 123—Gift—No registered deed—Once in possession—Estoppel—Equitable relief

Where there is a gift of lands in favour of a minor under which the donors divested themselves of the ownership of these lands and the minor has alone been in possession since the date of the gift *Held* in a suit by the donors or any person claiming through them, the minor can resist the claim on the ground of estoppel even though there was no registered deed of gift. The Transfer of Property Act was enacted in order to prevent fraud and deception and it is founded on the highest principles of Justice, equity and good conscience. (*May Ung, J*) *M P L M P CHETTY v MA NGWE SIN.*

1 Rang 665

—S 123—Gift unregistered—Actings of parties—Possession Given—Estoppel

A donor who made a gift of immoveable property put the donee in possession of the land and transferred it to him. There was no registered deed. Subsequently the donor died and the donee submitted a report to the revenue surveyor for mutation of names in the official record. The heirs of the donor attested the report and were present when it was made. *Held*, that the heirs of the donor were estopped from impeaching the gift thereafter. (*Heald, J.*) *MA SHIN v MAUNG HMAN*

1 Rang 651,

—S 123—Hindu Law—Gift—Delivery of possession—Necessity for. See (1922) DIG COL 1044 *LALLU SINGH v GUR NARAIN*

45 All 115

—S 126—Voidable gift—Right of transferee to avoid

The right of a person to avoid a voidable gift is one personal to himself and cannot be transferred. (*Miller C, J and Mullick, J*) *BAJNATH SINGH v MT BIRAJ KUER.*

2 Pat 52

4 Pat L T 239

—S 130—Actionable claim—Right to recover goods lent or to claim damages—If can be transferred. See T, P ACT S 6 (E)

69 I C 238.

—S. 130—Arrears of rent due—Assignment of

The transfer of a right to arrears of rent and current dues can only be made by an instrument in writing under S 130 of the T P Act. (*Das and Adam, JJ*) *RAMESHWAR NARAIN SINGH v RIKNATH KOERI*

1923 F 165

—S 130—Assignment of decree—Validity—Notice.

In the case of an assignment of the decree debt, the assignment is not valid as against the debtor until the debtor has in fact notice of the assignment and any payment to the original decree holder is valid against the assignee if made before notice of the assignment. (*Miller, C J and*

## TREES

*Kulwani Sahay, J*) *TATA IRON AND STEEL CO LTD v BAIDYANATH LAIK* 2 Pat 754

—Ss 130 and 131—Contract for supply of goods—Assignment—Notice of—Notice of address of solicitor of assignee—Not a sufficient Compliance

To attract the operation of the Exception in S 130 of the T P Act, there must be a strict compliance with the requirements of S. 131 of that Act. Where therefore a notice of assignment of a contract for sale of goods did not state the address of the assignee but only his Solicitor's address *Held*, that the notice was defective and did not prevent the vendor from dealing direct with the vendee. 9 Bom L R 838, 8 Bur L T 266 Rel on

*Per Rankin, J* In construing Ss 130 and 131 of the T P Act it must be remembered that they contain a very special scheme which must be regarded as a whole in itself. At Common law a chose in action was not assignable, in equity it was freely assignable upon certain principles as to notice. The Indian Legislature has composed a new scheme which has some of the features of both and the law, while regarding the transfer of an actionable claim as valid if effected in a certain manner, will not undertake to enforce against a debtor the assignment except upon the terms that the debtor may arrange with the original creditor unless and until he has received in writing a particular kind of notice. (*Mookerjee and Rankin, JJ*) *MRS. SADASOOK RAMPROTAP v HOARE MILLER AND CO.*

27 C W N 738

1923 Cal 719.

—S 130 (1)—Insurance policy, if can be assigned—Rules prohibiting assignment.

Though ordinarily an insurance policy can be assigned, yet if the rules of the particular company prohibit an assignment, the general provisions of S 130 (1) T P Act cannot override the special rules and give a title to the assignee. (*Chandrasekhara Aiyar C J and Subbanna, J*) *HYDER KHAN v THAYARANNISSA*

1 Mys, L, J 98

—S 132—Attachment of debt—Execution Sale—Rights of purchaser—Equities

Where a decree holder purchases a debt due to his judgment-debtor from a third person he takes the debt as it stands at the time of sale subject to the equities and liabilities to which the judgment debtor was subject at the time of the sale. Consequently the debtor of the judgment debtor could set off against the debt any amounts due to him from the judgment debtor. (*Matineau and Harrison, JJ.*) *RAM BHAI DATTA v RAM DAS*

3 Lah 414 69 I C 720

1923 Lah 261.

TREES—Ownership of—Adjacent lands—Rights of owners

Where a tree on one land falls down partly on another land the owner can require it to be removed and on its not being removed, do it himself. If after falling it strikes fresh root in both the owner's lands, the owners are entitled to the fruits thereof jointly. (*Bucknill and Kulwani Sahay, JJ*)

74 I C 828.

## TRUST

**TRUST—Constructive—Express—Distinction See LIMITATION** 32 M L T 196 (P C).

—Co trustees—Suit in ejectment—Omission to implead some of the trustees as parties—Effect of *See* (1922) DIG COL 1045 *THINA SHANMUGA MOOPANAR v SUBBAYIA MOOPANAR* 70 I C 645

—Object of—Family ceremonials

Where a person was entrusted with certain money and he was directed to defray the expenses of family ceremonials with the interest on the money there is a sufficient declaration of trust, (*Batten, J. C*) *KASHIPRASHAD v MOHAN LAI* 69 I C 547

—Power of settlors to alter character of rights

It is always open to a testator or settlor with full power of disposition to exclude the practical consequences of the principle which governs the character of proprietary and contractual rights by saying it was his intention the devisee should account in a particular way. This would create a trust in equity (*Viscount Haldane*) *PHIROZSHAW BOMANJEE PETIT v BAI GOOLBAI*

47 Bom 790 18 L W 940 26 Bom L R 76  
33 M L T 372 (P C) 50 I A 276  
(1923) M W N 616 (1923) P C 171

—Transfer—No right to associate in management *See* (1922) DIG, COL 1046 *KOTASERI E V SANKARAN NAMBI v DEWAKI ANTHEERJENAM* 73 I C 491

—Trustee—Incapacity to sell to himself

When any one is in fiduciary position he cannot sell to himself. Thus an ordinary trustee cannot buy trust property nor can an official appointed to conduct a sale for creditors be himself the purchaser. But where a seller sold not on behalf of the debenture holder alone but on behalf of the Company and it was his duty and interest to secure as high a price as possible so that the balance—after meeting secured debts—should go to the Company, the fact that the buyer is himself a holder of the debentures becomes irrelevant. There is no merging of the two positions which is what is prohibited—namely, that the interest of the seller, to get the highest price and of the buyer to get the lowest price is centered in the same person, (*Lord Dunedin*) *KANHAYA LAL v. NATIONAL BANK OF INDIA LTD.*

45 M L J 497  
33 M L T 349 (P C) 25 Bom L R 1248  
4 Lah 284 75 I C 7 50 I A 162  
1923 P C, 114

**TRUSTS ACT (1882)—Applicability—Bihar**

The Indian Trusts Act does not in terms apply to Bihar, but the principles contained therein will apply rules of justice equity and good conscience (*Jwala Prasad and Foster, JJ*) *GOBIND SINGH v. MAHARAJA KUMAR GOPAL SARAN NARAIN SINGH* 4 Pat L T. 731 2 Pat L R 27

—Applicability of—Public trusts—Formalities necessary for dedication—Intention—Execution of trusts—Enforceability of *See* (1922) DIG, COL 1046 *VENKATACHALAPATHI AIYAR v CHAKRAPANI AIYAR.* 32 M L T (H C) 169

## TRUSTS ACT, (1882). S 82

—Ss 63 64—Knowledge of nature of money—Effect

S 63 of the Trusts Act applies to a case where Tarwad money is unlawfully used in purchasing property for the Karnavan's daughter. To such a case the last clause of S 64 does not apply which means and includes the passing of money in the ordinary course of business (*Oldfield and Devadoss, JJ.*) *MEENAKSHI NETHIAR AMMA v. PARVATI NETHIAR* (1923) M W N, 657 74 I C 1012

—S 64—Applicability—Transferee from religious endowment.

A transferee from a religious endowment is not protected by S 64 of the Trusts Act as the Trusts Act does not apply to public or private religious endowments and also because the manager is not a trustee 38 Mad 1064 dissented from (*Pipon, J C*) *GULIAN HAIDAR v MANAGER, COMMITTEE SAMADH BABA PHULA SINGH* 73 I C 711

—Ss 71, 77, 83, 94—Trust becoming defunct—Effect

Where a trust becomes defunct, the trustee becomes thereafter a simple trustee for the real owner of the properties (*Jwala Prasad and Foster, JJ*) *GOBIND SINGH v MAHARAJA KUMAR GOPAL SARAN NARAIN SINGH* 4 Pat L T 731 2 Pat L R 27

—S 77 (c)—Public trust—Failure of trust—Rights of donor and his heirs

The land in suit having been given for the purpose of being used as a road to connect the main road with a public garden was held by the District Board as a trustee for the public, and when the land on which the gardens were planted was sold to a private individual and the gardens ceased to exist, the fulfilment of the purpose for which the land in suit had been given became impossible. The trust was then extinguished under S 77 (c) of the Trust Act and the donor of the property was entitled to recover the land given 7 A 382 Ref *Martineau, J*) *GELA RAM v DT BOARD MUZAFFARGARH* 1923 Lah 93

—S 82—Applicability of—Sale by mortgagee of equity of redemption—Pre-emption—Vendee not in possession—Rights of pre-emptor—Redemption of mortgage by vendee—Right to possession

The defendants purchased the equity of redemption in certain property in the possession of a mortgagee and the vendor left with the defendants a sum of money to pay off the mortgage. The plaintiffs sued for pre-emption and obtained a decree and paid the entire consideration in Court which was withdrawn by the defendants. As the defendants were not in actual possession, the plaintiffs could not apply for actual possession. Subsequently the defendants paid off the amount of the mortgage and the plaintiffs, sued for possession. Held that the title of the plaintiffs to possession became complete only on the date of the redemption of the mortgage, that no application for possession could have been made in execution of the pre-emption decree inasmuch as the defendants had not been entitled to actual possession and that the present suit was not barred by limitation (*Lindsay and Daniels, JJ*) *RAGHUBIR SINGH v JODHA SINGH,* 45 A 482

21 A L J, 417 L R 4 A. 223  
73 I C 646 1923 A. 507.

**TRUSTS ACT, (1882), S 90.**

—S 90—*Revenue sale of mortgaged property—Purchase by mortgagee—Effect*

Where a revenue sale of mortgaged property is brought about partly by the mortgagee, and he purchases the property, the mortgage is revived but the mortgagor has to reimburse him for the money paid (*Plumer and Subbanna JJ*) **KEMPANNA v MUNEPPA** 1 Mys L J 30

**TRUSTEES—Suit for rent—If maintainable by one alone**

In the case of a religious and charitable trust, one trustee can sue to recover rent without impleading the other co-trustee (*Po Hun J*) **MA SE v U LUN** 2 Bur L J 266

—Insolvency—Trustee appointed to realise assets of insolvent—Negligence of trustee—Rights of creditor against insolvent while arrangement in force

Negligence on the part of the trustee appointed under an award to realise the assets of the insolvent will not entitle plaintiff, a creditor, to recover his debt from the insolvent as long as the arrangement under the arbitration, to which he (the creditor) was a party or which he had subsequently accepted, is in force nor has he any redress against another creditor who has assigned the debt due to him from the insolvent, with an indemnity bond, to the plaintiff until it is known whether or not the liquidation proceedings will result in the payment of insolvent's debt in full.

It is impossible to allow one creditor who is a party to a settlement to proceed against a trustee in respect of one debt alone. If he wishes to proceed at all on the basis of the settlement he must sue to enforce the settlement as a whole (*Kennedy J C and Madgavkar, A J C*) **DOWLAT RAM v RUPSI MADHOWJI** 1923 S 33

**TRUSTEE DE SON TORT—Accounts—Liability—Wilful default**

Where on the death of a shebait his son though not legally entitled to succeed to take up the management, he is liable as a trustee *de son tort* and cannot set up his want of title as a defence. To get a decree on the footing of wilful default, the *cestui qui* trust must allege and prove at least one instance of wilful default. He must prove some portions of the trust fund which were not received ought to have been collected. The liability in such a case is much higher. English Law on the subject reviewed (*Mookerji and Rankin, JJ*) **RAJA PEARY MOHAN MOOKERJI v MANOHAR MOOKERJI**, 27 C W N 989 38 C, L J 255 74 I. C 373

**ULTRA VIRES—Exemption of Crown lands from tax—Levy of tax from persons occupying Crown lands**

Tenants who occupy crown property not as officials of the Crown but for commercial or business purposes are liable to taxation so long as the assessment is based on their interest or occupation, the same is not *ultra vires* the powers of the legislature (*Lord Parnoor*) **THE CITY OF MONTREAL v ATTORNEY, GENERAL OF CANADA**

33 M L T 257 (P C)

**U P DIST MUNICIPALITIES ACT, S 116**

—Powers of Indian Legislature

The Indian Legislature has powers expressly limited by the Acts of the Imperial Parliament which created it, and it can do nothing beyond the limits which circumscribe those powers. But when acting within those limits it is not in any sense an agent or delegate of the Imperial Parliament but has and was intended to have plenary powers of legislation as large, and of the same nature as those of Parliament itself. The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question, and the only way in which they can properly do so, is by looking to the terms of that instrument by which, affirmatively, the legislative powers were created, and by which negatively, they are restricted. If what has been done is legislation within the scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited, it is not for any Court of Justice to enquire further, or to enlarge constructively those conditions and restrictions. The British Parliament intended to give the widest powers to the Indian Legislature, and that though relying on the latter's good sense not to abuse those powers, it yet retained practical checks in case of necessity (*Macleod, C J Marten and Crump*) **ALFRED WILKINSON v WILKINSON** 47 Bom 843 25 Bom L R 945 1923 Bom 321

**U P COURT OF WARDS ACT (IV of 1912), 37—Disqualified owners—Death of—Property inherited from proprietors—Superintendence of Court of Wards—Effect on contract by heir** See (1922) DIG COL 1048 (*DALIP SINGH v, KHURSHED HUSAIN* 44 A 706

—S 54—*Notice—Transfer if gets the benefit of*

A notice given to the Court of Wards does not enure to the benefit of the transferee (*Reves and Demels, JJ*) **MUHAMMAD SIDDIQ ALI KHAN v ANWAR-UL-HASAIN** 45 A, 563 L R 4 A 263 21 A L J 521 74 I C 389

—S 61—*Personal liability of ward—Covenant—Breach of warranty*

The breach of a warranty implied by law in respect of a sale effected by the Court of Wards cannot result in a personal liability of the ward. Though under the general law a guardian cannot covenant to improve personal liabilities on the ward, under S. 61 U P Court of Wards Act, if a specific covenant is entered into by the court of wards, he is personally liable on it (*Wazir Hassan A J C*) **PIRTHI PAL SINGH v RAJA MUHAMMAD EJAZ RASUL KHAN**, 74 I C 90

**U P. DISTRICT MUNICIPALITIES ACT, S 116—Municipal rubbish and night soil—Property in—Municipal servant selling night-soil and rubbish and appropriating proceeds—Breach of trust—Penal Code, S 420**

S. 116 of the U P Municipal Act vests in the Municipality the care of night soil deposits and also on rubbish and night soil collected by the Municipality from houses. An arrangement by which the Municipality undertakes to collect all night soil and refuse from private houses, through



## U P DIST MUNICIPALITIES ACT, S 326

the instrumentality of customary sweepers for a reward arranged by contract between them from time to time does not affect the right of the Municipality to the rubbish and when collected Where therefore a sanitary Inspector of the Municipality used his influence with the sweepers and had the night soil sold privately and appropriated the proceeds Held that he was guilty of an offence under S, 409 I P C, (Walsh, J) HORI LAL v EMPEROR 45 A 281 21 A L J 149 L R 4 A 62 (Gr) 1923 A 480

—S 326—*Suit—Limitation—Contract to do certain works—Disallowance of bill of Contractor*

Pliff contracted with a municipal council to build certain huts On examining A's bills the Municipal Engineer reported that certain items could not be allowed The Municipal Board thereupon withheld payment for those items In a suit by the plaintiff after the lapse of 4 years for recovery of the amount held that the suit was barred by the provisions of S 326 of the Municipal inasmuch as the act was done by the Board in its official capacity (Mears, C J and Banerjee J) ABDUL WAHID v THE MUNICIPAL BOARD, ALLAHABAD 21 A L J 161 L R, 4 A, 479 90 & A L R 327 71 I C 1032 (1923) A 267 (1)

## U P EXCISE ACT (IV OF 1910), S 64 (c)—Partnership—Liability of all for wilful breach by one

Just as a master would be liable for a wilful breach of a licence condition by his servant, one partner is liable if another sells liquor in contravention of the licence granted (Walsh, J) EMPEROR v JWALA PRASAD 45 All 642 1924 A 101

## —S 71 (a)—Report by Police sub Inspector—Magistrate if can take cognisance

Under the rules framed by the Government under S 10 Excise Act, a police sub Inspector who has been invested with powers under the Act is an excise officer and a Magistrate has jurisdiction to take cognisance of any offence reported to him by such officer (Mears, C J and Piggott, J) EMPEROR v CHHATER SINGH 21 A L J 922

## U P LAND REVENUE ACT (III OF 1901)—Sir land—Settlement entries

Quere whether a settlement entry can be taken as conclusive proof of the land being sir, or if it can be rebutted on proof that the land could not be sir according to the law in force at the time of the settlement (Fremantle, S M) MT, SMIRKHA KUR v, RAM TAHAL RAI L R 4 A 198 (Rev)

## —S 4 (12-a)—Land recorded as sir from prior to the Act—Right to eject

In a suit in ejectment where it is shown that the land has been successively recorded as sir even before the Land Revenue Act and Agra Tenancy Act it is not necessary to show that the land had actually been cultivated for 12 years before the Acts came into force (Fremantle S M and Burn, J M) LAL SINGH v DHANPAT L R 4 All 387 (Rev.)

## —S. 29—Land in Agra—Demarcation proceedings.

## U P LAND REVENUE ACT (III OF 1901), S. 34

Land in Agra may be the subject of demarcation proceedings under S 29 or S 41 of the Land Revenue Act (Burn, J M) MIRA EZAZ ALI BEG v AMIR ULLAH L R 4 All 381 (Rev)

## —S 33 (2)—Mutation effected—If can be altered

The terms of S 33 (2) U P Land Rev Act are wide and they allow to be recorded all changes that may take place and any transaction that may affect any of the rights or interest recorded

After widow's name was recorded as heir, if a will is found under which she gets a portion only the rest going to the daughters, an alteration must be made in the register of mutation (Fremantle S M and Burn, J M) MT BHIKOO v, GARGI DIN 90 & A L R 781

## —S 33 (2)—Patwaris papers—Correction of errors

Patwaris papers prepared at a summary quinquennial settlement are merely annual registers and even if they did constitute a record of rights, an error therein can be corrected under S 33 (2) of the Land Revenue Act (Fremantle, S M and Burn J M) MAHABIR PRASAD v, THE AJUDHIA ESTATE L R 4 A 367 (Rev)

## —S 34—Ejectment—Sir land—Qabiz

A person who is a mere qabiz of sir land is not entitled to sue for ejectment Where the purchaser of a share in a zamindari did not obtain mutation in his favour under S 34 of the Land Revenue Act but was recorded as in possession of sir plots he has no right to sue for ejectment of the person cultivating the plots as representative of the sir-holders (Burn, S M and Pearson, J M) AVADSH SINGH v GAJADHAR SINGH L R, 4 A, 37 (Rev)

## —S 34 (2)—Lease of specific areas—Record in Khewat

The lease referred to in S 34 (2) Land Revenue Act is a lease of zamindari rights under which the lessee manages a mahal or a portion of a mahal The entry of a lease of a specific area which is not occupied by tenants but which the lessee takes up either in cultivation or for building is not provided for in S, 34 (Fremantle S M) AJODHYA DAS v BISHUN MOHAN SAHAI L R 4 All 392 (Rev)

## —S 34 SUB-S 5—Succession report—Necessity for—Patwari's report—Report by proprietor during pendency of suit—Sufficiency

The language of S 34 Sub S 5 of the U P Land Revenue Act is perfectly general and it is impossible to regard that section as being applicable only to cases under the Land Revenue Act A report made by the putwari is not a substitute for the report which the Act itself requires to be made by the proprietor A report by the proprietor is a pre-requisite to the institution of a suit for profits be a person other than the recorded proprietor Until the report required by the section has been made the court is debarred from entertaining the suit (Daniels, A J C) MT RUQAIYA BEGAM v IMDAD ALI 90 L J, 590 90 & A L R 81 74 I C, 321 1923 Oudh 117

## U. P. LAND REVENUE ACT (III OF 1901), S 36

—S 36—*Expropriatory tenancy—Agreement to accept less than standard rent—Effect of*

When the parties have agreed to a rent lower than the standard rent, when the amount fixed is not unreasonable the court is bound to fix that rent under S 36 (*Fremantle, S M and Burn, J M*) KAMTA PRASAD v MOHAN DEBI

L R 4 A 118 (Rev) 90 & A L R 535

—S 36—*Land—Mortgage—Possession not given—Interest—Liability for*

Where a proprietor usufructually mortgages his sir land and also stipulates that, if he does not give possession of the land to the mortgagee he would re-pay the mortgage money with interest at a fixed rate and does not give possession he cannot redeem the mortgage without paying interest (*Ryves, J*) JANKI RAM v MISRI LAL

71 I C 382 1923 A 377

—S 36—*Proceedings under—Written statement—Right to file*

The Deputy Collector received a report from the Thasil and on that recorded that there was no land in which the ex-proprietory rights accrued. This record of his was made without information to the parties so that they had no chance of filing written statement as they have a right to do under the rules. Held the procedure was illegal (*Fremantle, S M*) MANZOOR AHMED v FASIH AHMED

L R 4 A 219 (Rev)  
90 & A L R 760

—S 39—*Transfer of interest in groves—Application to record—Maintainability*

The transferee of the equity of redemption in certain groves can apply to have their names recorded by the Land Records Officer (*Fremantle, S M*) DAULAT v AJODHYA RAI

L R 4 All 305 (Rev) 90 & A L R, 758

—S 40—*Right to possession—Enquiry into*

The questions of title to possession and of an absolute title are quite different and the fact that the decision as to possession is based merely on a summary enquiry as to the person best entitled to the property cannot be used as an argument that the Court is not competent to decide the question of title to possession when the section requires a Court to put the person into possession (*Ashworth, J C*) SURENDRA BIKRAM SINGH v EMPEROR

73 I C 153 24 Cr L J 537

—S 42—*Correction of Jamabandhi—Procedure*

In a case to which S 42 of the Land Revenue Act applies the Assistant Collector is bound to observe the procedure for trying suits laid down by the Act. If this is not done his decision is liable to be set aside (*Burn S M and Penton, J M*) TILAK SINGH v JHABBA SINGH

L R 4 A 45 (Rev.)

—S 42—*Inquiry—Evidence—Statements made to Naib Tahsildar—Admissibility of*

In a case coming under S 42 of the U P Land Revenue Act the Court must hear the whole of the evidence on which it relies and cannot rely on statements made to a Thasildar or a Naib-Thasildar except in the case where formal com-

## U P LAND REVENUE ACT (III OF 1901), S 86

MISSION IS ISSUED (*Fremantle, S M and Burn, J, M*) KOLHU BARAI v SITAL CHAUBE,

L R 4 A 234 (Rev)

—S 42—*Mutation—Parties not summoned—Report of Tahsildar—Status of tenant*

An order of mutation based on the report of a Naib Tahsildar without summoning the parties and deciding the nature of the tenure is not a conclusive order as to the state of the parties under S 42 of the Land Rev Act (*Fremantle, S M and Burn, J M*) CHATTAR v RAJA SURAJ PAL SINGH

L R 4 A 373 (Rev)  
L R 4 A 442 (Rev.)

—S 42—*Omission to comply with section—Effect of—Decision of question as to whether a person is an occupancy or non occupancy tenant*

In cases where the question is whether a cultivator has not occupancy rights or occupancy rights the procedure enjoined by S 42 of the land Revenue Act must be strictly followed and if it is not followed, any order passed does not constitute resjudicata. (*Burn, J M*) CHUNNI v GOKUL CHAND

L R 4 A 120 (Rev).

—S 43—*Mutation cases—Duty of Court to record findings on question of possession*

In mutation cases it is the duty of the Court to record a finding one way or the other on the question of possession or given definite reasons for the conclusion that it is impossible to record a satisfactory finding. If it fails to do so, it is failing to comply with the definite provisions of the law (*Burn S M and Pearson, J M*) JAGMOHAN SINGH v SRI TAKURJI

L R 4 A 52 (Rev)

—S 57—*Entries in settlement records—Correctness—Presumption—Rebuttal*

Entries in settlement records are presumed to be correct but if it is sought to be rebutted by entries in previous annual papers, the court should consider in every case whether the presumption is rebutted. It is not correct to say that in no case can the prior entries rebut the presumption (*Fremantle, S M and Burn, J M*) MURLI PRASAD AVASTHI v SARAN CHAMAR

L R 4 All 434 (Rev)

—S 86—*'Cess'—Meaning of—Customary dues payable to the Zemindar*

The word "cess" is used secondarily to denote demand for contributions in cash or kind to be devoted to the benefit of the village as a whole and when used in that sense the word almost means a rate. Another sense in which the word is used is a demand by the zemindar for provision of certain articles or the doing of certain services for his own personal benefit. When the word is used in this sense it is better to refer to the demand as a demand for dues and in these cases the dues demanded are customary dues. A cess levied in accordance with village custom can only be recoverable if recorded by the Settlement Officer and generally or specially sanctioned by the local Government. Mere payment of these dues for 20 or 30 years is insufficient to establish a custom to pay the cesses (*Stuart, J*) MAHOMED ASGHAR ALI KHAN v RAMMON

1923 A. 378. 71 I C 432.

## U. P. LAND REVENUE ACT (III OF 1901), S 87

—S. 87—Enhancement of rate of rent—*Procedure*

Where all that a tenant claims as a matter of fact is that he has always held at a favourable rate and he should continue to do so, the tenancy Act makes no special provision for such cases, but, on the analogy of S 87 of the Land Revenue Act which deals with the determination of the rent of occupancy tenants at settlement and provides that "When it is proved that by local custom or practice any class of persons holds land at a favourable rate of rent, the rent shall be fixed with reference to such custom or practice," it might be held that the order of the Assistant Collector which fixes the rate at Rs 1-4 per bigha instead of Rs 1 was fair and equitable and also in accordance with the law, in the circumstances of the case (*Fremantle, S M and Burn, J, M*) MAHARAJA KESHO PRASAD SINGH v MAHENDRA PRASAD SINGH

L R 4 A 225 (Rev)

—S 107—Partition—Co sharer—Right of Hindu daughter—Life interest under father's will See (1922) DIG COL 1053 BAHADUR SINGH v MOHINI KUNWAR

45 A 13

—S 111—Partition—Objection affecting proprietary rights—*Revision*

Cosharers who have filed objections affecting their proprietary rights in a suit for partition are entitled to have those objections decided according to the provisions of S 111 of the Land Revenue Act (*Burn, S M and Pearson, J M*) GHURAHU SINGH v DUBAR SINGH

L R 4 A 89 (Rev) 90 &amp; A L R 199

## —S 111—Partition proceedings—Civil and Revenue Court

A party to a partition suit may not while the partition suit is pending, bring a suit against another party in the civil court to clear his title otherwise than under the direction of the court hearing the partition suit. The basis of this proposition is that the partition suit is given jurisdiction in respect of title and this impliedly makes the question of title an essential part of the partition proceeding so that a civil court is debarred from entertaining questions of title except in a suit instituted by direction of the partition court. It does not follow from this that a party not directed to bring a title suit cannot join a party directed to do so in bringing of one. A direction by a Revenue court in the process of a partition suit under section 111 (b) to one party to bring a title suit in a Civil Court implies the right of joinder in the suit of any person as plaintiff in whom a joint right of relief exists. The direction to bring a suit to any person must mean that he is to bring it according to, and is permitted by, the law of procedure. O 1, R 1, Code of Civil Procedure allows such joinder. (*Ashworth, A. J C*) MT KUSAM DEI v HAR DUTT

26 O C 98 74 I C 459

—S. 111—Partition—Question of proprietary title—*Procedure*

An objection that the applicant is not entitled to a larger proportion in the shamilat land than the fractional share in his name is one involving a question of proprietary title and should be

## U. P. LAND REVENUE ACT (III OF 1901), S 126.

dealt with under S 111 of the Land Revenue Act (*Burn, S M Pearson, J.*) JADUNANDAN SINGH v. PALTU SINGH, L R 4 A 162 (Rev)

—Ss 111, 112—Partition by Revenue court—*Finality of*

The order of a Collector in partition proceedings can be final like the decree of a Civil Court only if all the conditions of S 111 of the Land Revenue Act are complied with. If the order deals with properties not the subject of the application or objection, the same can again be made the subject of litigation in a Civil Court (*Wazir Husan, A. J C*) NAROTAM DAS v SHEIKH MAHOMED RAZA

90 &amp; A L R 1030.

## —S. 111 (c)—Dismissal of objection Appeal to Civil Court

Where in partition proceedings before a Revenue Court a question of title was raised but the objection was dismissed, the order is one under S 111 (c) and is appealable to the Civil Court (*Dalal, J C*) BHAGWAN DUT v BRIJ BHUKHAN

90 &amp; A L R 885

## —S. 117—Partition—Expropriatory and Occupancy holdings, if included.

Land held by a co sharer as ex-proprietory or occupancy holding is not land held in severalty within S 117 of the Land Revenue Act. It should be available for distribution among the sharers on partition (*Fremantle, S M and Burn, J M*) AJUDHIA PRASAD v FAZAL AHMAD

L R 4 A 242 (Rev)

—S 117—Partition—Groves—Mode of See (1922) DIG. COL 1055 JAGESWAR v, SHEO SHANKAR LAL

90 &amp; A L R 357

—Ss 117, 123 & 125—Scope of—Land held in severalty—Common land, See (1922) DIG COL 1055 GOKUL v SHADI

90 &amp; A L R, 98

## —S 123 cl 3—Partition—Annulment—Powers of Deputy Commissioner

S 123, cl 3, of the Land Revenue Act gives a Deputy Commissioner power, when a partition case goes up to him for orders, not to confirm it or to pass such other orders as he thinks fit. In a case where it was a question of embarking on a new method of or procedure or of abandoning the partition altogether it is obviously reasonable that a Deputy Commissioner should exercise the powers conferred on him by this clause (*Pearson, J M*) RAM BHAROSEY v RAGHUBAR DAYAL

L R 4 A 41 (Rev.)

—Ss 125 and 133—Partition—Directions for—Appeal—*Procedure*

Though the Deputy Commissioner's order directing that a perfect partition be made in compact chaks on the authority of S 125 of the Land Revenue Act does not come under S 133 and is not therefore appealable still when an appeal has been preferred the Court would go into the matter and decide the dispute instead of allowing the partition proceedings to be the subject of a further appeal (*Fremantle, S. M*) BASHIR UD-DIN v MT. BHAGWAN DEI.

L R 4 A 145 (Rev.)

—Ss 126 and 127—Partition—Claim—*Withdrawal of*

## U P LAND REVENUE ACT, S 126

Claims under Ss 126 and 127 of the Land Revenue Act must be made before the confirmation of partition. They cannot be entertained at a later stage

Where a claim to ex-proprietory rights was made at partition but was withdrawn, it could not be made at a later stage, 17 A L J 1072, 2 U D 521, 49 D 392 foll (*Fremanille S M and Burn, J M*) MADAN SINGH v PHUL SINGH  
L R 4 A 264 (Rev)

—Ss 126 and 127 —Partition —Finality of—  
Expropriatory rights—Claim of—

The principle which governs the finality of partitions is that the partition record defines the rights of parties to the partition as against each other finally and exhaustively. No party to a partition is entitled to deny the accuracy of the partition record when to do so would be injurious to any other party

The provisions of Ss 126 and 127 of the Land Revenue Act give an ex propriatory right in the circumstances described in them. But this is a right which may be waived, and if it is not claimed, at the time of the partition, it is lost and cannot be claimed afterwards. The right is also lost as provided in S 126, if it is not maintained by cultivation after the partition takes effect. S D No 2 of 1898, S D No. 6 of 1913 and S D No 17 of 1919 considered, 17 A L J 1075 foll (*Fremanille, S, M and Burn J M*) DURGA PANDE v MEWA PANDE L R, 4 A 253 (Rev.)  
90 & A L R 569.

—S 133—Order confirming partition Appeal—  
Manner of partition question as to See (1922) DIG COL. 1056 HAKIM MD HAMID ALI KHAN v. HAKIM MD, MAHBOOB ALI KHAN 90 & A L R. 281

—S 138 Sub Ss. (3) and (4)—Applicability  
of—Responsibility for rent payable to Talukdar

In S 138 Sub Ss (3) and (4) provision is made for the limitation of the joint responsibility of the co-sharers in any newly constituted mahal to the rent due in respect of that mahal only. It is also provided that all objections to distribution of the lands of a mahal into new mahals at the time of partition shall be decided by the Collector. There can be no doubt that the responsibility of the co-sharers mentioned in these provisions would support the contention

Section 138 merely refers to the responsibility for revenue to Government *inter se* of the owners of talukdari mahal which was partitioned and does not refer to the responsibility *inter se* of the lessees for rent to the Talukdar in the various lessee mahals (*Ashworth, A J C*) JUGNU KHAN v RUDRA PARTAB SINGH. 26 O C. 118  
74 I C 429 1923 Oudh 216.

—Ss. 200 and 201—Ex parte decree Absence  
of party at adjourned hearing — Procedure —  
Appeal.

S 200 of the U P Land Revenue Act applies only to a case where a party neglects to attend on the day specified in the summons for his attendance and it does not cover the case of a party being absent on a day to which proceedings may have been adjourned. In such a case an appeal

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## U P MUNICIPALITIES ACT (II OF 1916), S 2

lies (*Fremanille, S M and Burn, J M*).  
LACHMAN SINGH v TIRLOK SINGH  
L R 4 A 154 (Rev)

—S 233—Partition suit—Proprietary title  
—Power of Civil Court to try

Where in partition proceedings a question of proprietary title is raised before the Revenue Court and the Revenue court has refused impliedly to permit its decision by the Civil Court and has proceeded to determine the question itself its decision is final (*Stuart J*) DEOKI DUBE v UMA DAT 1923 A 369 71 I C 292.

—S 233 (k) — Application for perfect  
partition—Objection by part proprietors— Com-  
pletion of partition— Suit after seven years—  
Maintainability

One of the proprietors of a Mahal applied for perfect partition under the U P Land Revenue Act and another proprietor objected claiming that he was also part proprietor. The objector was directed by the Revenue authorities to establish his claim in the Civil Court and he brought a suit and obtained a decree declaring his rights. The Revenue Court was not informed of this fact at all and the partition proceedings were completed seven years later he sued for recovery of possession of his share in the Mahal. Held that the suit was barred under S 233 (k) of the Land Revenue Act (*Ryves and Daniels, JJ*) RAM CHARITRA v MOHAN DEI 45 A 309 21 A L J, 159  
L R 4 A 82 (Rev) 71 I, C 488  
1923 A 210

—S. 233 (k) Civil Court — Jurisdiction,  
when ousted

To oust the jurisdiction of Civil Courts under S 233 (k) U P Land Revenue Act, it must be shown that all the conditions relating thereto are satisfied (*Wazir Hasan, A J C*) NAROTAM DAS v SHEIKH MOHAMAD RAZA 90 & A L R. 1030

—S 233 (k) Partition proceedings — If  
binding on mortgagee

It is only the parties to a partition proceeding before a Revenue Court that are precluded from disputing its correctness before a Civil Court

A mortgagee from one of the parties is in no way affected by the Revenue Proceedings and can always proceed against his mortgagors share. He is not necessary party to partition proceedings. (*Dalal, J C*) MT. JANKA v SHIAM KISHORE LAL.  
90 & A L R. 742.

U P LOCAL RATES ACT (I of 1914) S 14—Con-  
tract—Meaning of

"Contract" as used in S 14 of the U P. Local Rates Act must mean a contract between the landlord and the under proprietor or permanent lessee, in addition to being a contract in its legal sense, (*Wazir Hasan, A J C*) SHEIKH ALI ABBAS v RAJA KUNWAR SHER BAHADUR SINGH 90 & A L R. 815 75 I C 267

U P MUNICIPALITIES ACT (II OF 1916), Ss. 2  
and 116 (g)—Public street—Encroachment See  
(1922) DIG COL 1057 MUNICIPAL BOARD OF  
BENARÉS v RAM KISHNA DAS 70 I, C 416.

—S. 16 (3) (c)—"Place of profit"—Meaning  
of—Election —Municipal contractor.

## U. P. MUNICIPALITIES ACT, (II OF 1916), S. 20.

The words "place of profit" have a definite historical association and when coupled with the word "office" are familiar. A contractor who receives remuneration for supply of articles to a municipality cannot in accordance with the ordinary meaning of the word "place" be said to hold a place of profit.

The proper meaning which should be ascribed to the words "place of profit" in S. 16 (3) (c) is one which denotes position and employment in the sense of having a title attached to such employment and a definite standing and partaking of the nature and character of that of master and servant. That is, a position in relation to the Board in which the Board can require a person to obey its command and to do certain work or to render personal services in return for remuneration. Instances of this kind readily occur to one, e.g., a consulting Engineer who for a retaining fee holds himself at readiness to give expert opinions and furnishes reports; a whole or part time medical officer with defined duties towards the Municipal Board, and each and every Municipal servant of any grade. This rule is necessary because members of a Board should not be in the false position of being masters and servants at one and the same time (*Mears, C. J. and Figgott, J.*) MAHOMED BAKSH v. MAHOMED ABDUL BAGI KHAN. 45 A. 720 : 21 A. L. J. 661

L. R. 4 A 587 : 74 I. C. 490

— Ss. 20 and 22—*Petition if should be presented personally to collector—Practice.*

Ss. 20 and 22 of the U. P. Municipalities Act need not be construed so strictly as to invalidate petitions not presented personally to the Collector. If it was the practice of the particular District that petitions to the collector are in his absence received by some other officer who would hand them over then presentation to that officer is sufficient. It must reach the collector well within the period of limitation. (*Mears, C. J. and Figgott, J.*) SURAJ NARAIN v. JANG BAHADUR. 45 A. 687 : 74 I. C. 2

— S. 23 (c)—*Election to Municipality—Rival candidates—Withdrawal of one during polling leaving survivor sole candidate—Procedure*

The poll opened with two candidates for one vacancy in a Municipal Council and before the time came for the poll to close and votes to be counted and the Returning Officer to declare who was elected, before that time arrived there was only one candidate and that one candidate a candidate for the one vacancy. The returning officer thereupon closed the poll and declared the remaining member duly elected. Held that his action was legal. Rule 36 (1) of the Municipal Rules and Bye Laws of the particular Municipality, provided that a poll should be taken on the day for the election when the number of duly nominated candidates who were entered in the schedule and who had not withdrawn their candidature before the time fixed for the poll exceeded that of the vacancies. When you have got duly nominated candidates in the excess of vacancies you have got to have an election. Rule 36 (2) provided "If the number of such candidates is equal to the number of vacancies, all such

## U. P. MUNICIPALITIES ACT (II OF 1916), S. 271.

candidates shall be deemed to be elected" Therefore if there are three candidates and three vacancies, all such candidates shall be deemed to be elected; similarly two, similarly one. Though in terms rule 36 (2) does not contemplate nor is there anywhere any provision which contemplates the withdrawal of a candidate during the few hours during which the polling is in progress, by analogy to the duties of the Returning Officer before the opening of the poll, it is the proper course for the Returning Officer to act in conformity with R. 36 (2) and if he finds only one candidate left for the one vacancy, to declare that man duly elected. (*Mears, C. J. and Figgott, J.*) SULTAN BAKSH v. ABDUL HAMID. 45 A. 685 : L. R. 4 A. 335 : 21 A. L. J. 639 : 74 I. C. 24.

— S. 85—*Action under—Strike by scavengers.*

S. 85 of the U. P. Municipalities Act which renders a municipal sweeper who resigns or abandons his employment without permission liable to imprisonment for two months is very drastic and must be carefully worked. Such action can be justified only by the extreme danger to the health of the town which would result if it was left unscavenged. (*Daniels, J.*) ANGNOO v. EMPEROR. L. R. 4 All 202 (Cr) : 21 A. L. J. 808 : 9 O. & A. L. R. 922.

— S. 128 (B)—*Breach of sanction—Penalty.*

Where persons are charged with raising buildings contrary to approved plans, the object is to enable the public authority to control streets and buildings. Penalties are only intended *in terrorem* and are not to be used vindictively for technical offences. (*Walsh, J.*) NIHAL MUHAMMAD v. EMPEROR. 21 A. L. J. 774 : L. R. 4 A 226 (Cr.).

— S. 185—*Material alteration—What is.*

The raising of the plaint and the alterations made in the size, position or number of the doors or windows cannot be treated as material alteration within the meaning of S. 185. (*Kanhaya Lal, J. C.*) EMPEROR v. BABU RAM. 1923 Oudh 35 (1).

— S. 267—*Removal of building—Prior grant of permission—Effect.*

Even when the Municipality has sanctioned the construction of a building, there is nothing to prevent it in the interests of public health from directing the removal or demolition of the same. (*Daniels, J.*) BABU LAL v. MUNICIPAL BOARD, FARRUKHABAD. 21 A. L. J. 828 : L. R. 4 A 567 : 9 O. & A. L. R. 1053.

— Ss. 271 and 307—*Paving by Municipality of a certain enclosure after notices to owner—Suit by the owner against the Municipality for the restoration*

Where plaintiffs were found to have received the notices sent by the Municipal Board to pave the yard with brick so as to make it sanitary and thereafter the municipal board itself paved it with brick and sent the bill of costs to the plaintiffs, Held that the action of the municipality was perfectly legal and within its powers and that no suit lies against it for this action. (*Gokul Prasad, J.*)

**U. P. MUNICIPALITIES ACT (II OF 1916), S. 326.**

MAHOMED QASIM v. THE MUNICIPAL BOARD SAHARANPUR. 75 I. C. 607. 1923 A. 371.

—S. 326—Right to collect carcasses—If immoveable property—Suit for Limitation.

A right to collect carcasses of dead animals is not immoveable property. The period of 6 months allowed by S. 326 of the U. P. Municipalities Act applies to a suit for declaration of such a right against the Municipality (*Rafiq, and Stuart, JJ.*) JHUNWA v. MUNICIPAL BOARD, DHAMPUR.

45 A. 267; L. R. 4 A. 363 :

21 A. L. J. 101 : 71 I. C. 291. (1923) A. 179

**U. P. TOWN IMPROVEMENT ACT, Ss. 56 to 59—District Judge—Jurisdiction of, to entertain application of the acquisition officer**

A land acquisition officer referred a question arising under Improvement Trust Act to the District Judge, although a question arising in respect of the acquisition of the same land by the Improvement Trust had already been before the Improvement Trust tribunal. The District Judge without the slightest jurisdiction proceeded to consider whether he had jurisdiction or not, and decided that the tribunal constituted under the 1919 Act has ceased to exist. *Held*, that the Judge had no jurisdiction to consider whether if had or it had no jurisdiction and that his decision was in direct breach of the provisions of Ss. 56 to 59 of the Improvement Trust Act. (*Walsh, and Ryves, JJ.*) M. T. SUKHRANI KUNWAR v. BAUKHAN SINGH.

21 A. L. J. 193 :

71 I. C. 628 : L. R. 4 A. 141 : (1923) A. 286.

**S. 57—Improvement trust—Reference to District Judge.**

A Land Acquisition Officer has no power to refer to the District Judge any matter arising under the U. P. Town Improvement Act when there is an Improvement trust tribunal created under S. 57 of the Act. (*Walsh, and Ryves, JJ.*) MT. SUKHRANI v. BHUKHAN SINGH.

21 A. L. J. 193 : 71 I. C. 628 :

L. R. 4 A. 141 : 1923 A. 286.

**U. P. VILLAGE PANCHAYAT ACT (V OF 1920)—Courts under—If subordinate to High Court—Power to transfer proceedings.**

*Per Stuart, J.*—Village panchayat courts constituted under U. P. Act VI of 1920 are not subordinate to the High Court either for purpose of S. 526, Cr. P. Code or S. 22, Letters Patent and as such proceedings in one court cannot be transferred by the High Court to another court.

*Per Kanhaiya Lal, J.*—The High Court cannot transfer proceedings under S. 526, Cr. P. C., but it has power under S. 22 Letters Patent to transfer in a proper case. (*Stuart and Kanhaiya Lal, JJ.*) SAT NARAIN v. SARJU.

21 A. L. J. 925.

**USURIOUS LOANS ACT (X of 1918)—Applicability of—Judgment on admissions in pleadings—Power of Court.**

There is nothing in the Usurious Loans Act to prevent its application in favour of a defendant who confesses judgment. (*Robinson, C. J. and May Oung, J.*) S. P. R. M. FIRM v. MAUNG PO KYA.

1 Rang. 580.

**WAJIB UL ARZ.****VENDOR AND PURCHASER—Invalid sale—Agreement to sell—Equities—Defence to suit**

The mortgagor of certain properties agreed to sell the mortgaged property to the mortgagee, put him in possession, and finally referred to execute the sale deed. In a suit for redemption, *Held*, even if the sale is not invalid, the mortgagee can rely on the contract of sale and in the period of limitation for specific performance has not expired set up his right successfully and resist redemption. (*Duckworth, J.*) MA PRONE v. MA U.

2 Bur. L. J. 233.

**Marketable title—What is—Repudiation of Contract—Rights of purchaser.**

The title which the vendor in a contract for the sale of land must show must be a title in himself or in those whom he has a legal or equitable right to require to join in the conveyance, he has no right to say, that some other person is willing to enter into a contract and to force the title of that other person on the purchaser. When a person sells property which he is neither able to convey himself nor has the power to compel a conveyance of it from any other person, the purchaser as soon as he finds that to be the case, may repudiate the contract. This right of repudiation must be distinguished from the common law right of rescission, and arises out of that want of mutuality, which, unless waived, is generally fatal to relief by way of specific performance. But the right must be exercised, if at all, as soon as the defect is ascertained. If, after ascertaining the defect, the purchaser still treats the contract as subsisting, he does not retain the right to repudiate at any subsequent moment he may choose. (*Mulla, J.*) PAULO DAVID v. DAFHTARY.

23 Bom. L. R. 610.

**WAJIB-UL-ARZ—Construction—Custom or contract—Record prepared under directions of the Board of Revenue. See (1922) DIG COL. 1060, SITAL PRASAD v. MAHABIR SINGH.**

L. R. 4 A. 17.

**Construction—Ejection—Right of Zemindar.**

A Wajib-ul-arz of a village provided that "if the proprietors turn out, or eject or put out any of the inhabitants, that inhabitant will have the right to remove the materials" *held* that it was not open to the Zemindar to turn out an inhabitant from his house on village abadi without assigning sufficient cause. A Zemindar who claims to turn out his tenants arbitrarily must strictly make out that right. (*Grimwood, C. J. and Banerji, J.*) DINA SINGH v. LALA DEVICHAND

1923 A. 263 (2) : 71 I. C. 529.

**Construction—Rights of proprietor.**

A wajib-ul-arz provided that at the time of sale the proprietor of the land receives  $\frac{1}{3}$  of the sale price in virtue of his proprietary rights and also that any grove holder in possession under this custom could fell any tree and appropriate the timber to his own use. *Held* where the grove holder did not fell the trees, remove the timber and sell the same for their own profit, but they sold the trees as they stood and the vendee cut them down. (*Piggott, J.*) KRISHNA DATT DUBE v. BRIJ LAL.

(1923) All. 269.

**Custom—Evidence of—Record of agreement between parties.**

## WAJIB-UL-ARZ

A Wajib-ul-arz- *prima facie*, is to be construed as embodying a record of custom, but it is quite clear that this presumption must give way if the language of the documents itself indicates that the record is not one of custom, but of contract. While it may be the case that the word "iqrar" which is often interpreted "agreement" is an ambiguous word the words "so long as this Settlement lasts the following conditions shall be binding on us" clearly indicate that whatever usages were recorded in this document were recorded as usages of contract and not of custom (*Rafique and Piggott, JJ*) HARI SINGH v. HARBANS LAL 72 I. C. 491 : (1923) A. 488 (1).

## —Entry in—Construction.

The Wajib-ul-arz provided "The rule of inheritance and division (thereof) in this village is that on the death of a co-sharer his sons become owners of his share in equal shares and the daughter does not get any share by inheritance. If a co sharer has several wives, of whom one has one son and the other several, then on the death of the co-sharer his share will be divided equally among his sons", *Held*, the only construction which can be put on the entry is that on the death of an owner of the village no daughter of his is under any circumstances entitled to a share in the property by right of inheritance whether he had left sons or not. If a daughter had no right to inherit her issue could not inherit. The provision that on the death of a co-sharer his sons become owners of his share in equal shares was probably inserted to exclude any claim under a custom of primogeniture which is not an uncommon custom in Oudh. (*Sir John Edge*). BALGOBIN V. BADRIPRASAD.

45 M. L. J. 289 : 26 O. C. 217 :

45 A. 413 : 38 C. L. J. 302 :

33 M. L. T. 317 (F. C.) (1923) M. W. N. 799 :

9 O. &amp; A. L. R. 581 : 10 O. L. J. 368 :

74 I. C. 449 : 50 I. A. 196 :

21 A. L. J. 578 : (1923) P. C. 70. (F.C.)

## —Entries in—Custom.

An entry in a Wajib-ul-arz is *prima facie* evidence of the existence of a custom unless there is anything in the Wajib-ul-arz itself which negatives the idea of such an existence or there is other evidence to the contrary or such custom is unreasonable or unenforceable, the presumption would be that such a custom exists, (*Lindsay and Sulaiman, JJ*) GAYAN SINGH v. BABU LAL.

21 A. L. J. 822 : L. R. 4 A. 557 :

9 O. &amp; A. L. R. 1019.

## —Entry in—Pre-emption—Rebuttal.

There was an entry in the wajib-ul-arz of a village about the existence of a right of pre-emption; evidence was let in that 50 years previously, there was only one proprietor in the village, *Held* this did not rebut the presumption of correctness, as the right of pre-emption might have grown up in the period of 50 years. (*Lindsay and Sulaiman, JJ*) RAM DAS RAI v. SHEIKH ABDUL GHAFUOK. 74 I. C. 297.

## —Evidentiary value of—Rebuttal.

The Wajib-ul-arz is strong, *prima facie* evidence of custom and in order to over him the presumption in its favour, there must be convincing

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evidence to satisfy the court that in fact the Wajib-ul-arz could not reasonably be treated as evidence of custom. (*Lindsay and Kanhaiya Lal, JJ*) SHER MUHAMMAD KHAN v. PARBHU LAL.

21 A. L. J. 801.

## WASTE LAND—Registration—Mere allotment

The mere "allotment" of State waste land without actual possession ten years ago gives no right which can be enforced in a Civil Court, against the persons actually in possession. (*Brown, A. J. C.*) MA NGWE PYU v. MAUNG PON SAING. 1923 Rang. 117.

## WATERS—Riparian owners—Rights of—Easement natural right.

The right to water flowing through artificial courses is right of easement, and must rest on some grant or some arrangement, either proved or presumed from, or with the owners of the land from which the water is artificially brought, or in some legal origin. It is quite distinct from the natural right, which, is a natural incident to the ownership of land, and entitles *prima facie* each successive riparian proprietor to the unimpeded flow of water of a natural channel in its natural course, and to its reasonable enjoyment as it passes through his land. In the case of artificial water course where no easement or customary right enjoyed by the plaintiff has been proved only diminution of supply (and not complete stoppage) will not entitle plaintiff to an injunction. Until plaintiff proves that he has used the whole water of the watercourse as of right, S. 26 of the Limitation Act does not avail him. (*Campbell, J.*) BELA SINGH v. BALI RAM.

73 I. C. 489 : 1923 Lah. 257 (2).

## WHIPPING ACT. S. 5—Whipping and fine—if legal.

If a sentence of whipping is passed no other sentence can be passed, for the whipping is considered to be in lieu of other punishments. (*Stuart, J.*) KISHAN SINGH v. EMPEROR.

21 A. L. J. 916.

## WILL—Attestation—Validity.

Where the Sub-Registrar and the person who identified the testator put their signatures after the execution of the bill but in the presence of the testator the requirements of law are satisfied, (*Das and Kulwant Sahay, JJ.*) RAJENDRA LAL BHATTACHARJ V. MENOKA DEBI

1 Pat. L. R. 267.

## —Codicil—What is.

A document signed by the testator which came into the hands of the trustees at the same time and under the same circumstances as the will itself and which gave directions to the trustees is a codicil though there is no reference to the will itself. (*Batten, O. J. C.*) RAMDULARI v. BISHWESHWAR DAYAL.

69 I. C. 876 : 1923 Nag. 105.

## —Construction.

A will provided :—"I alone am the owner of the properties acquired by \* \* \* \* If a male issue be born to me, then he shall remain the owner. Should perchance a son be not born to me, then my heir is Chiranjiv Keshari Singh. Should a heir (i. e.) a son be born to Chiranjiv

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Keshri Singh, then he shall be the heir in the future. Should perchance no son be born to Chiranjiv Keshar Singh and should it be necessary to bring (a son) from (some) other place, then during the life time of my wife (a son) from our Gotra shall be brought (adopted) with the consent of my wife. *Held* the words of the will, "Should perchance a son be not born to me, then in that case my heir is Chiranjiv Keshar Singh," and the subsequent words, "I appoint Chiranjiv Keshar Singh (be) my heir" are sufficient words to pass the property from the date of the death of the testator, and although the subsequent terms of the will as to the adoption of a son with the consent of the testator's wife in the event of no son being born to the respondent, and other expressions used, may appear to give an unusual authority to the wife, there is nothing in them to cut down the express terms of the will appointing defendant to be the testator's heir. An intention to leave the wife in the same position as if he had died intestate cannot be implied in a case where the testator has made a will in which he has deliberately made no express provision with reference to the plaintiff. (*Lord Curzon*). *FOOL COOVERBAI v. RAI SAHEB KESHRI SINGH RAJMAL*.

45 M. L. J. 249 : 25 Bom. L. R. 621 :  
18 L. W. 153 : (1923) M. W. N. 578 :  
33 M. L. T. 214 (P. C.) L. R. 4 P. C. 151 :  
9 O. & A. L. R. 799 : 73 I. C. 242 :  
1923 P. C. 112.

## —Construction.

Where the testator bestowed absolute estate upon his brother and daughter and a portion of the estate upon his widows and to propitiate his brother for this bestowal of absolute estate upon the widow bestowed upon him a greater portion of his estate upon which the brother consented to the will *held* the estate upon the widow was absolute. (*Martineau and Zafar Ali, JJ.*) *MR. SHERA KHATUN v. MAHOMED ALI SHAH*.

1923 Lah. 559.

## —Construction — Administration — Panchas.

Where the will directed six persons to be Panchas of whom one was to supervise the work of administration and Panchas were given power to appoint other panchas. *Held* that power could only be exercised by the whole body of Panchas. Evidently the testator had never intended that Panchas should have the power to appoint other Panchas by will because it was intended by the testator that they should exercise that power as a body. That would exclude any power to appoint by will. At the most one pancha would be a person who might apply for letters of administration *de bonis non*. (*Macleod, C.J. and Crump, JJ.*) *SHANKER GANPAT v. DAMODAR*.

75 I. C. 569 : 1923 Bom. 216 (1).

## —Construction—Bequest of profits in perpetuity—Grant of corpus.

Where there are no words in the will to indicate that the legatees are specifically debarred from claiming proprietary interest, a bequest of the profits of property in perpetuity vests the property itself in the legatees. (*Dalal, J. C. and Neane*

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A. J. C.) *MAHOMED AHSAN ALI v. MASUD ALI*,  
10 O. L. J. 339.

## —Construction—Chinese testator—Gift to wife—Devolution in case of re-marriage—Effect of death.

A Chinese testator drew up a will in English and provided for the property being divided equally among his sons and wife and in case the wife re-married, her share was to go over to her sons.

The wife died before the testator, an event which was unprovided for. *Held*, a gift over to the sons could not be implied and it must be dealt with as on intestacy. *Held also*, in construing such a will couched in English terms of legal art, Chinese usages should not be adverted to. (*Lord Sumner*) *CHIA KHWEI ENG, v. CHIA PO CHOON & OTHERS*.

33 M. L. T. 212 (P. C.).

## —Construction — Clause uncertain and repugnant to gift made—Operativeness. See (1922) Dig. Col. 1062. J. N. GHOSE v. B. B. DAS.

70 I. C. 638

## —Construction—English Rules—Parsi will —Heirs—Time of ascertainment of. See (1922) Dig. Col. 1062. DINBAI v. NUSSEWANJI RUSTOMJI.

49 Cal. 1005 : 17 L. W. 174 :  
27 C. W. N. 199 : 69 I. C. 323 :  
37 C. L. J. 420 : 45 M. L. J. 572 :  
25 Bom. L. R. 625 (P. C.).

## —Construction—Gift to female—Absolute estate in earlier part of the will—Restrictions on power of alienation and mode of enjoyment—Effect of see (1922) Dig. Col. 1063. SURENDRA NATH CHATTERJEE v. SAROJBANDU BHATTACHARJEE.

70 I. C. 923.

## —Construction—Gift—Transfer of property in present—Revocation.

In dealing with the internal evidence of a document upon its own character, neither the reservation of property to the testator nor the alleged delivery of possession to the legatees are in themselves sufficient to destroy the character of the document which purports to be a will. Nor is there any authority for the proposition that actual delivery of possession to beneficiaries is fatal to a testamentary bequest. It is no doubt evidence against the disposition being testamentary but it is not a fact that *per se* annuls its testamentary character. As evidence, it can be rebutted by other evidence. It is a natural and intelligible position that a testator may wish to put his legatees in immediate possession to test the success of the disposition, to avoid disputes as to the interpretation of the Will and to familiarise the beneficiaries with their eventual properties. Courts must necessarily recognise such temporary possession as not incompatible with a will, provided that the disposition to which possession was given effect to is unmistakably revocable and that possession is not intended to confer a permanent interest during the testator's lifetime. The essential of a gift is that the donor should intend immediately to divest himself of the property. In the present case the exculant specifically reserved to himself in the deed the right of modification and did not so divest himself. *Held* the document was a will and the contention that it was not acted upon as such because possession was given under it cannot be



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maintained. (*Pipon, J. C.*) YUSAF KHAN v. MISAL KHAN. 73 I. C. 99.

—Construction—Gift to wife—Sir land—Absolute estate—Election—Person claiming under will cannot dispute other bequests. See (1923) DIG. COL. 1063 JAI INDRA BAHADUR SINGH v. BIRAI RAJKUNWAR. 21 A. L. J. 125 : 27 C. W. N. 221 (P. C.).

—Construction—Powers of executor—Power of sale—Mortgage—Suit to enforce mortgage.

An executor under a will with express power to sell has power to mortgage except in cases where a prohibition against mortgage can be inferred from the terms of the will. In a suit upon a mortgage made by an executor under a will with express power of sale the onus is not on the mortgagee to prove as part of his case that the executor was acting properly in effecting the mortgage. (*Sir Walter Schwabe, C. J. and Wallace, J.*) PARTHASARATHI NAIDU v. MUKUNDAMMAL. (1923) M. W. N. 14 : 1923 Mad. 84.

—Construction—Property bequeathed for performance of ceremonies—Stranger—Rights of

The testator by his will directed that deities 1 and 2 who had lived with him as his own children should get the residence of his estate, namely, bigga and 5 Kath as or land and that they should sell the property and perform his shraddas with the proceeds. The children were minors and the shradda ceremonies were validly performed by a volunteer. Held that deities 1 and 2 nevertheless took the property freed from the burden and there was no intestacy as regards that property (*Ross, J.*) MOTI LAL v. RAM KHELAWAN DAS. 72 I. C. 400.

—Construction—Rules.

In construing wills the test is what did the testator mean having regard to the words used. One of the cardinal rules in construing a will is to avoid an intestacy whether wholly or partially. (*Raymond and Madgavkar, A. J. C.*) NARAIN DAS v. TEK CHAND. 1923 S. 42.

—Construction—Testator having limited interest in property—Bequest—What passes.

Where a testator has a limited interest in property and purports to dispose of the property itself the presumption is that he intends to dispose only of his limited interest, and if it is sought to carry the disposition further, it must be shown that he intended to dispose of more than his interest. Regard may be had to the context of the will and the aptitude of the testamentary limitations if applied to the testator's actual interest (*Ashworth, A. J. C.*) MAHESA v. RAMESHWAR. 28 O. C. 329.

—Execution—Pardanashin—No proof of misleading.

In the case of a will by a Pardanashin lady, where the Courts below find she was not misled into executing it and that she executed it deliberately, the finding was accepted on appeal to His Majesty in Council. (*Viscount Haldane*) ISUBU LEBBE MARIKAR v. IDROSS LEBBE MARIKAR. 33 M. L. T. 437 (P. C.).

—Execution—Proof of—Quantum of evidence necessary—Similarity of signatures—Value

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of Appreciation of evidence by trial Judge. See (1922) DIG. COL. 1066 RAM GOPAL LAL v. MT. AIPNA KUNWAR. 27 C. W. N. 485 :

21 A. L. J. 402 : 1 Pat. L. R. 273 : L. R. 4 P. C. 106 (P. C.).

—Executor—Disposition by executor—Possession if necessary.

Wherever an executor by virtue of the grant of probate exercises a disposing power in respect of reality belonging to the legal personal representative, the property of the testator must be deemed to have come to the executor as executor though it did not come into his possession. (*Sir Henry Duke*) THE UNITED STATES FIDELITY AND GUARANTY CO v. THE KING. 33 M. L. T. 438 (P. C.).

—Executor—Legatee erecting mortgage pending administration—Decree on mortgage—Executor if entitled to declaration of invalidity of decree. See (1922) DIG. COL. 1065, SOUNDARATH AMMAL v. NARAYANASWAMI AIYAR. 70 I. C. 358.

—Genuineness—Shaky signature. See (1922) DIG. COL. 1066. PALCHUR SANKARA REDDI v. PALCHUR MAHALAKSHAMMA. 17 L. W. 1 : 27 C. W. N. 414 : 70 I. C. 949 (P. C.).

—Legacy—Suit by legatee against executor *de son tort*. See (1922) DIG. COL. 1066. ZAMINDAR OF BHADRACHALAM v. SRI RAJA VENKATADRI APPA RAO. 46 Mad. 190 : 70 I. C. 689.

—Life estate—Creation of—Remainder, vesting of. See (1922) DIG. COL. 1066 KUAR NAGESHAR SAHAI v. KUAR MATA PRASAD. 69 I. C. 730.

—Proof—Probabilities. See (1922) DIG. COL. 1104. BAI KUNTHA NATH CHATTERJEE v. PARASANNAMOYI DEBEYA. 44 M. L. J. 699 : 72 I. C. 286 : 27 C. W. N. 797 : 9 O. & A. L. R. 501 (P. C.).

—Proof of—Testamentary capacity—Execution—Burden of proof.

The burden of proving that a document in dispute is the last will of a free and capable testator lies on the propounder. He has therefore to allege and prove a sound disposing mind on the part of the testator. It is not sufficient in all cases to prove execution and rely upon the presumption of capacity. This may be so in a non-contentious case. (*Kotwal, A. J. C.*) MUKTABAI v. WAMAN. 69 I. C. 572 : 1923 Nag. 63.

—Restrictions on bequest.

A testator can give property whether by way of remainder or by way of executory bequest (to borrow terms from the law of England) upon an event which is to happen, if at all, immediately on the close of a life in being.

A Hindu, who has a power to transfer his property, though not self-acquired can make a will with a gift over. (*Abdul Raof and Sumensder, J.J.*) PREM SINGH v. HARDIT SINGH. 1923 Lah. 649.

—Revocation—What constitutes—Intention to revoke—Sufficiency of future intention.

An intention on the part of a testator to rescind a portion of the will and confirm the rest at some

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future time, without an expression of an actual present intention to alter or cancel the will cannot operate as a revocation in law. It may be a question how far, when the terms of a will have been reduced to writing evidence of oral statements in derogation of those terms can be admitted as between persons claiming to be the representatives in interest of the testator under the will or otherwise. The mere fact that in Mysore there is no statutory enactment corresponding to the Hindu wills Act would not necessarily preclude the Court from adopting a position which represents the current view of the Courts in British India as to the general principle of Hindu Testamentary Law in the matter under consideration, and which, while in itself reasonable and salutary in every way is not opposed to local precedents. Even if an oral revocation of a written will were to be accepted in evidence, the Court ought to insist in every case on very clear, cogent and consistent proof of an oral revocation and on the evidence being precise as to time and place (*Chandrasekhara Aiyar, C. J. and Ramaswami Aiyengar, J.*) *SUBBA BHATTA v. SREE SRINGERI MATTAM SWAMIGAL VARU.* 1 Mys. L. J. 116.

———**Soldiers' will — Requisites of — Oral will.**

Entries in the kindred roll and names of heirs made about a soldier by the military authorities are not tantamount to the soldier's will. (*Macleod C. J. and Crump, J.*) *BHAGHUBAI TUKARAN v. APPAJI SITARAM* 47 Bom. 552  
20 Bom. L. R. 157 : 72 I. C. 277 : 1923 Bom. 260.

———**Testamentary capacity — Proof of — Sound and disposing state of mind — Directions given by testator — Will prepared in accordance with — Signature — Registration.**

Testamentary capacity is a relative thing, it is to be considered with reference to the particular will the question being not whether the testator had capacity for will making, but whether he had capacity to make the disputed will. He may have had capacity to make that will in the circumstances and yet not have had the capacity to make a more complex will or he may not have had the capacity to make the will in suit and yet have had capacity to make a less complex or different one, whether he understood the particular thing he was doing is the vital question.

Where a testator has given instructions for the will while in health and executes the document prepared in accordance therewith while in illness slight proof of knowledge and approval will suffice, and the will may be held valid, though at the time of execution the testator merely recollects that he has given those instructions but believes that the will which he is executing is in accordance with them. (*Mookerjee and Chotzner, JJ.*) *SARADINDU NATH RAI CHAUDHURI v. SUDHIR CHANDRA DAS.* 50 Cal. 100 : 1923 Cal. 116.

———**Testamentary capacity — Requisites of.**

The mere fact that the testator had sense or consciousness or that he was able to answer a question or two put by a doctor about his illness is not sufficient to prove testamentary capacity. (*Chatterjee and Pearson, JJ.*) *JOGESH CHANDRA SHAHA v. BHIKU SAN PARAMANIK.* 72 I. C. 88.

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———**Validity — Suspicious circumstances.**

Where under a will which is sought to be propounded the testator's wife and children are not mentioned at all, for 20 years after the death it had not been probated, and in prior proceeding regarding the estate, the testator had been treated by all as having died intestate the genuineness must be held not established. (*Spencer and Venkatasubba Rao, JJ.*) *ROSA MARIA v. JACOB SOUZA.* (1923) M. W. N. 647 18 L. W. 588.

———**WITNESS — Relationship not sufficient to discredit.**

Relationship to the agent of a party or even to the party himself is not sufficient reason by itself for disbelieving a witness (*Batton J. C. and Hallifax, A. J. C.*) *LACHMINARAYAN v. MOULVI ZAHIRUL SAID ALVI.* 1923 Nag. 322.

———**WORDS — Agachh trees — What included.**

"Agachh trees" means trees are valueless for fruit bearing or timber purposes. (*Bucknill and Das, JJ.*) *NATHUNI RAI v. MAHARAJADHIRAJ SIR RAMESHWAR SINGH BAHADUR,* 1 Pat. L. R. 289 : 73 I. C. 629.

———**'Auladdar aulad' — Meaning of.**

The words 'auladdar aulad' include descendants whether male or female except descendants through females. (*Macleod, C. J. and Crump, J.*) *SAYED MIRA SAHIB v. BAI CHHOTI BEGAM.* 73 I. C. 427.

———**Farokha, meaning of.**

Where the co-sharers in a zemindari claimed a customary right to pre-mortgage on the strength of a clause in the wazib-ul-arz which ran as follows :

'In case none of the cosharers is prepared to purchase or to accept a mortgage or lease, then the co-sharer in question may sell to a stranger', held that the word "Farokha" cannot be held to mean "transfer", as it is inconsistent with the ordinary meaning of the word. (*Rafique and Piggott, JJ.*) *SURAJ NARAYAN PRASAD PANDE v. RAM GHULAM SHUKUL.* 45 A. 321 : 1923 A. 361 (2).

———**Heirs and representatives — Meaning of See DEED — CONSTRUCTION.** 1923 P. C. 160.

———**Hissedar karbi — Meaning of See PRE-EMPTION.** L. R. 4 All. 550.

———**Importation — Meaning of See SALT ACT.** S. 27. 69 I. C. 460.

———**Jis Se razi ho — Meaning of See PRE-EMPTION.** 1923 A. 519.

———**Jote.**

The expression "jote" in a deed does not mean that the tenancy is a ryoti holding. The expression "jote" is a general term and does not necessarily mean a Ryoti "Jote" (*Chatterjee and Pearson, JJ.*) *KRISHNENDRA NATH SARKAR v. RANI KUSUM KAMANI DEBI.* 1923 Cal. 351.

———**Makaran — Meaning of See BENGAL TENANCY ACT, S. 105** 38 C. L. J. 372.

———**Mahk — Meaning of — Absolute ownership. See HINDU LAW WILL.** 69 I. C. 286.

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**WORDS "Malikana" What is—Portion of holder.**

Malikana is a right to a portion of the benefits of an estate in consideration of proprietary rights—(*Mookerjee and Rankin, J.*) SOUDAMINI DASSYA v. SECRETARY OF STATE. 50 Cal. 822.

———Miras—Meaning of. See LEASE—CONSTRUCTION. 27 C. W. N. 1037.

———Mireshorotto Jansudiya—Meaning of. See LEASE—CONSTRUCTION. (1923) Cal. 705.

———Putra poutrade Krame—Meaning of. See GRANT. 27 C. W. N. 964.

———Putra poutrade krame—Meaning of. See LEASE—CONSTRUCTION. 1923 Cal. 505.

———"Settled for periods."

The words "settled for periods" are not an admission that the settlement was *de jure*. (*Lord Phillimore*), NARESH NARAYAN ROY v. SECRETARY OF STATE FOR INDIA. 50 Cal. 446 : 45 M. L. J. 444 : (1923) M. W. N. 511 : 50 I. A. 121 : (1923) P. C. 1 : 32 M. L. T. (P. C.) 162.

———Veetukutti—Who is. See MALABAR LAW—THATTANS. 44 M. L. J. 274.

———"Kul" irrigated.

Description of lands in Jamabandi was 'Kul irrigated,' held this does not mean that they were as a matter of fact irrigated from a particular Kul. The description only means that the lands were capable of being irrigated from a Kul. (*Moti Sagar, J.*) MANSA RAM v. KALU RAM. 1923 Lah. 605.

———"Shop"—Building mainly used as residence.

The word "shop" denotes a building primarily used for the retail sale of goods. Where a building was mainly used as a residence the mere fact that a part of it is used as a tailor's workshop does not convert the whole of it into a shop. (*Scott Smith, J.*) SANT SINGH v. GOBIND RAM. 73 I. C. 454 (2) : 1923 Lah. 209.

**WORKMAN'S BREACH OF CONTRACT ACT (XIII of 1859), S. 1.—Contract with two workmen or artificers—Proceedings under the—Elements of offence.**

Notwithstanding the language of S. 1 of the Workman's Breach of Contract Act, it is open to an employer to start proceedings under the Act in respect of a contract entered into with two artificers jointly. In a case under the Act, the court has to find on the evidence whether the artificers have received an advance of money. (*Oldfield and Devadoss, JJ.*) KANDASWAMI PILLAI v. GURUSWAMI PILLAI. 44 M. L. J. 53 : 1923 Mad. 184 : 71 I. C. 61 : 24 Cr. L. J. 13.

———S. 1—Proceedings under—Not criminal. See CR. P. CODE, S. 247.

32 M. L. T. 347 (H. C.).

———Ss. 1 and 2—Supervisor, if a workman—Enforcement after expiry of period.

A person who undertakes to supervise the work of coolies and agrees to the penalties under the Act is an "artificer, workman or labourer" under S. 1 of the Act.

**WORKMAN'S BREACH OF CONTRACT ACT, S. 4.**

Contract which fall under the Act can be enforced even after the time fixed, unless the period fixed is an essential term. (*Chandrasekhara Aiyar, C.J. and Subbanna, J.*) KADADAS v. FARAIAS. 1 Mys. L. J. 25.

———S. 2—Refusal to work—Physical fitness—When an offence.

A person can be held to have refused "wilfully and without lawfully or reasonable excuse" only if it is proved that he was physically fit at the time. (*Macgregor, J.*) HEETH LAL KADRIA v. MOOKSUDALLY. 1923 Rang. 79 (2).

———S. 2—Slavery—Agreement for service when amounts to—Applicability.

For a sum of Rs. 160 due by the accused, father and son to the Complainant they entered into an agreement with him whereby they undertook to work in his (Complainant's) Coconut tope for a period of one year and subsequently to repay any money that might be found still due by them to him at the end of the year. They were to be paid Rs. 6 per month out of which Rs. 2 a month were to be taken towards the debt Rs. 4 being paid in cash. This working in the tope was to continue for only a year, and there was no obligation under the agreement to work in the tope thereafter and the bond then converted itself into a simple money debt bond.

Held that there was nothing unfair in the arrangement, and nothing which would amount in the remotest degree to what may be called Slavery.

Where the second class Magistrate directed the two accused to work for a period of 6 months, the balance of the period of one year stipulated for in the agreement, held that his order was right and that the case was not one for the application of S. 2 of the workman's Breach of Contract Act. (*Krishnan, J.*) ELLAN. In re. 45 M. L. J. 843 : (1924) M. W. N. 41.

———(XIII of 1859 amended XII of 1920) S. 2

—Whether one year equals 365 days at intervals.

An agreement that the accused should work every day should not be transformed by the Court into an agreement to work for 365 days at odd intervals, if the complainant so chose, when the accused should fail to work one day after the other. (*Ryves, J.*) ASGAR ALI v. EMPEROR. 1923 A. 609 (2).

———S. 2 (b)—Order to show cause not issued.

Where the Magistrate omitted before ordering the complainant to pay compensation under S. 2 (b) of the Act, to call on him to show cause. Held that his order was illegal. (*Daniels, J.*) ABDUL SAMAD KHAN v. EMPEROR. 45 A. 616 : 1923 A. 599.

———S. 4—Applicability of—Contract—Meaning of.

The word 'contract' as used in S. 4 of Act 13 of 1859 would include all contracts falling within the meaning of the Indian Contract Act of 1872 except where the period specified for performance exceeds one year. Where a new contract is entered into under circumstances showing that it merely superseded the old contract, it is enforceable under the Act. (*Kanhaya Lal, J.*) ABDUL RASHID KHAN v. HAJI NISAR MAHOMED KHAN. 45 A. 691 : 21 A. L. J. 622 : L. R. 4 A. 137 (Cr.).

# SUPPLEMENT.

## APPEAL.

**APPEAL—Decree passed ex parte—Service of Summons—Defects in—If can be gone into.**

Where a decree is passed ex parte and an appeal is preferred from the same, the appellate court is ordinarily concerned with the question whether the evidence on record is sufficient to support that decree. The question whether there was due service of summons is the subject matter not of an appeal from the decree but of the special proceedings under O. 9, C. P. Code. (*Young, O. C. J. and Carr, J.*) **RAJ CHANDRA DHAR v. MESSRS K. D. O. C. RAY.**

2 Bur. L. J. 282.

**BUDDHIST LAW—Burmese—Succession—Rights of wife—Superior and inferior—Distinction between.**

A Burmese Buddhist may marry one or more women at the same time and they may all have the status of a wife. Such wives whether they live with the husband or not inherit on equal footing. They are classed as "superior wives." The law contemplates also another class of wives, but who are given a distinctly inferior status. They are "inferior wives" and get two-fifths of the husband's estate, provided they live with the husband. If they live apart, the wife is entitled only to retain such property as was in her actual possession. (*Heald, and May Oung, JJ.*) **MA THEIN YIN v. MAUNG THA DUN.**

2 Bur. L. J. 292.

**—Husband and wife—Loan taken by husband for the benefit of himself and his wife—Decree against husband—Liability of wife.**

Where a loan is taken for the benefit of both the husband and the wife yet where the creditor sues and obtains a decree against the wife only, the decree does not bind the wife's share of the joint property. (*Duckworth, J.*) **SAW HLA HUNG v. MA MER NYO.**

1 R. 555.

**BURDEN OF PROOF—Law applicable—Custom or Hindu Law—Agricultural community in the Punjab See CUSTOM.**

4 Lah. 434.

**BURMA MUNICIPAL ACT (III OF 1893), S. 2 (6)—Lodging house—Tenements let out—When to be licensed.**

If a building as a whole is let in lodgings or otherwise occupied to any extent in common by members of more than one family, then it is a lodging house and has to be licensed. If there is no such common occupation of the building as a whole, but there is such common occupation of a particular part, then that part alone is a lodging house and has to be licensed. It neither the building as a whole nor any part of it separately is occupied to any extent in common by the members of more than one family, neither the building nor any part of it is a lodging house

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requiring licensing. (*Held a.J.*) **EMPEROR v. SEIH.**

2 Bur. L. J. 298.

**C. P. CODE, S. 110—Appeal dismissed for default of appearance—Appeal to Privy Council.**

Where an appeal is dismissed for default of appearance, the same is not appealable to the Privy Council. (*Young, O. C. J. and May Oung, J.*) **MAUNG SAD MYAING v. MG SEIN.**

2 Bur. L. J. 294.

**—S. 115 and O. 41, Rr 27 and 33—Appellate Court—Powers of—Decision by trial Court under O. 17, R. 3, C. P. Code—Appellate Court directing additional evidence to be taken without setting aside decree of trial Court—Irregularity—Revision**

Plff, sued deft. for the removal of the eaves of his house which hung over his wall. Upon the day fixed for hearing the plaintiff did not appear and the case was decided on the merits under O. 17, R. 3, C. P. Code and the plaintiff's suit was dismissed. On appeal the appellate Court directed the trial Court to take any evidence which might be offered by the plff, and to return the record. Against the order of the Appellate Court the defendant preferred an appeal. *Held*, (1) that the order of the Lower Appellate Court was not one passed under O. 41 R. 23, C. P. C. but under O. 41, R. 27 or R. 33, (2) that in it was not open to appeal; (3) that the appeal could be converted into a revision; and (4) that the proper course for the lower appellate Court was to set aside the decree and remind the case to the trial Court for hearing and decision on the merits. (*Duckworth, and Po. Han, JJ.*) **ASHROF ALI v. MAHAMED MORDEN.**

1 Rang. 656.

**COURT FEES ACT, S. 7 (V) (b)—Land separately assessed to revenue—Entire holding—Suit for recovery of possession—Court-fees.**

Where the lands in dispute in a suit form an entire holding which is separately assessed to revenue the provisions of S. 7 (v) (b) of the Court Fees Act apply and Court fee should be paid on five times the annual revenue. (*Heald, J.*) **MA SHIN v. MAUNG HMAW**

1 Rang. 651.

**MINOR—Partnership business on behalf of—Presumption of benefit.**

In the case of a business undertaking, in which a minor is a partner, where transactions are carried on in the usual course of business, it is not necessary for the creditor to give specific evidence of benefit in each individual transaction. The fact that the transactions were carried on in the usual course of business is sufficient to raise a presumption that they were for the benefit of the business. (*Daniels, A. J. C.*) **WILYAT HUSAIN v. PUTTU LAL.**

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## II—SELECT ENGLISH CASES.

### ALIEN.

**ALIEN**—*German national—Who is, within the meaning of the Treaty of Peace Order, 1919—Whether a person who is both a British subject and a German national is one.*

Both in the Treaty of Peace and in the order the expression "German National" means a person who is by German law a subject of Germany.

It makes no difference that the person whose property is charged under the Order Cl. 1 (xvi), is also a British subject. The word "enemy" in Art. 297 refers to enmity between country and country between country and individual.

Reference may be made to the treaty to ascertain the true construction of the order which is based thereon. **KRAMER v. ATTORNEY GENERAL.**

(1923) A. C. 528 affirming  
(1922) 2 Ch. 850, C. A.

———*Married Woman—Life—Estate of—With restraint on anticipation—Whether her "property, rights and interests" in England—Treaty of Peace Order, 1919—Statutory charge.*

Notwithstanding that a German national who is a married woman has no power to anticipate, her life-interest in a fund in England is subject to the charge created by the Treaty of Peace Order, Cl. 1 (xvi).

A restraint on anticipation, though not a mere personal disability, and though it may render the property inalienable by any act of the woman, does not exclude the possibility of the creation of a charge adversely to her.

The Peace Order can operate upon the separate estate of a married woman restrained from anticipation because it is property of hers and is by statute affected by action adversely to her and not by act done by her. **PUBLIC TRUSTEE v. WOLF.**

(1923) A. C. 544, reversing  
(1923) 1 Ch. 56, C. A.

**ALIMONY**—*Calculation of—If can be attached in Execution*

Alimony is an allowance which, having regard to the means of the husband and wife, the Court thinks right to be paid for her maintenance from time to time. By its very nature it is incapable of being assigned, nor can it be attached in execution nor a receiver appointed to collect the same. **J. WALLIS LTD. v. LEGGE.**

(1923) 2 K. B. 240

**APPEAL**—*Taxation of bill of costs—Matters of practice and procedure.*

Whenever there has been an action, an application for an order to tax the solicitors' bill for services rendered in the conduct of that action is a matter of practice and procedure and an appeal from the order lies to the court of Appeal, though it may be a final order within the meaning of S. 1 (4) of the Judicature Act, 1894. *In re WINGFIELDS.*

(1923) 2 K. B. 112.

### BANKER AND CUSTOMER.

**ARBITRATION**—*Agreement to refer—Suit on original cause of action—Not maintainable without going to arbitration. See HALLEN v. SPAETH.* (1923) A. C. 684 (P. C.).

———*Award when can be set aside—Error of law—Terms of contract not incorporated—If can be referred to.*

When matters in dispute are referred to an arbitrator, he is constituted the sole and final judge of all questions both of law and fact. The only exceptions to this rule are when the award is the result of corruption or fraud and when an error of law is palpable on the face of the award or upon some paper accompanying and forming part of the award, as for instance a note appended by the arbitrator stating the reasons for his judgment. When the terms of the contract giving rise to the arbitration are not incorporated, they cannot be looked to, for the purpose of detecting an error of law. **CHAMPSEY BHARA AND CO. v. JIVRAJ BALLOO SPINNING AND WEAVING CO. LTD.**

(1923) A. C. 480.

———*Construction of document—Award when can be challenged—Evidence—Admissibility.*

When the construction of a document is referred to an arbitrator, unless it appears on the face of the award that the arbitrator has proceeded on principles which are wrong in law, his conclusions are final. Even the fact that the court itself would have come to a different conclusion does not matter. If he has proceeded illegally, for instance decided on evidence which is inadmissible or on principles of construction which the law does not countenance, then there is error of law which may be ground for setting aside the award. Case law reviewed.

The fact that the arbitrator in construing the deed looked into the surrounding circumstances not only to make the terms intelligible but to be inferred therefrom that the parties intended to agree to terms which, though not clearly expressed, are in his opinion implied in it, does not vitiate the award, as he is quite competent to infer such a matter. **GOVERNMENT OF KELANTAN v. DUFF DEVELOPMENT CO. LTD.**

(1923) A. C. 395.

———*Reference out of court—Power to order affidavit of document or answer interrogatories.*

In a case of reference to arbitration out of court, the arbitrator has jurisdiction to direct any party to make an affidavit of documents and to answer interrogatories on oath. **KURSELI v. TIMBER OPERATORS AND CONTRACTORS, LIMITED.**

(1923) 2 K. B. 202.

**BANKER AND CUSTOMER**—*Crediting cheque in customer's account—Proceeds if available before clearance.*

**BANKRUPTCY.**

The question whether a banker receives a customer's payment by means of a crossed cheque as agent for collection or as holder for value is one of fact. The mere fact that the cheque is immediately credited in the ledger does not make the banker a holder for value, though *prima facie* such inference may be drawn. But such inference may be negatived by other evidence showing that the customer could not draw before clearance. Where a banker receives a cheque as agent for collection and stops payment before the cheque is cleared at the clearing house, the banker can only receive the proceeds as collecting agent for the customer and the relationship between the parties is not the ordinary bank relationship of debtor and creditor. *FARROW'S BANK LTD. In re.*

(1923) 1 Ch. 41.

**BANKRUPTCY—Fraudulent conveyance—Devise to defeat or delay creditors—**13 Eliz. Ch. 5.

A person in embarrassed circumstances agreed to sell to a company to be formed all his property on condition they allotted him a number of shares, appointed him their managing director and paid his business debts. *Held*, the object of the transaction was to remove his assets out of the reach of the creditors and hence it tended to defeat and delay creditors within the meaning of 13 Eliz. Ch. 5.

*Per Lord Sierndale M. R.* The fact that one creditor incidentally got a benefit does not prevent the transaction from being void.

The principle to be applied in such cases is as laid down in 4 Ch. 622. "If the deed is *bona fide i. e.*, if it is not a mere cloak for retaining a benefit to the grantor, it is a good deed under the Statute of Elizabeth." *In re FASEY EX PARTE TRUSTEES.*

(1923) 2 Ch. 1.

———**Hire purchase on agreement—Ownership.**

Some months before a person was adjudged insolvent he sold some articles to another who however allowed the articles with the former on a hire purchase agreement. The trustee in bankruptcy moved for an order that they belonged to the bankrupt. *Held*, from the circumstances the inference of ownership arose. *In re KAUFMAN SEGAL AND DOMB: EX PARTE THE TRUSTEE.*

(1923) 2 Ch. 89.

**CAUSE OF ACTION—Inducing agent to commit breach of his duty to principal—Damage to principal—If confers a right to recover from the person inducing.** See *JASPERSON v. DOMINION TOBACCO Co.*

(1923) A. C. 709, (P. C.)

**CERTIORARI—Absence of jurisdiction—Judgment by default—Effect**

When plaintiffs chose to bring an action before a certain tribunal which would have no jurisdiction to hear it if a certain defence is pleaded, and when that was pleaded sought to have the whole matter transferred to the High Court by taking out a writ of certiorari, *Held*, they were not entitled to do so. In such a case there is no rule compelling defendants to enter an appearance, and a judgment obtained by default should be set aside. *GIUSTI PATENTS AND ENGINEERING WORKS, LTD. v. MAGGS.*

(1923) 1 Ch. 515.

**COMPANY.**

**CHARITABLE AND NON-CHARITABLE OBJECTS—Bequests to.** See *In re CLARKE.* (1923) 2 Ch. 407.

**CHARITY—Endowment—Educational grounds—Purposes beneficial to the community—Validity.**

The scheme of the Shakespeare Memorial Trust was to provide a national theatre as a memorial to Shakespeare with the objects of performing Shakespeare's plays reviving English classical drama, encouraging modern plays of great merit and otherwise furthering the development of the modern drama, stimulating the art of acting and so on. *Held*, that the trust was a charitable trust either on educational grounds or on the ground that it was a trust for purposes beneficial to the community other than the relief of poverty or the advancement of education or religion. *Commissioners for Special Purposes of Income Tax v. Pemsel* [1891] A. C. 531, 583 applied. *In re SHAKESPEARE MEMORIAL TRUST EARL OF LYTTON v. ATTORNEY GENERAL.*

(1923) 2 Ch. 398.

**CHARTERPARTY—Construction—General words followed by specific ones—Ejusdem Generis rule.**

Where a charterparty provided that no demurrage need be paid "Should the vessel be detained by causes over which the charterers have no control, viz. quarantine ice etc" and as a result of a general strike over which the charterers had no control a delay was caused, *Held*, by the majority the initial general words are not controlled by the specific ones following. The *ejusdem generis* rule will not apply to such a case. *AMBATIELOS v. ANTOR JURGENS MARGARINE WORKS.*

(1923) A. C. 175.

**COLLIERY—Rating—Basis of—Actual output if test.**

For purposes of rating a Colliery there is no obligation to follow the practice of assessing it at the actual output of the previous year. The output will vary according as there were strikes or not and the proper basis would what a tenant would give for them for the year in question. *DURHAM COUNTY COUNCIL v. TANFIELD OVERSEERS.*

(1923) 2 K. B. 338.

**COMPANY—Winding up—Debt due to Food Controller—Crown debt—Priority—Companies (Consolidation) Act, 1908 (8 Edw 7. c. 69) Ss 186, 209.**

S. 186 of the Companies (Consolidation) Act, 1908 provided that, on the voluntary winding up of a company, the property of the Company shall be applied in satisfaction of its liabilities *pari passu*. S. 209 gives priority to certain debts, including specified Crown debts, over all other debts. *Held* that the generality of the words of S. 186 must be supplemented and corrected by the particularity of the exceptions enumerated in S. 209. S. 186 must be read as if the words "save as hereafter provided" were written into it. *Held* therefore that a debt owing to the Food Controller not being one of the Crown debts specified in S. 209, the prerogative priority attaching to it as a Crown debt was taken away by S. 186 read with S. 209 (by necessary implication).

**CONFLICT OF LAWS.**

Observations on the phrase "Crown debts"  
**FOOD CONTROLLER v. CORK.** (1922) A. C. 647

Affirming. (1923) Ch. 369 C. A.

**CONFLICT OF LAWS—Devolution—Movables and immovables.**

When a person of foreign domicile dies intestate the devolution of his immovables is governed by the *lex situs* and of his movables by the *lex domicilii*. The interest in the proceeds of the sale of freeholds is immovable property and hence succession thereto is governed by the *lex situs*. *In re BERCHTOLD: BERCHTOLD v. CAPRON.* (1923) 1 Ch. 192.

**CONSPIRACY—Interference with freedom of trade—Combination—If actionable.**

Any interference in combination with a man's right to carry on his business as he wills and to deal with such people as he thinks fit is a violation of legal right, which, if procured by threats and resulting in damage to him, is actionable if there be no sufficient justification for the interference.

Where the defendants combined to interfere with the plaintiff's right to trade as he willed by means of threats, unless sufficient justification exists, it is actionable if it results or would result in damage.

To justify an otherwise unlawful act on the ground of protection or promotion of trade interest, it must be shown it was his direct trade interest to do the act in question. *SORRELL v. SMITH.* (1923) 2 Ch. 32.

**CONTRACT—Agency—Inducing breach of—If actionable. See JASPERSON v. DOMINION TOBACCO Co.** (1923) A. C. 709 (F. C.)**Commission—Contract for sale—Of site at a fixed price—Sale at lower price—Right to Commission—Quantum meruit.**

A Steamship agent and broker stipulated for a commission of 3½ p. c. on the purchase price of a steamship if he procured a purchaser at or above a fixed price. The terms of the brokerage were reduced to writing. The ship was sold at a lower price and the broker claimed his brokerage or in the alternative, a quantum meruit for alleged services in effecting the sale. *Held* that the sale having been effected at a lower price than that upon which alone the brokerage of 3½ p. c. was to be payable, the claim for commission on foot of the contract failed. The parties having reduced all the terms of their bargain to the shape of a commission note, there was no scope for the operation of the principle of quantum meruit. *HOWARD HOULDER AND PARTNERS, LTD., v. MANX ISLES STEAMSHIP Co., LTD.* (1923) 1 K. B. 110.

**Intention to bind in honour—Ousting of jurisdiction—if enforceable.**

Where two persons who had been doing business with each other under a binding contract entered into a new arrangement include a third party therein and the document contained a clause that it was not a legal arrangement enforceable in

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courts of law, but only an honourable pledge among themselves, it was not a binding contract on which an action will lie. The clause cannot be rejected as repugnant to the rest of the agreement.

*Per Scrutton, L. J.* :—A court cannot seek the intention of parties from language used in a part only of the document but in the whole. *ROSE AND FRANK COY. v. J. R. CROMPTON AND BROTHERS LTD* (1923) 2 K. B. 261.

**Joint contract—Judgment against two of the contractors—Bar to proceedings against the rest.**

Apart from any special provision by statute or rule, a judgment against one joint contractor or tortfeasor is a bar to proceeding against the others. *PARR v. SNELL.* (1923) 1 K. B. 1 C. A.

**COSTS—Successful Defendant—When can be deprived of—Trial Court—Discretion of—Interference on Appeal.**

A successful defendant can be deprived of costs only on one of the three grounds mentioned in *Kitter v. Godfrey* (1920) 2 K. B. 47. Where the trial judge does not apply the accepted principles in regulating the exercise of his discretion as to costs, the appellate court will interfere.

Where a plaintiff's suit for damages for the defendant's negligence was dismissed on the ground of his (plaintiff's) own contributory negligence, *held* that the defendant was wrongly deprived of costs.

"Issue" in a case explained. *JACKSON v. ANGLO AMERICAN OIL CO.* (1923) 2 K. B. 601.

**CRIMINAL TRIAL—Evidence—Power of Court to recall witnesses for prosecution after evidence and speech for defence are closed.**

The power of the trial judge to recall witnesses stands on much the same footing as the power of allowing rebutting evidence to be called, that is to say, the Judge has a discretionary power with which a court of appeal cannot interfere unless it should appear that real injustice has resulted. A Judge in a criminal trial has power to recall prosecution witnesses for the purpose of rebutting the case set up by the prisoner in his evidence and of meeting a suggestion made by the counsel for the prisoner in his speech to the jury. *REX v. SULLIVAN.* (1923) 1 K. B. 47.

**CROWN—Prerogative to resist discovery—If taken by implication—Claims against Government and Crown Suits Act. 1912 (New South Wales), S. 4.**

The words of S. 4 of the claims against Government and Crown Suits Act, 1912 of New South Wales, that the proceedings and rights of the parties are to be "as nearly as possible" those as between subject and subject, take away any prerogatives of the Crown with regard to discovery.

While rights of the Crown could not be taken away except by express statutory provision of the operation of clear and necessary implication, the implication may arise from the use of general

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words which, properly construed, will exclude the right.

The reasoning in *Farnell v. Bowman*, 12 App. Cas 643 applied. *JAMIESON v. DOWNIE*. (1923) A. C. 691 (P. C.)

**CROWN DEBTS**—What are — Prerogative — Taking away by Statute—Expressly or by necessary implication. See *FOOD CONTROLLER v. CORK*. (1923) A. C. 647.

**DAMAGES**—Adultery—Death of wife—Effect,

A husband can file a petition for damages against a person who has committed adultery with his wife, even after the death of the wife. Such a petition has no connection with the petition for divorce on the same ground and the old common law action for criminal conversation is not affected in this respect by anything in S. 33, Matrimonial Causes Act *KENT v. ATKINSON*. (1923) P. 143.

— Measure of—Obstruction of ancient lights.

Where as a result of the obstruction to the access of light to the ancient windows of one house, that house and the adjacent one which would otherwise have developed commercially to a great extent depreciate in value for commercial purposes, in assessing the quantum of damages the adjacent house also though it has no ancient windows can be taken into consideration, *WILLIS v. MAY*. (1923) 1 Ch. 317.

— Negligence — Dangerous premises — Defective staircase—Injury to lodger of tenant—Liability of land-lord.

Defendants were the owners of a block of flats which they let to various tenants, the common staircase giving access to the flats remaining in the possession and under the control of the defendants. The stairs were made of cement reinforced by iron bars embedded in the cement and running along the length of the stair. Owing to the gradual wearing away of the cement, in some cases a bar became exposed and an irregular hollow or depression was scooped out behind it by the breaking away of little bits of cement. The plaintiff who was lodging with her sister in a flat of which her sister's husband was the tenant, while descending the stairs sustained injuries by catching her heel in a depression so formed. In a suit by plaintiff for damages against the defendant. *Held* (by the majority) that the only duty owed by the defendant to the plaintiff was not to expose her to a concealed danger or trap, that on the evidence, it was clear that the danger if any was obvious and could have been noticed by the plaintiff and that the action failed. *FAIRMAN v. PERPETUAL INVESTMENT BUILDING SOCIETY*. (1923) A. C. 74.

**DIVORCE**—Costs—Liability of husband—Jurisdiction disputed—Effect.

In proceedings for divorce the Court has jurisdiction to order security for the costs of the wife from the husband, notwithstanding the latter is

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raising a question as to the jurisdiction of the Court to entertain the suit. *SMITH v. SMITH*. (1928) P. 128.

— Marriage of Englishman with German wife in Germany—Decree of nullity in German law—Validity of, in England,

A domiciled Englishman married in Germany a woman with German domicile. Some time later she obtained a decree of nullity in the German Courts on the ground of mistake as to personal attributes. Later on, she re-married, and then the husband applied in England for divorce. *Held* the validity of a marriage solemnised in Germany according to that law is a matter properly cognisable by German tribunals and as the husband had appeared in the nullity proceedings, he was bound by the same. Such a decree is open to examination by an English Court to the extent it does not conform to the principles of natural justice, but subject to that, it is conclusive and binding. The validity of the marriage does not depend on the law of the husband's domiciles but on the *lex loci contractus*. Hence the fact that English law does not recognize mistakes as to personal attributes as a ground for nullity while German law does, does not enable an English tribunal to question the legality of the nullity order. *MITFORD v. MITFORD AND VON KUHLMANN*. (1923) P. 130.

**EASEMENT**—Light — Threatened obstruction—Power of court to award damages in lieu of injunction—Various kinds of dicta.

*Held* by Lord Sterndale M. R. and Warrington L. J. (Younger L. J. holding *contra*) In a motion for injunction by the plaintiff regarding a threatened obstruction to his ancient lights, even where the court finds that the interference would be small and could be compensated in damages, it has no jurisdiction to grant damages in lieu of injunction, as no legal injury had yet been committed S. 2 of Lord Cairn's Act, 1858, construed. Dicta in 43 Ch. D. 416 *folld*.

Per Lord Sterndale M. R.:—Dicta are of different kinds and of varying degrees of weight. Sometimes they may be called almost casual expressions of opinion upon a point which has been raised in the case and is not really present to the judge's mind. Such dicta, though entitled to the respect due to the speaker may fairly be disregarded by judges before whom the point has been raised and argued in a way to bring it under much fuller consideration. Such dicta are of a different kind; they are although not necessary for the decision of the case, deliberate expressions of opinion given after consideration upon a point clearly brought and argued before the court. It is open no doubt to other judges to give decisions contrary to such dicta, but much greater weight attaches to them than to the former class. *SLACK v. LEEDS INDUSTRIAL CO-OPERATIVE SOCIETY, LTD*. (1923) 1 Ch 431.

— Right of way — Co-lessees — When implied.

A lessee cannot acquire a right of way over the land of another lessee under the same lessor either by prescription at common law or under the



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doctrine of a lost grant or by prescription under the Prescription Act.

But in such a case, law can imply in order to give effect to the intention of the parties grants and reservations as to a right of way, or such easements as may be necessary to give effect to the purpose of the grant or the manner in which land is to be used. (1915) A. C. 634 followed.

Several lesses under the same lessor may by express grant as between themselves create easements of way. *CORY v. DAVIES*.

(1923) 2 Ch. 95.

**ESTOPPEL—Bill of Sale—Ownership of goods—Effect of declaration.**

The doctrine of estoppel applies only to contracts *inter partes* and it is not competent to parties to estop themselves against an Act of Parliament.

Where a party to a bill of sale described the goods as his own though they belonged to his wife and she too made a statutory declaration to that effect she is estopped from denying afterwards that the goods were those of her husband. *WESTON v. FAIRBRIDGE* (1923) 1 K. B. 667.

**—Doctrine of—Duty of owner of goods let out on hire purchase system.**

In order to create an estoppel there must be a duty owing by the person estopped towards another person to speak or to act, which he has failed to perform and damage must thereby have resulted to that other person. No one can rely upon the estoppel except the person to whom the duty was owing and who has suffered the damage.

Where under an execution the sheriff seizes goods which were let out on hire purchase system, there is no duty on the owner to tell the Sheriff anything and if the goods are mistakenly sold, the owner is not in any way estopped. *JONES BROTHERS (HOLLOWAY) LTD v. WOODHOUSE*.

(1923) 2 K. B. 117.

**EVIDENCE—Criminal trial—Good character—Evidence of—Statement voluntarily made defence witness as to good character of accused—Cross examination as to bad character—Admissibility of.**

If a prisoner endeavours to establish a good character either by calling witnesses himself, or by cross examining the witnesses for the prosecution, the prosecution is at liberty, in most cases, to give proof of the prisoner's previous convictions. A prisoner cannot be said to be endeavouring to establish a good character merely because a witness, whom he called, voluntarily and probably against the prisoner's own desire, made a statement as to his good character and that does not entitle the prosecution to question the prisoner as to his previous convictions. *REX v. REDD*.

(1923) K. B. 104.

**—War—Judicial notice.**

A court of law may take judicial notice of the fact that a state of war exists between one country and another but it cannot do so as regards the date when particular operations began. *COMMON*

**HABEAS CORPUS**

**WEALTH SHIPPING REPRESENTATIVE v. PENINSULAR AND ORIENTAL BRANCH SERVICE.**

(1923) A. C. 191.

**EXECUTOR—Powers of—Right to effect partition—Purchaser—Rights of.**

Where a testator was possessed of property which he held as tenant-in common along with others, his executors have a right to concur in a partition of that property, as that is a natural and reasonable method by which he can put himself in a position easily to administer and realise the testator's estate.

The purchaser of such a share obtains a good title thereto, if he has no notice of any improper conduct on the part of the executors other than the execution of the deed of partition. *IN RE KEMNAL AND STILL'S CONTRACT In re*.

(1923) 1 Ch. 293.

**EXTRADITION—Fugitive criminal—Abetment of offence in Switzerland—Arrest in England.**

If a person residing in England has abetted an offence in Switzerland and is seeking to avoid trial in Switzerland by keeping himself in England, he is a "fugitive criminal" within the meaning of S. 26 of the Extradition Act and he could be extradited. *REX v. GODFREY*.

(1923) 1 K. B. 24.

**GARNISHEE PROCEEDINGS—Order in—Effect of—Debt due to foreigner—Liability to pay again.**

Where a judgment for money is obtained against foreigners who had submitted to the jurisdiction of the Court and thereafter the decree holders took out garnishee summons to attach a debt due to the judgment debtors from an English Bank. Held the debt sought to be garnished being one contracted and payable in England, the English Courts can exercise jurisdiction over it, and a garnishee order would be a valid discharge of the amount paid and will be recognised by International Law on the principle that a person who has been compelled by a Court of competent jurisdiction to pay a debt once shall not be compelled to pay it over again. *SWISS BANK CORPORATION v. BOCHMISCHE INDUSTRIAL BANK*.

(1923) 1 K. B. 673.

**HABEAS CORPUS—Order directing issue of writ—Determination of the legality of the applicant's detention—Discharge not ordered—Appealability of the order—Appellate Jurisdiction Act, 1876 (39 and 40 Vic., C. 59), S. 3.**

In spite of the wide generality of the words in S. 3 of the Appellate Jurisdiction Act, 1876, which allows an appeal to the House of Lords from any order (subject to certain exceptions which do not apply) of the Court of Appeal in England, held (by Earl of Birkenhead, Viscount Finlay, Lord Dunedin, and Lord Shaw of Dunfermline, Lord Atkinson dissenting), that where a court of law having power to entertain an application for a writ of habeas corpus comes definitely to the conclusion that the applicant is entitled to his discharge, no other court either by way of review or of appeal can upset that judgment. That the court of Appeal had merely decided that the applicant's detention was illegal and had not

## INCOME-TAX.

directed his discharge was held immaterial, and the House dismissed the appeal as incompetent.

*Per Lord Shaw of Dunfermline*; considerations justifying the Courts to arrive at the intention of the Legislature overlooking the plain meaning of sections in a statute; *Stradling v. Morgan* (1558) Plowd 199, 205. *Cox v. Hakes* (1809) 15 App. Cas. 506 applied; *Barnardo v. Ford* [1892] A. C. 326 distinguished. SECRETARY OF STATE FOR HOME AFFAIRS *v.* O'BRIEN,

(1923) A. C. 603, on appeal from (1923) :  
2 K. B. 361, C. A.

## INCOME-TAX—Children — En ventre sa mere—Deduction if claimable.

Finance Act, 1920, provided a certain deduction in the case of persons having children at the commencement of the year of assessment. *Held*, a child *en ventre sa mere* is not one falling within the particular provision, though for some other purposes it may be considered as a "child living" *JACKSON v. VOSS*, (1923) 2 K. B. 354

—*Excess profits duty* — *Ascertainment of capital*—*Unpaid purchase-money*—*Borrowed money*—*Debt*—*Deductions for*—*Finance* (No. 2) Act 1915 Sch IV, Part 3, Rr 1-3.

The port of London Authority was created by Statute in 1908. It took over the assets of three London Companies, and issued its own stock to the debenture holders' and share-holders of the said companies according to the value in the market of their former holdings. The port stock bore interest, was redeemable after a certain period, and so on. *Held* that the authority acquired its assets otherwise than by cash; that the stock issued was neither "unpaid purchase money" nor borrowed money nor (per Viscount Cave, L. C. Viscount Finlay, Lord Atkinson and Lord Sumner; Lord Phillimore dissenting) did it constitute a "debt" within the meaning of these phrases in the Finance (No. 2) Act, 1915 Sch IV Part 3, Rr. 1-3.

*Held* therefore, that in ascertaining the capital of the authority in order to determine whether its income exceeded a certain percentage on the capital so as to make it liable to pay excess profits duty, the value of the stock issued to the share-holders and debenture-holders of the old dock companies should not be deducted.

Observations on the term 'debt'. INLAND REVENUE COMMISSIONERS *v.* PORT OF LONDON AUTHORITY. (1923) A. C. 507 :

Affirming (1923) 2 K. B. 599.

—*Exemptions* — *Charity* — *Income Tax* Act (1918) S. 37.

Where according to the terms of a will certain annuities were to be paid first and the balance after the death of certain persons was to be paid to a charity, the amount was an annual payment" within the meaning of S. 37 (b) of the Income Tax Act, 1918 and as such was exempt from income tax. *THE KING v. SPECIAL COMMISSIONERS OF INCOME TAX: EX PARTE SHAFTESBURY HOMES AND ARETHUSA TRAINING SHIP*. (1923) 1 K. B. 393.

## INTERNATIONAL LAW.

—*Manager of company*—*Bonus calculated on profits*—*How assessable*.

The remuneration of the manager of a company was fixed at a certain sum as salary and a bonus calculated on the profits of the year. *Held*, in assessing the bonus to income tax. Sch. E.R. 4 of the Income Tax Act, 1842 applies and the basis is not the actual amount of the year in question, but the average of the three preceding years, *MC. DONALD v. SHAND*, (1923) A. C. 387.

—*Mode of Computation*—*Right to deduct tax out of salaries*—*Waiver*—*Calculation of income*.

Where a company agrees with its employees not to exercise the right conferred upon it by the statute to deduct or retain out of the salaries of its employees the income tax chargeable thereon the amount of tax paid by the company though not deducted from the salaries is part of the income of the employees for purposes of income tax. *NORTH BRITISH RAILWAY COMPANY v. SCOTT*. (1923) A. C. 37.

—*Supertax*—*Calculation of Deductions*.

On a construction of the sections of the English Income Tax Act, 1918 and Finance Act 1920, held by the Court of Appeal that in assessing super-tax, a person is not entitled to claim a deduction in respect of those allowances which are specifically granted for income tax purposes. Hence neither the income tax payable by an assessee on his pension nor the whole of the tax paid under the Income tax Act, 1918 could be deducted for the purpose of calculating the super-tax. *DAVIS v. COMMISSIONERS OF INLAND REVENUE*. (1923) 1 K. B. 370.

—*Super-tax*—*Notice to make a return*—*On non-resident*—*By post abroad*—*If valid*—*Assessment in default of Return*—*Finance* (1909-10) Act, 1910 (10 Edw 7, C. 8) Ss 66, 72.

A notice under S. 72 of the Finance (1909-10) Act on a non-resident may be served by post outside the United Kingdom. If a person fails to make a return on being so served, the special Commissioners may assess him according to the best of their judgment; and after he is validly assessed, he may be informed of the assessment by notice served abroad.

Principles of International Law as to assuming jurisdiction without the realm considered. *INLAND REVENUE COMMISSIONERS. v. HUNI*.

(1923) 2 K. B. 563.

INTERNATIONAL LAW—*Independent Sovereign State*—*Letter of Secretary of State*—*If conclusive*—*Submission to jurisdiction*.

Where in proceedings initiated in English Courts against a person who claims to be the ruler of an independent Sovereign State, a letter of one of the Secretaries of States is produced to the effect that he is one, the Court without considering the question on the evidence will treat the matter as concluded.

Such a ruler merely by initiating proceedings before an English tribunal to set aside the award cannot be held to have submitted to the jurisdiction of the Court so as to invest it with powers to

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proceed against his property in England in garnishee proceedings *DUFF DEVELOPMENT CO. LTD. v. GOVERNMENT OF KELANTAN AND THE CROWN AGENTS FOR THE COLONIES.*

(1923) 1 Ch. 385.

JURISDICTION—*Shipping—Pilot dues—Action in rem—Maintainability.*

The High Court of Admiralty and its successor the Admiralty Division of the High Court of justice have always entertained actions in rem for pilotage remuneration and that jurisdiction has never been taken away.

*Quære*: Whether there is a maritime lien for pilotage dues. *THE AMBATIELOS v. THE CEPHALONIA.*

(1923) P. 68

LANDLORD AND TENANT—*Covenant to repair—Assignment of lease to two persons—Liability on default.*

Where a lease continued a covenant to repair on the part of the lessee and he assigned his interest to two persons who took as tenants in common, the liability in cases of breach of the covenant is one and indivisible and either of them is liable to be proceeded against for the whole of the damages. *UNITED LTD v. PUBLIC TRUSTEE AND ANOTHER.*

(1923) 1 K. B. 469.

———*Forfeiture—Covenants not to assign or underlet without permission of lessor—Under lease subject to same conditions—Breach—Duty of lessee—Waiver.*

The suit premises were let to the defendant for a term of years for carrying on a particular business, and defendant also covenanted not to assign or sub-let without the consent of the lessor. There was the usual clause for re-entry. Some time later the lessee with the consent of the lessor sub let the premises to a third party to be used for a different purpose. The lessor then sold his interest in the reversion to the plaintiff, but meanwhile the sub-lessee without the knowledge or permission of either the lessor or the defendant leased out a portion of the premises to another to be used for an entirely new business. The defendant refused to take steps to remedy the breach, whereupon plaintiff commenced the action for possession. *Held*, (1) defendant had permitted or suffered a breach of a continuous nature after he came to know of it and there was nothing to prevent him from having recourse to legal proceedings; (2) there was no waiver of the covenants either by the receipt of any rent (as the breach was continuous) or by purchasing the reversion subject to the lease in the absence of any proof that plaintiff was actually aware at the time of his purchase of the last breach by the sub-lessee; (3) that plaintiff was therefore entitled to enforce the right of re-entry. *ATKIN v. ROSE.*

(1923) 1 Ch. 522.

———*Forfeiture—Covenant not to sub-let without consent—Failure to disclose terms—Waiver—Proof of*

A lease of the suit premises contained clauses against sub-letting without the consent of the lessor, restricting the purposes for which they were to be put to and the usual clause for re-entry. With the permission of the lessor, a

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sub-lease was granted with an additional covenant that the sub-lessee should not sub-let without the consent of both the original lessor and lessee and that the latter should not object if the former did not. The sub lessee then obtained the permission of the original lessor for sub-lease and applied to the lessee for permission without disclosing to him the full details of the proposed transaction. He withheld permission, but in spite of it the arrangements were carried through. In a suit based on breach of covenant, held the lessee was entitled to exercise his right of forfeiture and to re-enter.

If in such a case, the sub lessee pleads waiver such as by receipt of rent he must establish that his lessor did so with knowledge of all the relevant facts. *FULLER'S THEATRE AND VAUDEVILLE COMPANY, LTD. v. ROFE.*

(1923) A. C. 435

———*Forfeiture—Mesne profits—Extent of liability.*

Where a tenant commits a breach of covenant and thereupon the landlord suing to enforce his right of forfeiture gets a decree for possession and mesne profits, the latter will be calculated as from the date of suit and not from the date of breach. *ELLIOTT v. BOYNTON.*

(1923) 1 Ch. 422.

———*Lease—Agreement that lessor purchase by valuation the buildings erected by the lessee, etc such valuation to be fixed by arbitration if parties fail to agree—Covenant by lessee not to transfer the premises without lessor's consent in writing—Breach of the covenant—Failure to proceed to arbitration—Lessee's right to sue.*

The lease was for 10 years and in case there was no renewal the lessor bound himself to the purchase "by valuing the buildings erected by the said lessee and also the growing crops, stock and implements". If the parties could not agree on the valuation, the matter was to be referred to arbitration. The lessee bound himself not to transfer the premises demised without the consent in writing of the lessor. Without such consent, however, the lessee sublet the estate to two persons, for his whole terms of 10 years, the leases to them containing precisely the same covenants as his lease, with a difference only in the rent payable.

*Held* that lessee's breach of the covenant not to transfer without consent gave the lessor only a right to damages;

that a sub-lease for the entire term of the sub-lessor (the original lessee) amounted to an assignment or transfer (*Beardman v. Wilson*, L. R. 4 C. P. 57);

that the contract did not require the lessee personally to put up the buildings, and, as the lessee was liable to pay for them to the sub-lessees he had sufficient interest to maintain the suit against the lessor, although he had parted with the entire interest in the term,

but that the lessee had no right to sue for the value of the buildings, until the valuation had been fixed by arbitration in accordance with the provisions of the lease.

While by the common law parties could not contract validly to oust the Courts of their jurisdiction, they could contract that no right of action

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should accrue until a third person had decided the amount to which there was to be a right *Scott v. Avery*, (1856) 5 H. L. C. 811 applied, *Dawson v. Fitzgerald*, L. R. 9 Ex. 7, Ex. D. 257 Dist. *Hallen v. Spaeth*.

(1923) A. C. 684, (P. C.)

—Lease—Covenant not to assign or underlet or to part with possession of the tenement without the lessor's consent—Subletting of portion with consent—Subsequent letting of the remainder without lessor's consent—Breach of covenant—Forfeiture.

Where the tenant has covenanted not to part with the possession of the premises without the lessor's consent, it is a breach of the covenant to part with the possession of the whole without such consent, though previously possession had been parted with of a portion with consent.

The case might have been different if the tenant had retained possession of some part of the premises, on the principle that if there be a covenant not to assign or underlet the premises, it is not a breach to assign or sublet part of the premises. *Chatterton v. Terrell*.

(1923) A. C. 578 :

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(1922) 2 Ch. 647. C. A.

—Lease—Covenant to "well and sufficiently repair" etc. premises—Standard of repair—Breach of the covenant—Measure of damages.

Where a lease of houses then new for a term of 95 years contained terms that the tenant do "well and sufficiently repair" etc. the buildings and deliver them up to the lessor at the end of the term in such repair, held that the terms would be satisfied if the houses were in such repair as, having regard to the age, character, and locality of the houses, would make it then reasonably fit for the occupation of tenants of the class who would be likely to take them; and damages for breach of the covenant should be assessed accordingly.

*Proudfoot v. Hart*, (1890) 25 Q. B. D. 42 applied. Case law on the subject discussed. *Calthorpe v. McOscar*, (1923) 2 K. B. 573

—Lease for a term—Option to purchase—Time for exercising option not specified—Effect—Rule of perpetuities.

An agreement to lease contained a clause that the tenant should have an option to purchase the freehold of a lease of 97 years. There was no period fixed for the exercise of the option nor was a lease executed. Held, such an option unlimited in time exists so long as the relationship of landlord and tenant continues. The option to purchase the freehold is however inoperative and invalid because of the rule against perpetuities, but the right to call for a removal of the lease is outside the rule and may be exercised. *Rider v. Ford*, (1923) 1 Ch. 541

—Lease—Furnished house—Implied warranty—Fitness for habitation—Risk of infection—Breach of warranty—Damages.

Where a furnished house is let, there is an implied warranty that the house is reasonably fit

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for habitation on the date fixed for the commencement of the tenancy. If this warranty is not satisfied, because for instance there is substantial risk of infection to the lessee and his household, the lessee is entitled to renounce the tenancy and he is also entitled to damages. So held in a case where the house had been recently occupied by a person suffering from pulmonary tuberculosis. *Collins v. Hopkins*.

(1923) 2 K. B. 617.

**LICENSING ACT, S. 4—Consumption—Meaning of**

Where the Licensing Act of 1921 made it an offence to consume liquor on licensed premises at stated hours, the fact that the consumer got the liquor from elsewhere but drank it at the licensed premises does not make it any the less an offence. The word 'consume' must be given in its natural ones and ordinary meaning. *Caldwell v. Jones*.

(1923) 2 K. B. 309.

**MARINE INSURANCE—Approved policy—What is.**

*Per Scrutton, L. J.*—An approved insurance policy must be one to which no reasonable objection could be made and which ought therefore to be approved.

A certificate of insurance which does not show on its face the terms of the insurance offered in place of the goods if lost, is not an approved insurance policy.

*Per Atkin, L. J.*—The phrase "approved insurance policy" indicates a reference to some more objective or absolute standard than the approval of the person to whom it is tendered. It means a policy to which no reasonable objection can be taken by reasonable commercial men, *Donald H. Scott and Co. Ltd. v. Barclay's Bank, Ltd.* (1923) 2 K. B. 1.

**MARKET—By-law restraining sale by auction—Validity.**

A by-law made by the owners of a market which altogether prohibits sale by auction in a public market is invalid, as it prohibits the exercise of a common law right. One which requires the consent of a Superintendent for such a sale by auction is also equally invalid. *Nicholls v. Tavistock Urban District Council*.

(1923) 2 Ch. 18.

**MARRIED WOMAN—Restraint upon anticipation by—Separate property—Nature and incidents of.**

See *Public Trustee v. Wolf*.

(1923) A. C. 544.

**MONEY HAD AND RECEIVED—Mistake of fact—Suit for repayment—Estoppel.**

Where persons who are statutorily entrusted with the duty of making certain disbursements pay a certain person a sum of money much more than he is entitled to and the latter misled into the belief that he might retain the money spent it all for private purposes, the plaintiffs are estopped from alleging that the payment was made under a mistake of fact and trying to recover the excess is an action for money had and received. *Holt v. Markham*, (1923) 1 K. B. 504.

**MORTGAGE.**

**MORTGAGE**—*Fixtures*—*Cinema—Chairs fastened to floor—If pass.*

Where the proprietors of a Cinema mortgage the cinema hall with its fixtures and appurtenances, chairs attached to the floor are included in the security and so are available to the mortgagee, *VAUDEVILLE ELECTRIC CINEMA, LTD. v. MURSET* (1923) 2 Ch. 74.

**MOTOR CAR**—*Defects in—Damage—Liability of owner.*

A motor lorry soon after its overhauling and repair by the manufacturers while being driven in a public way had a wheel slipped and this caused damage to the plaintiff's van. In an action for damages held per, *Mccardie, J.*—(1) There is no duty at common law cast on the owner of the lorry to see it was in a safe and proper condition (2) the owner cannot be made liable for any negligence on the part of the manufacturer or repairer; (3) it is not by itself a nuisance, *PHILLIPS v. BRITANNIA HYGENIC LAUNDRY COY.* (1923) 1 K. B. 539.

**PENALTIES**—Power of Court to relieve from—If applicable to statutory penalties. See *REX v. CANADIAN N. RY. CO* (1923) A C 714 (P. C.)

**POVERTY**—What is—Gift to aid persons of some means—If charitable. See *In re CLARKE* (1923) 2 Ch. 407.

**PRACTICE**—Appeal—On question of costs See *JACKSON v. ANGLO AMERICAN OIL CO.* (1923) 2 K. B. 601

—*Costs*—*Defendant paying amount into Court—Effect.*

In an action for damages for infringement of copyright and for an injunction, even where the defendant pays into court a sum of money which the Court holds to be sufficient damages, the plaintiff would be entitled to his costs, as he is entitled to have his rights pronounced upon. This was the original rule of English practice, but though it has been modified now, still where the Court thinks it proper that the plaintiff, instead of at once taking the money out of court, should have a determination of the question of liability, it has a discretion to say the plaintiff should have his costs, *PERFORMING RIGHT SOCIETY, LTD. v. CRYL THEATRICAL SYNDICATE, LTD. AND ANOTHER.* (1923) 2 K. B. 146.

—*Discovery—Subpoena duces tecum*

A subpoena duces tecum served on a person who is the secretary of a company with the object of enforcing the forfeiture on a lease against that company is bad. The refusal to order discovery of documents in cases involving forfeiture is due to the rule that such documents ought not to be ordered to be produced by the person against whom the forfeiture was sought to be enforced *EARL OF POWIS v. NEGUS.* (1923) 1 Ch. 186

—*Security for costs—Foreigner added as defendant.*

Where the plaintiff, a foreign Company brought an action in England which involved questions concerning foreign assignments and the effect of foreign legal proceedings and during the

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course of the action, another foreign Company obtained permission to intervene as a defendant, an order for security of costs should not be passed against the latter.

*Banks, L. J.* rested the decision on the ground that plaintiffs were themselves foreigners and did not give security, while *Scrutton, L. J.* and *Younger, L. J.* put it on the ground that the defendants were probably resisting an attack and not putting forward a claim. *MAATSCHAPPIJ VOOR FONDSSENBEZIT AND ANOTHER v. SHELL TRANSPORT AND TRADING COY. & OTHERS.* (1923) 2 K. B. 166.

**PRESUMPTION—Proof.**

Where a ship which has been insured has disappeared at sea and nothing more is known the presumption may well be that the loss was due to perils of the sea. But where either party gives evidence as to the probable cause of loss and the Court is left in doubt as to the effective cause of loss, the assured must fail in his action unless he affirmatively proves the loss by one of the perils insured against, *LA COMPANIA MARIARTU v. THE CORPORATION OF THE ROYAL EXCHANGE ASSURANCE.* (1923) 1 K. B. 650.

**PRINCIPAL AND AGENT**—*Larceny by trick—What is—Sale without authority—Liability of purchaser.*

Simple larceny is the felonious taking of goods belonging to another person against his will and without his consent. In the case of larceny by trick the person who has lost goods has given an apparent consent to possession being taken but the consent has been obtained fraudulently by a trick.

Where a person pretending to be an agent for the purchase of a car obtains possession of it and then sells it to another, he is guilty of larceny by a trick and the purchaser is bound to return the car or its value unless they have a valid statutory defence under the sale of goods Act or Factors Act. It is on the purchaser to prove that he purchased in good faith and without notice of the agent's want of authority. There can be no estoppel on the part of the owner unless he is more than merely negligent and has disregarded all obligations towards the buyer. *HEAP v. MOTORISTS' ADVISORY AGENCY, LTD.* (1923) 1 K. B. 577.

—*Right of agent to be indemnified—Basis of right.*

Prima facie if an agent carries on a business for a principal he is entitled to a full indemnity. Where for a monthly remuneration plaintiff carried on a business for the defendants who formed a limited Company and in the course of the same he had to pay Income tax and Supertax he is entitled to be indemnified, though it may be that if the business were run by the defendants themselves, the liability to pay Supertax might not have arisen. This right to reimbursement also arises because plaintiff is in effect a trustee. *ADAMS v. MORGAN AND COMPANY LTD.* (1923) 2 K. B. 204.

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———*Signature "as agents"—Description in the body as charterers—Demurrage—Liability of the agents.*

In the absence of exceptional circumstances, where the signature is qualified by the words "as agents," the persons signing are absolved from personal liability.

The principals who were the real charterers in this case were disclosed to the plaintiffs and there were terms in the charterparty which could apply to the signatories only in their capacity of agents.

*Held*, therefore, notwithstanding that the defendants were described in the charterparty as "charterers" and the charterers were by its term made liable for any demurrage, the defendants' personal liability was excluded by their adding the phrase "as agents" to their signature.

*Lennerd v. Robinson.* (1855) 5 E. & B 125 overruled.

*Gadd v. Houghton* (1876) 1 Ex. D 357 approved. *UNIVERSAL STEAM NAVIGATION CO v JAMES MC KELVIE & Co.* (1923) A. C. 192

**Affirming** (1922) 1 K. B. 518 (C. A.)

———*Third party inducing breach of agent's duty—Principal suffering damage—If third party liable.*

Where, in consequence of a third person inducing an agent to commit breach of the duty he owed to his principal, the principal became liable to pay damages to others, *held*, that the principal might recover from the third party.

Interference directed to bringing about a violation of legal right is a cause of action and it is a violation of legal right to interfere with contractual relations recognized by law if there be no sufficient justification for the interferences. It is an illustration of this principle when the interference is directed to inducing an agent to act in contravention of his duty by pleading his principal's credit. *Lumley v. Gye* (1853) 2 E. & B. 216 and *Quinn v. Leatham* (1901) A. C. 495 followed. *JASPERSON v. DOMINION TOBACCO CO.* (1923) A. C. 709 (P. C.)

**RECTIFICATION—Mistake—Nature of.**

A person who seeks to rectify a deed upon the grounds of mistake must be required to establish clearly that the alleged intention to which he desires it to be made conformable continued concurrently in the minds of all parties down to the time of execution. There must be a common and not a unilateral mistake to justify rectification. *VANDEVILLE ELECTRIC CINEMA LTD. v. MURSET* (1923) 2 Ch. 74.

**RIOTING—What amounts to—Soldiers—If can commit—Compensation.**

*Per Swift, J.*—To constitute rioting under English Law five elements must be present; first, the assembly of a member of persons not less than three; secondly, they must have a common purpose; thirdly, they must act in execution or inception of the common purpose; fourthly, there must be an intent to help one another by force if necessary; and lastly, force must be displayed in such a manner as to alarm at least one person of reasonable firmness and courage,

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Every person subject to military law is still subject to criminal law and a Criminal offence committed by a soldier would be just as much an offence as if it were committed by a civilian, and the same consequences, such as liability to pay compensation for damages caused, will follow. *PITCHERS v. SURVEY COUNTY COUNCIL.*

(1923) 2 K. B. 57.

**SALE OF GOODS—Arbitration clause—Effect of Damages Latent defect.**

Where one of the terms of a contract for the sale of goods was that all disputes arising out of it were to be referred to arbitration within a certain time, and on a dispute arising the matter was referred to an arbitration but out of time as a result of which he declined jurisdiction and then the matter was sought to be agitated in the Civil Courts. *Held*, the presence of an arbitration clause in the contract is not in itself a bar to an action or a condition precedent to a right of action. Where the award does not deal with the claim, but merely with the jurisdiction of the arbitrator, it is no answer to the claim.

The expression "latent defect" is only applicable to such a defect as is not discoverable by the exercise of reasonable care. Reasonable examination in the case of goods is not confined to examination by the life and does not exclude analysis or microscopic examination.

Where it was within the contemplation of the parties that goods would pass through a string of sellers and purchasers, it cannot be said that damages are too remote, if the vendee seeks to include therein what he has had to pay as damages to his vendees. *FINNOCK BROTHERS v. LEWIS AND PEAT LTD* (1923) 1 K. B. 690.

**Contract—Variation of terms by parol agreement—Time and place of delivery—Repudiation—Right to damages**

Where a contract for the sale of goods provides for delivery in instalments at a particular place a subsequent parol agreement extending the time for and altering the place of delivery does not operate as an implied rescission of the original contract, in the absence of any intention to rescind. Where the buyers wrongfully repudiate the contract, the sellers are not bound to prove that they were ready and willing at the date of the repudiation to deliver the goods. *BRITISH AND BENINGTONS LTD. v. N. W. CACHAR TEA CO* (1923) A. C. 48.

**Rejection after price is paid—Vendee if entitled to retain possession till money is paid.**

A buyer who has rejected the goods which have been purchased and paid for cannot retain possession of the goods until his money is paid back, and he has no lien over the same. *J. L. LYONS AND CO. LTD. v. MAY AND BAKER LTD.* (1923) 1 K. B. 685.

**Right to reject—Resale without examining sample—Effect.**

Where the buyers under a contract of sale resold a portion of the goods to sub-purchasers without examining the goods and satisfying themselves that they were of the specification ordered

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and latter finding that the goods were different rejected the same: *Held* the original buyers by reselling without examination committed an act "inconsistent with the ownership of the seller" and hence had lost their right of rejection. *HARDY CO. LTD v. HILOMS & FOWLER.*

(1923) 1 K. B. 658.

———*Unascertained goods—Sale of specific quantity out of larger bulk—Risk of deterioration.*

Defendants sold to plaintiffs certain quantity of white spirit of a larger quantity lying in their tank and handed to the plaintiffs a delivery warrant undertaking to deliver that quantity of the spirit to the plaintiffs' order. The rent for the storage of the spirit was paid by the plaintiff. Subsequent to the acceptance of the delivery warrant by the plaintiffs and before the quantity purchased had been severed from the bulk, the spirit in the tank deteriorated in quality. On a question arising as to who should bear the loss arising out of the deterioration *Held* that whether or not the property in the undivided portion of the larger bulk had passed to the plaintiff's the risk passed to the purchasers on the acceptance of the delivery warrant and that the loss must be borne by them. *STERMS LTD v. VICKERS LTD.*

(1923) 1 K. B. 78 C A.

**SHIPPING—Charterparty—Liability for coal consumption while off hire.**

Where under the terms of a charter party the charterers were to pay for all coal consumed while the owner was to keep the vessel efficient throughout the period but if the vessel was under repair for more than 24 hours consecutively, hire should not be charged for such period *Held*, the charterers were liable for the coal consumed even when the vessel was of hire while under repair for more than 24 hours. *S. S. ARILD v. ANONYME DE NAVIGATION HOVRANI.*

(1923) 2 K. B. 141.

———*Claims arising from — Law applicable*

"Whatever relates to the remedy to be enforced, must be determined by the *lex fori*, the law of the country to the tribunals of which the appeal is made." The nature of the right may have to be determined by some other law, but the nature of the remedy which enforces the right is a matter for the law of the tribunal which is asked to enforce the right.

Under English Law, a necessities man has no possessory or maritime lien over the ship but only a right to arrest the ship in rem, but French law gives him a priority over the claimant under a hypothec, but in English Courts only the English remedies would be given. *THE COLORADO.*

(1923) P. 102.

———*Collision—Suit for damages for loss of life—Limitation—Extension of.*

The period of limitation for an action for damages on account of loss of life arising from a collision is two years from the date of the loss of life. A court of law has discretion to extend the period but the mere facts that plaintiff did not know for a long time he had a cause of action will not justify the extension of the statutory period. Nor will an appellate Court interfere

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with the exercise of discretion by the trial Court unless the latter has gone on a wrong principle. *THE KASHMIR.*

(1923) P. 85.

———*Collision—Warlike operation—Negligence—Effect of.*

Where collision occurs as the result of negligence in the conduct of a ship engaged in warlike operation, for the purposes of insurance liability the Crown is liable in spite of the fact that the collision was due to negligence on the part of the master. Case law referred to. *ATTORNEY GENERAL v. ADELAIDE STEAMSHIP CO. LTD.*

(1923) I. C. 293.

———*Contract of service — Abandonment — What amounts to—Salvage claim.*

After a collision the master ordered his crew to abandon ship, but shortly afterwards finding it was still possible to save her, called for volunteers. A portion of the crew returned and safely piloted her ashore. They then claimed salvage remuneration. *Held*, a claim as salvors can be put forward only if the circumstances are such as to put an end to their contract of service. When a short time after ordering abandonment the master on maturer judgment arrived at the conclusion the ship was not sinking, there was no abandonment and no determination of the contract of service. The fact that he called for volunteers instead of ordering the crew to go back is immaterial. *In re THE PORTREALH.*

(1923) P. 155.

———*Implied warranty—Seaworthiness.*

Under English Law there is in cases of contracts to carry goods in a ship, whether that contract is in the form of a bill of lading or not, an implied warranty on the part of the person who hires the ship that it shall be seaworthy. The warranty is not merely that he would do his best to make the ship fit, but that the ship should really be fit. *PATERSON ZECHONIS & Co LTD. v. ELDER DEMPSTER & Co. LTD.*

(1923) 1 K. B. 420.

**SHOPS CLOSING ACTS—Every day other than Saturday—Weekdays other than Saturday—Sunday if included.**

Under the Shops Closing Acts of 1920 and 1921, the expression "every day other than Saturday" includes a Sunday, but "weekdays other than Saturday" does not include it. *LONDON COUNTY COUNCIL v. GAINSBOROUGH.*

(1923) 2 K. B. 301.

**SOLICITOR AND CLIENT—Confidential relationship—Purchase of an option by the solicitor from the client—Failure to disclose material information—Voidability.**

Although the relationship of solicitor and client in a strict sense has discontinued, the same principle applies so long as the confidence, naturally arising from such a relationship, is proved or may be presumed to continue, and even if the solicitor is no longer retained or acting, his duty, in the contemplation of a court of equity may still be such as to throw upon him the onus of upholding the validity of a purchase or lease from his clients, and in considering whether this onus lies upon him the test appears to be the

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proper answer to the question, whether in the particular transaction he owes his former client any duty in the contemplation of a Court of equity.

The principle has long been established that, in the absence of competent independent advice a transaction between persons in the relationship of solicitor and client, or in a confidential relationship of similar character, cannot be upheld, unless the person claiming to enforce the contract can prove, affirmatively, that the person standing in such a confidential position has disclosed, without reservation, all the information in his possession, and can further show that the transaction was itself, a fair one, having regard to all the circumstances. This principle is one of wide application, and must not be regarded as a technical rule of English law.

Their lordships held that in this case the solicitor had failed to make the exact disclosure of the facts essential to enable the client to determine whether the offer made by the solicitor to her was a fair one. The question is not one of honesty, but of a full disclosure of all the relevant facts and of a fair price. Holding, further, that the client had no competent independent advice their Lordships declared the transaction unenforceable, and that it was not subsequently ratified, even if such ratification be possible.

DEMERRARA BAUXITE Co. v LOUISA HUBBARD.  
(1923) A. C. 673 (P. C.)

STATUTES—Construction of *See* REX v. CAN. ADIAN N. RY. Co. (1923) A. C. 714 P. Cs

——— Interpretation of—Use of general word in an Act regarding legal procedure—Intention of the Legislature—Abrogation of the fundamental constitutional rights of the citizen—Construction to avoid if permissible. *See* SECRETARY OF STATE FOR HOME AFFAIRS v. O. BRIEN. (1923) A. C. 603.

———What is — Construction — Penalties—Power of Court to relieve from—*Alberta Act of 1907, s 2 (8)*—Penalties imposed by contract etc and by Statute—Distinction between.

The words "any statute" occurring in an Alberta statute in their natural ordinary sense would include a Dominion (of Canada) State. Statute "Statute" means an Act of a Legislature having legislative authority within the Province. The grammatical and the ordinary sense of the words in statutes is to be adhered to unless they would lead to absurdity, repugnancy or inconsistency with the rest of the instrument.

The power given to Court by an Alberta Statute to relieve from penalties is applicable only to such contractual penalties, and for forfeitures as those as to which the Court of Chancery had exercised jurisdiction REX v. CANADIAN N. RY. Co. (1923) A. C. 714 P. C.

TIDAL WATER—Public navigable river—Test of

The flowing of a tide is strong *prima facie* evidence of the existence of a public navigable river, but whether it is one or not depends on the situation and nature of the channel. Not every ditch which is reached by the tide forms part of the public navigable river, even though it be large enough to admit of the passage

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of a boat. The question is one of degree and must be decided with regard to all the facts. SIM E. BAK v. ANG YONG HUAT. (1923) A. C. 429.

TORT—Damages—Action in one country or province—Injury sustained in another.

An action will not lie in one country or province for a wrong committed in another unless two conditions are fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in the country of the forum; and, secondly, it must not have been justifiable by the law of the Country where it was done. The expression "justifiable" has reference to legal justification, and an act or neglect which is neither actionable nor punishable cannot be said to be otherwise than justifiable within the meaning of the rule. WALPORE v. CANADIAN NORTHERN RY. Co. (1923) A. C. 113.

——— Negligence—Mare kicking horse—Liability for damages.

Where defendant put his mare in a field where plaintiff's horse was, but did not inform the latter of the same and as a result of the mare kicking the horse the horse had to be shot and an action for damages was brought: Held reversing the decision in (1923) 1 K.B. 406, in the absence of proof of scienter, a mare cannot be classed among dangerous animals and no action lay either on the ground of negligence or breach of an absolute duty.

The mere possession of an animal of the class usually described as *mansuetæ naturæ* does not render the owner liable for injuries done by it to the person or to goods. MANTON v. BROCKLEBANK. (1923) 2 K. B. 212.

Reversing 1923 1 K. B. 406.

——— Negligence—Mare kicking horse—Liability of owner.

Where a person put his mare to graze in the field of another in which there was the latter's horse but did not notify him of the same and as a result of kicks the horse had to be destroyed:

Held an action for damages lay even if none is proved in the defendant. MANTON v. BROCKLEBANK. (1923) 1 K. B. 406.

Reversed by the C. A. 1923 11 K. B. 212.

——— Negligence—Proof of—Duty of owner to invitee or licensee

A boilermaker working on a dense foggy evening left the ship for the latrine which was situated on a piece of ground surrounded on three sides by water. A line of posts and chains existed on the three sides, but the chains used to be let down whenever access to the quay was required but replaced as early as possible. On that day the chain was down, and the boiler-maker slipped down and was drowned. In an action by his widow for damages under the Fatal Accidents Act. Held by the majority of the House of Lords the plaintiff had failed to prove negligence on the part of the Harbour Board or that it was the cause of death and that the Board did not owe any duty to keep the chains in position and hence no action lay. Case law reviewed.



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*Per Viscount Cave L. C.* When a person is invited or licensed to pass by a particular way and the owner without warning to him does something which makes it dangerous for him to use that way liability may no doubt be incurred. But to say that a landowner who permits an element of danger to exist in a place to which he neither invites nor expects a person to go thereby sets a trap for him is not correct.

*Per Lords Shaw and Buckmaster.*—Leaving the fencing open is a danger of a serious kind and a negligent omission for which the Board is responsible. The workmen were entitled to consider the plot as fenced and the removal of the claims constituted a trap. *MERY DOCKS AND HARBOUR BOARD v. PROCTER.* (1923) *e. c.* 253.

———*Public Officer—Liability—Service how effected—Unincorporated body.*

Where an unincorporated body like the Board of Trade is sued; there is no rule which dispenses with personal service on the members. Where the writ is served on the Permanent Secretary it is not good in law.

Where the claim is stated to be one arising out of contract, no action will lie against a department of the Crown, the proper proceeding being a Petition of Right.

Where the action is brought to recover back money extorted *colore officii*, the action lies against the person who actually extorted money.

Where the tort in question was committed by the Shipping Controller and on the abolition of the office, the rights and liabilities vested in the Board of Trade, the latter will be liable in respect of any matter for which the Shipping Controller would have been sued. *MARSHALL SHIPPING COMPANY v. BOARD OF TRADE* (1923) 2 K B 334.

**VENDOR AND PURCHASER—Deposit—Recovery of—Test—Default of purchaser in proceeding.**

The agreement between the parties was that on a proper contract being prepared by the vendor's solicitors the property was to be purchased. A certain sum was paid as deposit and in part payment of the purchase money. A proper contract was prepared by the vendor's solicitors and approved by the vendee's solicitors but still the vendees refused to proceed further and claimed a return of the deposit amount. Held they were not entitled to do so.

Where a deposit is paid before there is any firm contract the payer can recover it if the payee insists on something unreasonable in carrying out the transaction. If on the other hand the payee does not insist on unreasonable terms, and the payer when offered all he can reasonably ask to refuse without just cause to proceed, he cannot recover the deposit. *CHILLINGWORTH v. ESEHE.* (1923) 1 Ch. 576.

———*Mistake—Rectification—Power to order.*

By a mutual mistake of parties, an error crept into an agreement for sale of land and this was repeated in the sale deed. Held by a majority of the Court of Appeal (*Younger, L. J.* dissenting) the mistake could be rectified by court, though the effect of it might be to vary the terms of an written agreement by a parol variation and to

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grant specific performance of such a written agreement (1922) 2 Ch 809 affirmed.

*Per Warrington, L. J.*—The conditions to the exercise of jurisdiction by Courts of equity are that there must be an antecedent contract, a common intention of embodying it in writing and clear evidence that by a common mistake some term not agreed upon was put in or something agreed upon was omitted.

*Per Younger, L. J.*—To allow such a rectification would be to infringe the Statute of Frauds and in addition it would involve specific performance of a written agreement with a parol variation. *CRADDOCK BROTHERS v. HUNT.*

(1923) 2 Ch. 136.

**WILL—Bequest Gift of residuary estate Cypres doctrine.**

A gift of the residuary estate of a testatrix for the purpose of providing a stained glass window in memory of herself and certain members of her family is a good charitable bequest. In such cases the motive of the testator is immaterial. If any surplus remains, the *cypres* doctrine will apply to it. *In re KING · KEOR v. BRADLAY.*

(1923) 1 Ch 243

———*Bequest—"Patriotic purposes or objects"—Validity of.*

A testator by his will directed a portion of his estate "for such patriotic purposes or objects and such charitable institution or charitable objects in the British Empire" as they selected: Held, as the purpose need not necessarily be charitable, the trust was void. *In re TETLEY NATION PROVINCIAL AND UNION BANK OF ENGLAND LTD. v. TETLEY.*

(1923) 1 Ch 258.

———*Bequest—Validity of—Public benefit.*

The question whether a gift is or may be operative for the public benefit is one that is to be answered by the Court on the evidence before it. It is not the opinion of the donor of the gift or creator of the trust that governs, for otherwise trusts might be created for all kinds of fantastic objects. Held on the facts, a bequest for the training of persons as medium is invalid. *In re HUMMELTENBERG BEATTY v. LONDON SPIRITUALISTIC ALLIANCE LTD* (1923) 1 Ch. 237.

———*Codicil revoking clause in will—Construction—Revoked clause to be looked to.*

Where certain clauses of a will are revoked by a codicil which is clear and unambiguous, even when both the will and codicil are probated the revoked clauses cannot be resorted to as expressing the testator's intention for any purpose. *CHOA ENG WPN v. CHOA GIANG TSE.* (1923) A. C. 469.

———*Construction—Appointment—Powers of Survivorship.*

Where a will vested the power of appointing trustees to the testator's widow and his daughters and the widow and one of the daughters died the power survives to the remaining daughters. This is not in any way abrogated by S. 22 of the Trustee Act 1893. *In re HARDING: HARDING v. PATERSON.* (1923) 1 Ch. 182

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—Construction—Bequest to "Domestic servants"—Chauffer—Coachman—Gardener—if entitled to take.

The testator, Sir John Jackson, left a will giving numerous legacies, including some to his business employees and some to his "domestic servants" in amounts varying with the wages and the length of service of each. The chauffer and the coachman of the testator, followed the testator from his town residence to country residence and back and lived in rooms over the garage, and the stables respectively, and the gardener lived in a cottage provided for him at the country residence. *Held*, that these three were the "domestic servants" in contradistinction to the business employees of the testator, and were accordingly entitled to the legacies.

What a testator means by the use of certain words is a question to be decided on the construction of the will in each case.

*Ogle v Morgan* (1852) 1 D. M. & G. 359 does not lay down as a fixed principle that an out-door servant, not living under the master's roof, is excluded from coming under the expression "domestic servant" *In re SIR JOHN JACKSON : JACKSON v. HAMILTON* (1923) 2 Ch. 365, C. A.

—Construction—Bequest of "money" Securities and investments.

The word "money" when used in a will means money in its strict sense unless there is a context which is sufficient to show that the testator used it in a more extended sense "Money" in the strict sense means money actually, in hand as cash, or at a bank on drawing account. But a comparatively slight context one way or the other may either restrict the term "money" within comparatively narrow limits or may assist it so as clearly to include the whole personal estate or the residue of the personal estate. When a will is not drawn by a skilled lawyer, the words used may be looked at less strictly than in a case where it is so drawn. If there be a context enlarging the meaning of the word "money" it may enlarge it to the extent of including the whole of the personal estate or the residue of the personal estate, and it may enlarge it to any point between ready cash only and the whole of the personal estate. *In re TAYLOR : TAYLOR v. TWEEDI*, (1923) 1 Ch. 73 C. A.

—Construction—Chinese testator—Gift to wife—Devotion in case of re marriage—Effect of death.

A Chinese testator drew up a will in English, and provided for the property being divided equally among his sons and wife and in case she remarried, her share to go over to the sons. She died before the testator, an event which was not provided for. *Held* a gift over to the sons could not be implied and it must be dealt with as on intestacy. *Held* also, that in construing such a will couched in English terms of legal art regard should not be had to Chinese usages apart from the terms of the instrument *CHIA KHWEN ENG v. CHIA POH CHOON AND OTHERS*. (1923) A. C. 424.

—Construction—Codicil—Gift to children of brothers and sisters—Remoteness.

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A testator in his will provided for the income to be given to his wife for life and after her death to the children of his brothers and sisters. By a codicil, he provided after her death his trustees should hold it in trust for the children of his brother and sisters who should be living at her death or born at any time before any one of such children attained majority. At the time of his death, the testator's parents who were about 65 years old were still alive. *Held* by the majority of the Court of Appeal, the gift was void for remoteness.

The gift in the codicil revoked that in the will and if the former failed for any reason, intestacy would follow. *IN RE BURNYEAT : BURNYEAT v. WARD* (1923) 2 Ch. 52.

—Construction—Gift for "Charitable or public institution in Wales"—Effect of.

Where a testator after providing for certain annuities, directed the trustees "to apply the same for the benefit of one or more charitable or public institutions in Wales as they deem fit, held the object of the resulting trust was so extraordinarily wide and indefinite as to amount to a delegation of testamentary capacity and hence is void for uncertainty. *In re DAVIS : THOMAS v. DAVIS*. (1923) 1 Ch. 225.

—Devise of Real Estate and chattels real—Subsequent disposition of Real Estate by deed—Effect.

Where by a testamentary disposition, there was a devise of Real Estate and of some chattels in such a way that the bequest of the latter was of the nature of an accessory gift to be enjoyed with the principal gift relating to the Real Estate, yet if by a subsequent voluntary act of the testator, not being testamentary, the principal gift is revoked to bequest of the chattels will still stand and not be revoked. *In re WHITEBURN : WHITEBURN v. CHANTIC*. (1923) 1 Ch. 332.

—Bequest of Residue—Four classes of objects—One class indefinite charitable objects—Two classes—Named charities—One class indefinite charitable and noncharitable objects at the choice of executors—Validity—Power to executors to distribute the residue among the four classes—Validity—What the Court should do.

The testator disposed of his residuary estate among 4 classes of objects, of which (a) was indefinite charitable objects, (b) and (c) were named (definite) charities, and (d) was such other charities and institutions "as my executors in their absolute discretion shall think fit." And he directed the division of the residue among the 4 classes in "such shares and proportions" as his trustees (executors) should determine.

*Held*—The bequest to class (a) was good although it contemplated aid to persons of some means : *Trustees of the Mary Clark Home v Anderson* [1904] 2 K. B. 645, 655; *Attorney-General v. Wilkinson* (1839) 1 Beav. 370 *In re Gordon* [1904] 1 Ch. 662, 668, *In re Estlin*, 89 L. T. 88 followed.

The bequest to class (d) was void as the executors might in their discretion select the use of legacy for "institutions" which might p

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charitable, and hence the legacy was to indefinite charitable and non-charitable objects

The gift to class (d) being void the power given to the executors to distribute the residue among the 4 classes was also void.

The effect of the residuary bequest was to vest the residue in the 4 classes in equal shares until the executors should exercise the power. See *Lambert v. Thwaits* (1866) L. R. 2 Eq. 151, 155.

In this case the power being invalid, the residue remained so vested.

As class (d) could not have its  $\frac{1}{4}$  share of the residue, such share went to the next of Kin (as on intestacy).

Principles to be applied when gifts are made to indefinite charitable and non-charitable objects explained and discussed

*Morice v Bishop of Durham* (1804) 9 Ves. 399, 10 Ves. 522 and *In re Macduff* (1896) Ch. 451 dist and expld.

*Salisbury v Denton* (1857) 3 K. and J. 529 and *Hoare v. Osborne* (1866) L. R. 1 Eq. 585 applied. *In re CLARKE BRACEY v. ROYAL NATIONAL LIFE BOAT INSTITUTION.* (1923) 2 Ch. 407.

**Workmen's Compensation—Partial incapacity of injured workmen—Method of assessment—Review of weekly payments—Workmen's Compensation Act, 1906** (6 Edw. 7, c. 58) S. and 1 Sch paras 1 (b), 3, 16.

Workmen injured by accident arising out of and in the course of employment are entitled to compensation. The compensation payable may vary with circumstances, the earning capacity after accident depending upon the changes in the labour market. Where therefore no compensation was payable under the rules in the first Schedule of the Workmen's Compensation Act, 1906, to

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incapacitated workmen during a certain period owing to the fact that inflated wages made them earn more for the light work they could do than ordinarily, held that the right to compensation which had been suspended revived when, the wages having fallen, their earnings no longer exceeded the average pre-accident wage.

*Quære*, whether a review of the weekly payments cannot be asked, though there had been no suspension of the payment, upon a mere averment that the wages in respect of partial employment have fallen. The case of *Mc Alden*.

(1920) A. C. 39 referred to.

**PORTLAND COLLIERY CO. v. MURRAY & OTHER CASES** (1923) A. C. 566.

**WORKMEN'S COMPENSATION ACT (1906) Claims if can be settled by paying lump sum—Agreement for redemption of weekly payment,**

The scheme of the Workmen's Compensation Act is that a workman who is suffering from total or partial incapacity caused by an accident arising out of and in the course of the employment shall receive a weekly sum, may be redeemed by agreement with the employer by payment of a lump sum, subject to the approval of Court.

Where in a case arising under the Act, a lump sum was purported to be fixed between the parties, free from any examination by the Court Held by the majority of the House of Lords (Lord Carson dissenting) that such an agreement was in contravention of the Act and as such void. The only redemption which the Act allows is that of a weekly payment in which case the adequacy of consideration has to be judicially accepted. Prior cases cited and overruled. *RUSSELL v. RUDD*.

(1923) A. C. 309.